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TABLE OF CONTENTS

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SPEECHES

ARE BILATERAL INVESTMENT TREATIES AND FREE TRADE AGREEMENTS DRAFTED WITH SUFFICIENT CLARITY TO GIVE GUIDANCE TO TRIBUNALS?

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INTRODUCTION

The issue that I have chosen to address is whether Bilateral Investment Treaties ("BITs") and Free Trade Agreements ("FTAs") are drafted with sufficient clarity to give guidance to arbitral tribunals. I will say at the very outset that, in my view, the answer to this question is a resounding no.

This problem has become more and more apparent with the large increase in the number of disputes submitted to the International Centre for Settlement of Investment Disputes ("ICSID") and the United Nations Commission on International Trade Law ("UNCITRAL") tribunals based

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on BITs in particular.[1] This increase in the number of disputes submitted and the corresponding publication of resulting awards have demonstrated that arbitral panels often interpret BITs inconsistently with the consequence that there is a lack of clarity and transparency as to the nature and extent of the commitments made by the States vis–à–vis foreign investors.

Why is there such inconsistency between arbitral tribunals? The main reason is that many of the BITs, particularly the older ones, are not drafted with sufficient clarity. The provisions are generally vague.[2] They are comparable to general clauses in civil codes such as "good faith" or "bonos mores" that allow the decision maker to ascertain the normative content and the precise standards applicable to certain situations. In this respect, Article 31 of the Vienna Convention on the law of treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[3] But what if the actual terms of the treaty are unclear or are ambiguous? In these circumstances, the arbitrator will have difficulty determining the meaning to be given to the terms or to the intent of the negotiators. Furthermore, BITs are written in multiple languages and this tends to accentuate the interpretive problems even further. Specifically, the lack of precise linguistic equivalence and differences in legal systems throughout the globe make it "virtually certain that multiple language versions will include terminological differences that lead to conflicting interpretations of the text."[4]

Lack of clarity leads to inconsistent decisions and inconsistency creates uncertainty and damages the legitimate expectations of investors and States.[5] Investors that have structured their investments in a manner

1. *See The ICSID Caseload – Statistics*, ICSID at 7 (2015), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20(English)%20(2) Redacted.pdf (indicating that between 2000 and 2014, ICSID registered over 430 new investment disputes, as compared to just 66 in total between 1965 and 2000).

2. *See Investor–State Disputes Arising From Investment Treaties: A Review*, UNCTAD Series on Int'l Investment Policies for Dev. at 3 (2005), http://unctad.org/en/Docs/iteiit20054_en.pdf (noting that "the rather vague language of some treaty provisions (e.g. the fair and equitable treatment standard) and the increasing complexity of [International Investment Agreements] can make the outcome of arbitration less predictable") (internal quotations omitted).

3. Vienna Convention on the Law of Treaties art. 31 (1), May 23, 1969, 1155 U.N.T.S. 331.

4. Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611, 611–12 (1997) (explaining further that "language as a means of communication is fraught with ambiguities, mistakes, and deception.").

5. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1558 (2005)[hereinafter *The Legitimacy Crisis*]; *see also* Susan D. Franck,

designed to take advantage of the protection afforded by investment treaties suddenly discover that they will not receive those benefits.[6] Likewise, States find themselves in an untenable position of having to try to explain to tax payers why they are subject to damages of hundreds of millions of U.S. dollars in one case but not in another.[7]

There have been numerous examples of inconsistent decisions over what essentially amounted to the same dispute.[8] For example, in the *Lauder* arbitration, a Stockholm tribunal held that the Czech Republic breached a variety of its obligations to the Dutch corporate arm of a U.S. investor under the Netherlands–Czech Republic BIT.[9] Only ten days previously, on exactly the same set of facts, a London tribunal held that the Czech Republic only discriminated against a United States investor in violation of the United States–Czech Republic BIT.[10] The relevant provisions in the two treaties were identical. This inconsistency has presented challenges. After the *Lauder* awards, there was speculation that the Czech Republic might consider pulling out of its BITs.[11]

Another example of inconsistent cases is the *SGS* cases.[12] Both the Switzerland–Pakistan BIT and the Switzerland–Philippines BIT contained an umbrella clause.[13] The issue confronting the arbitrators in both cases was whether an umbrella clause in a treaty transforms a breach of contract

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The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 63 (2005) [hereinafter *The Nature and Enforcement of Investor Rights*] ("Inconsistency tends to signal errors, lends itself to suggestions of unfairness, creates inefficiencies, and generates difficulties related to coherence, most notably a lack predictability, reliability, and clarity.").

6. *The Legitimacy Crisis*, *supra* note 5.

7. *Id.*

8. *Id.* at 1545 (noting that there are three typical scenarios under which inconsistent decisions generally arise: (1) "different tribunals can come to different conclusions about the same standard in the same treaty;" (2) "different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights;" and (3) "different tribunals organized under different investment treaties will consider disputes involving a similar commercial situation and similar investment rights, but will come to opposite conclusions.").

9. *Id.* at 1559.

10. *Id.*

11. *The Nature and Enforcement of Investor Rights*, *supra* note 5, at 61.

12. *See generally* SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (Jan. 29, 2004); SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision of August 6, 2003, 18 ICSID Rev. 307 (2003); 42 I.L.M 1290 (2003).

13. *See The Legitimacy Crisis, supra* note 5, at 1568–69 ("Umbrella clauses are designed to protect investors' contractual rights against interference from a breach of contract or an administrative or legislative act.").

into a breach of treaty.[14] The Pakistan tribunal definitely said no, and the Philippines tribunal said yes. This was quite astonishing[15] since both awards dealt with an umbrella clause that was presumably borrowed from one sole model, the Swiss model.

Such cases are not isolated incidents. Argentina has been subject to multiple treaty claims related to its currency crisis.[16] These different claims have resulted in divergent applications of the same or similar treaty provisions and different conclusions regarding liability for the same government conduct.

There have also been inconsistent decisions in cases under the North American Free Trade Agreement ("NAFTA").[17] For example the three cases *S.D. Myers Inc. v. Canada*, *Metalclad v. Mexico*, and *Pope & Talbot v. Canada* used different approaches to determine how the standard of fair and equitable treatment should be interpreted and applied.[18]

This lack of consistency is a big problem. Without the clarity and consistency of the rule of law and its application, some scholars note that "there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a lack of legitimacy."[19] If there is no predictability, possibility of reliability, or legal certainty, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.[20]

How can this problem be addressed? One possible solution recently adopted by the three NAFTA countries was to issue an Interpretative Note regarding the obligation under Article 1105(1) to treat NAFTA investors "in accordance with international law, including fair and equitable treatment . . . ."[21] The Free Trade Commission ("FTC"), a body composed of representatives of the three State parties, can adopt binding interpretations of the treaty.[22] The FTC declared in the Interpretative Note that Article 1105 of the Treaty only encompassed *the minimum* standard of

14. *Id.* at 1569.

15. *Id.* at 1574 (noting that, "[e]ven though the Philippines tribunal had the opportunity to consider the Pakistan award and discussed the case in its own decision, reconciling the two awards is challenging").

16. *See The Nature and Enforcement of Investor Rights*, *supra* note 5, at 62.

17. *See generally The Legitimacy Crisis*, *supra* note 5, at 1575–82.

18. *See generally id.*

19. *See id.* at 1584.

20. *See id.*

21. North American Free Trade Agreement, Can.–Mex.–U.S., art. 1105(1), Dec. 17, 1992, 32 I.L.M. 605, 639 [hereinafter NAFTA].

22. *Id.* art. 2001(1).

treatment in customary international law.[23] Since this note was issued, NAFTA tribunals have applied Article 1105 in a more uniform fashion.[24]

Similar provisions requiring tribunals to decide the issues in dispute in accordance with applicable rules of international law are found in many BITs and FTAs. For example, Article 30(3) of the United States Model BIT (both 2004 and 2012) provide for a mechanism that is similar to the one in the NAFTA.[25]

Other examples include Article 27(2) of the investment chapter of the ASEAN–Australia–New Zealand Free Trade Agreement ("AANZFTA"), which authorizes a tribunal to request a joint interpretation by the parties of any provision of the agreement.[26] Furthermore, Article 27(3) establishes the binding nature of that joint interpretation.[27]

This method is efficient, but it has one notable detractor: states may strive to issue official interpretations in an attempt to influence proceedings to which they are parties.[28] As the example of the July 2001 interpretation of the FTA under NAFTA demonstrates, the home states of disputing investors are more interested in protecting state respondents than protecting their own nationals when it comes to treaty interpretation.[29] This is why commentators and jurists have expressed concern about the legitimacy of these interpretative mechanisms.

Putting these interpretative mechanisms to one side, what are the other

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23. *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter11 Provisions (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp ("Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."); *see generally id.* art. 1105(1), (2)(c); The Legitimacy Crisis, *supra* note 5, at 1581–82.

24. *The Legitimacy Crisis*, *supra* note 5, at 1582.

25. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty art. 30(3) (2012), http://www.state.gov/documents/organization/188371.pdf ("A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision."); *see also* 2004 U.S. Model Bilateral Investment Treaty art. 30(3) (2004), http://www.state.gov/documents/organization/117601.pdf.

26. Free Trade Agreement, ASEAN–Australia–New Zealand, art. 27(2) (Feb. 27, 2009), http://www.asean.org/storage/images/archive/22260.pdf ("The tribunal shall . . . request a joint interpretation of any provision of this Agreement that is in issue in a dispute.").

27. *Id.* art. 27(3) ("A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.").

28. Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1201 (Peter T Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

29. *Id.*

possible solutions? Various suggestions have been made. Some commentators have, for example, suggested replacing investor–State arbitration with a mechanism that would require such claims to be brought before a permanent judicial body, perhaps something akin to the International Court of Justice ("ICJ").[30] While this would help to create a coherent body of investment treaty jurisprudence, there would be still no check on the court's discretion should the court simply get it wrong. In other words, shifting disputes to a permanent court will not completely solve the problem.

Another suggestion is to allow parties to have the option of submitting a question to a court in the manner of a preliminary ruling like the one provided by article 234 of the EU Treaty.[31] Another option would be to create a system of appeal or an appellate body that would focus on establishing a clear and coherent body of law and would correct legal errors in specific cases. It has even been suggested that the ICJ have appellate jurisdiction over investment treaty cases. But this would only prolong the procedure by several years and still increase the cost of these types of cases, which is already very high and heavily criticized.

In my view, it is better to tackle the problem from its root. We should look at the actual BITs themselves. The best solution to the problem resides in the drafting process. The goal is to create treaties that accurately capture the intent of the contracting states and then articulate those intentions in a form that can be appropriately interpreted in future relations. One of the ways to implement this method involves working backwards, identifying the flaws in arbitral interpretation, and hypothesizing ways to avoid them when constructing the document itself. It is only through awareness of how treaties are interpreted that the drafting process can be amended.

To put it differently, by providing enhanced textual clarity about the meaning of substantive rights, or more precisely, by providing detailed definitions of all the relevant legal terms, arbitrators will have better guidance thus leading to a more consistent interpretation of treaty provisions.[32] For instance, if investment treaties guarantee freedom from arbitrary and discriminatory treatment, states might include clear and precise definitions for the terms "arbitrary" and "discriminatory" in these

30. *See e.g.,* Charles H. Brower, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 35 VAND. J. TRANSAT'L L. 37, 90 (2003).

31. Treaty on the European Union, art. 234, Feb. 26, 2001 ("Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.").

32. *See The Nature and Enforcement of Investor Rights*, *supra* note 5, at 84.

treaties.[33]

Such an approach has two benefits. First, it permits states to choose what rights they wish to grant to investors.[34] Second, by elucidating the parameters of investors' substantive rights, this approach brings more textual clarity to an individual treaty, and this will in turn generate a more consistent interpretation of its provisions.[35] Of course, this approach is not without its problems.[36] There is a risk that over–definition of rights might generate more issues for litigation, which also in turn would lead to more inconsistency.[37] Not to mention the fact that renegotiating the terms of thousands of BITs presents political challenges and looks impractical.[38] But in my opinion, it still remains the better approach.

I will now test this proposal by examining older and more recent BITs in five areas: the notion of investment, fair and equitable treatment, full protection and security, the most favored nation ("MFN") clause, and expropriation.

II. AN EXAMPLE OF THE PROBLEM AND ITS SOLUTION: THE NOTION OF INVESTMENT

The definition of "investment" is important in ICSID arbitrations because unless an asset or an economic activity constitutes an investment under Article 25(1) of the ICSID Convention, it is not subject to ICSID jurisdiction.[39] Unfortunately, the drafters of the ICSID Convention chose not to define the meaning of investment within the Convention, generating significant debate. The five criteria retained in the *Salini* award[40] have

33. *See id.*

34. *Id.* at 85.

35. *Id.*

36. *Id.*; *see also* Brower, *supra* note 30, at 87–88 (explaining several problems that arise in drafting "perfectly clear rules," including the inability of negotiators to capture a complex balance of stakeholder interests in simple rules, the potential for such simple rules to produce absurd results at the margins, and the potential for creating "a sense of constructive indeterminacy and a paradoxical reduction of legitimacy.").

37. *The Nature and Enforcement of Investor Rights*, *supra* note 5, at 85.

38. *Id.*

39. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(1), Mar. 18, 1965, 17 U.S.T. 1270 ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State").

40. Salini Costruttori S.p.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001) (identifying five criteria indicative of the existence of an investment, including: (1) substantial commitment or contribution, (2) duration, (3) assumption of risk, (4) contribution to economic developing, and (5) regularity of profit and return).

been referred to in many cases but nowadays, at least two of these criteria are no longer considered relevant by many. I will not dwell on this since we are concentrating on BITs. I will instead concentrate on the definition of investment in those BITs. However, I wanted to make the point that since arbitral tribunals generally recognize that there is a double barrel test, the absence of a definition of *"investment"* in the ICSID Convention complicates matters and explains why in ICSID arbitrations, sometimes more than half of the submissions, which often means several hundred pages, are only devoted to jurisdiction and, in particular, to the issue of whether there is a protected investment.

Indeed, most BITs traditionally aimed at protecting investments.[41] Therefore "investment" was defined in a way that was both broad and open–ended, covering "not only the capital that has crossed the borders, but also practically all other kinds of assets invested by an investor in the territory of the host country."[42] A significant number of BITs have included a standard definition of "investment," covering "every kind of asset" owned or controlled by an investor of another party.[43] This broad definition of "investment" is typically complemented by an illustrative list of assets that are included within the definition.[44] Such list commonly includes five categories of assets: movable and immovable property, interests in companies (including both portfolio and direct investment), contractual rights, intellectual property, and business concessions.[45]

This kind of approach can still be found in recent draft BITs, like the 2006 French Model BIT.[46] In such an approach, not only is the list of assets in the definition non–exhaustive, but the use of broad generic terms, such as "every kind of assets," "movable and immovable property,"

41. U.N. Conference on Trade and Development, *Investor–State Dispute Settlement and Impact on Investment Rulemaking* 22 (2007).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* 2006 French Model Bilateral Investment Treaty art. 1(a)–(e) (2006) (defining the term "investment" to mean "every kind of assets, such as goods, rights and interests of whatever nature, and in particular though not exclusively: (a) movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights; (b) shares, premium on share and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party; (c) title to money or debentures, or title to any legitimate performance having an economic value; (d) intellectual, commercial and industrial property rights such as copyrights, patents, licenses, trademarks, industrial models and mockups, technical processes, know–how, trade names and goodwill; (e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, including those which are located in the maritime area of the Contracting Parties.").

"claims to money," can complicate the issue of whether the transaction falls within one of the categories of investment protected by the BIT.

In recent years, the way the notion of investment has been interpreted by some arbitral tribunals has created great concern in some countries. Some of these interpretations have been considered too broad and go beyond what the contracting parties considered an *"investment"* when negotiating the BIT. For instance, in *Pope & Talbot v. Canada*, the tribunal found that a market share through trade could be regarded as part of the assets of an investment.[47] And in *S.D. Myers v. Canada,* the tribunal held that the establishment of a sales office and the carrying out of marketing constituted a sufficient investment.[48] Experience has shown the risk of having an extremely broad and unqualified definition of investment.

Another problem is that, at times, the definition itself lacks clarity. As chairman of an arbitral tribunal, I recently encountered this problem in an ICSID case. The Germany–Sri Lanka BIT provides in its Article 1: "1. The term "investment" comprises every kind of asset, in particular: . . . (c) claims to money which has been used to create an economic value or claims to any performance having an economic value and associated with an investment."[49] We were confronted with the issue of whether the phrase "claims to money which has been used to create an economic value" could stand on its own or whether it was required to be associated with a separate investment in order to qualify for protection. The majority of the Tribunal decided that the categories enumerated (which included "claims to money which has been used to create an economic value") were an illustrative list of assets every kind of which was considered to be an investment and that defining an investment by reference to investment would be a circular reasoning. We could not reach unanimity on this solution. It is clear that if the terms of the provision had been expressed with more clarity, this debate would not have taken place.[50]

So what is the solution to this issue? One form of approach is for the BIT signatories to adopt negative definitions of an investment. For example, the 2012 United States Model BIT provides the following:

> Some forms of debt, such as bonds, debentures, and long–term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and

47. *See* Pope & Talbot, Inc. v. Canada, Interim Award, ¶ 96 (June 26, 2000).

48. *See Investor–State Disputes Arising From Investment Treaties supra* note 2, at 16.

49. Treaty Between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka Concerning the Promotion and Reciprocal Protection of Investments, Germany–Sri Lanka, Feb. 25, 2002, art. 1.

50. *See supra* note 6 and accompanying text.

> result from the sale of goods or services, are less likely to have such characteristics.[51]
>
> Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.[52]
>
> The term "investment" does not include an order or judgment entered in a judicial or administrative action.[53]

Similarly, the Chile–Korea FTA also provides that neither "claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party; or (ii) the extension of credit in connection with a commercial transaction, such as trade financing;"[54] nor "an order entered in a judicial or administrative action"[55] are included in the definition of "investment."

Another way of avoiding an overly broad definition of investment is to use a "closed–list" definition, consisting of a varied but finite list of tangible and intangible assets. Originally envisaged in the context of the United States–Canada Free Trade Agreement, this approach evolved towards the definition used in Article 1139 of the NAFTA.[56] Subsequently, the "closed–list" approach has been frequently used by several countries in the definition of "investment" in their BITs. For example, Article 96 of the Free Trade Agreement between Japan and Mexico illustrates this approach in its definition of "investment."[57] The definition includes such categories

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51. *See* 2012 U.S. Model Bilateral Investment Treaty, *supra* note 25, art.1 n. 1.

52. *Id.* art. 1 n. 2.

53. *Id.* art. 1 n. 3.

54. Free Trade Agreement, Chile–S. Kor., Feb. 15, 2003, art 10.1(i).

55. *Id.* art 10.1(j).

56. NAFTA, *supra* note 23, art. 1139 (defining investment by limited terms and providing certain exceptions so long as the kinds of interests set out in the finite list are not involved).

57. The Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, Jap.–Mex., art. 96, Sept. 17, 2004, (defining "investment" to a closed list of eight limited categories, including (1) an enterprise; (2) an equity security of an enterprise; (3) a debt security of an enterprise; (4) a loan to an enterprise; (5) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (6) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution; (7) a real estate or

as "a debt security of an enterprise (a) where the enterprise is an affiliate of the investor, or (b) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity of a Party or a state enterprise"[58] and "a loan to an enterprise (a) where the enterprise is an affiliate of the investor, or (b) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Party or a state enterprise."[59] The text concludes with the limiting language presented above in the Chile–Korea FTA.[60]

In the face of such a specific definition of investment that already indicates the duration (three years) of certain types of investment, an ICSID tribunal will not be able to contradict the BIT when assessing whether the duration characteristic under Article 25 has been fulfilled for a loan or debt security to an enterprise.[61] The closed–list of investments also indicates to some extent what sort of risk or commitment is acceptable as an investment and the tribunal should also take that into account in considering whether the Article 25 definition has been fulfilled.[62]

During the last decade, the "closed–list" definition of "investment" has also begun to be used in the context of BIT negotiations.[63] In 2004, Canada abandoned the asset–based definition of "investment" in its foreign investment protection and promotion agreements and opted to incorporate into its new Canadian Model BIT a relatively detailed "closed–list" definition of "investment."[64] In addition to being finite, the list contains a series of specific clarifications to prevent the application of the agreement to certain kinds of assets that would otherwise fall under the definition of investment.[65] The Canadian Model BIT that defines investment by utilizing nine categories,[66] the same type of approach used in the Japan–

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other property, tangible or intangible, and any related property rights; and (8) interests arising from the commitment of capital or other reasons in the Area of a Party to economic activity in such Area).

58. *Id.* art. 96(CC).

59. *Id.* art. 96(DD).

60. *Supra* notes 55–56 and accompanying text.

61. Michael Hwang & Jennifer Fong Lee Cheng, *Definition of "Investment" – A Voice from the Eye of the Storm*, 1 ASIAN J. OF INT'L L. 99, 126 (2011).

62. *Id.*

63. *Investor–State Dispute Settlement and Impact on Investment Rulemaking,* UNCTAD at 73 (2007), http://unctad.org/en/Docs/iteiia20073_en.pdf.

64. *Id. See generally* 2004 Canadian Model Bilateral Investment Treaty art. 1(I)–(IX) (2004).

65. *Investor–State Dispute Settlement and Impact on Investment Rulemaking, supra* note 63, at 73.

66. 2004 Canadian Model Bilateral Investment Treaty, *supra* note 64.

Mexico FTA,[67] and it continues

> For greater certainty:
>
> (i) a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment; and
>
> (ii) a loan granted by or debt security owned by a cross–border financial service provider, other than a loan to or debt security issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article.[68]

The definition includes the same exclusions concerning certain claims to money and also any other claims to money that do not involve those kinds of interests expressly enumerated within the FTA.[69]

Another approach used to clarify the definition of "investment" has been to qualify an otherwise very broad definition.[70] Accordingly, numerous recently negotiated BITs incorporate a definition of "investment" in economic terms—that is, they cover, in principle, every asset that an investor owns and controls but add the qualification that such assets must have the characteristics of an investment.[71] For this purpose, they refer to criteria developed in ICSID practice, such as "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[72] This approach is complemented by explicit exclusions of several kinds of assets, which are not to fall within the category of covered investments under the agreement.[73]

Article 10.1 of the Chile–Korea FTA illustrates that approach and defines the term "investment" in the following manner: "investment means every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits and the

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67. *See supra* note 57 and accompanying text.

68. *See* 2004 Canadian Model Bilateral Investment Treaty, *supra* note 64, art. 1(v)(iii)–(iv).

69. *Id.* art. 1(X)–(XI) ("[B]ut investment does not mean, (X) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraphs (IV) or (V); and (XI) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (1) through (IX).").

70. *Investor–State Dispute Settlement and Impact on Investment Rulemaking*, *supra* note 63, at 73.

71. *Id.*

72. *Id.*; *see also* United States–Colombia Trade Promotion Agreement, Colom.–U.S., art. 10.28, Nov. 22, 2006.

73. *Investor–State Dispute Settlement and Impact on Investment Rulemaking*, *supra* note 63, at 73.

assumption of risk."[74] The section continues by enumerating eight forms that an investment may take, akin to those discussed above,[75] and clarifying through an exclusionary clause that certain kinds of money and of orders entered in a judicial or administrative action do not qualify as an investment.

The wording of this definition indicates that for an asset to be considered a covered investment, a minimum of three conditions must be satisfied.[76] First, it must be owned or controlled by an investor as defined by the agreement; second, it must have the characteristics of an investment; and third, it must not fall within any of the excluded categories.[77]

The definition does not list all the characteristics that an asset must have in order to be considered an investment.[78] However, the definition does include some minimum parameters, namely the commitment of capital, the expectation of gain or profit, or the assumption of risk.[79] The inclusion of these criteria within the definition of investment has the effect of excluding *ab initio* certain assets: this would normally be the case for real estate or other property, tangible or intangible, not acquired in the expectation, or used for the purpose, of economic benefit or other business purposes.[80]

III. FAIR AND EQUITABLE TREATMENT

Despite its popularity, the precise legal meaning of the fair and equitable standard has also been the subject of much debate. And in recent BITs and FTAs, the negotiators have not only clarified the meaning of investment but also of several key obligations like fair and equitable treatment or expropriation.

The main problem concerning fair and equitable treatment is whether the standard incorporates the international minimum standard required by customary international law or whether it imposes other, possibly more stringent, obligations on the host country.[81]

Several old generation BITs are unclear in this respect. Either they grant covered investments fair and equitable treatment without making reference to international law or to any criteria to determine the content of the standard; or they just provide that the fair and equitable standard shall not

74. *Supra* note 53 and accompanying text.

75. *See e.g., supra* note 46 and accompanying text.

76. *Investor–State Dispute Settlement and Impact on Investment Rulemaking*, *supra* note 63, at 74.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See The Legitimacy Crisis*, *supra* note 5, at 1575.

be less favorable than national treatment or most favored nation treatment granted to the investment or the investor concerned; or they just refer to the duty to abstain from impairing the investment through unreasonable or discriminatory measures. Some BITs also make the fair and equitable standard contingent on the domestic legislation of the host country.

More recent BITs and FTAs have clarified the issue. One example of this is contained in the 2005 BIT between the United States and Uruguay which provides in Article 5.1 that "[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . . ."[82] Article 5.2 goes on to state that:

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.[83]

Another example is Article 11.5 of the Free Trade Agreement negotiated between Australia and the United States, which begins much like the FTA between the United States and Uruguay discussed above but goes on to say:

> The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . . .[84] A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.[85]

This provision is complemented by an annex that clarifies the understanding of the parties regarding the concept of customary international law as follows:

> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 11.5 and Annex 11.B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5. the customary international law minimum standard of treatment of

82. Treaty Between the United States and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.–Uru., art. 5.1, Oct. 24, 2004, 44 I.L.M. 272, https://ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf.

83. *Id.* art 5.2.

84. *Id.* art. 5.2(a).

85. *Id.* art 5.3. *Compare* Free Trade Agreement, Austl.–U.S., art. 11.5.3, May 18, 2004, KAV 6422 *with id.* art. 5.3.

aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

IV. FULL PROTECTION AND SECURITY

In many BITs, the standard of full protection and security is defined in very broad terms. The most common expression is in the form of "full protection and security." However, there are different variants such as "constant protection and security," "protection and security," or "physical protection and security," and this raises various issues.[86] Does the word "full" make a difference? Is it limited to physical violence? Or does it impose a general duty upon States to prevent harm to the investment from the acts of government and non–government actors? Generally speaking, the more fundamental issue is whether the standard is a strict liability standard or is limited to the customary international law standard to the treatment of aliens.

Here again, a better drafting of the BITs would certainly help. A good example is Article 5 of the United States Model BIT that provides:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.[87]
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concept of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> [. . . .]
>
> b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.[88]

The United States Model BIT is therefore explicit in two ways. First, it links the full protection and security standard to the minimum standard of customary international law for the treatment of aliens.[89] Second, it refers only to the level of police protection. It helps clarify the debate in recent cases on the application of this standard beyond police protection.[90]

Another approach is the ASEAN Investment Agreement of 2009 that

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86. *See generally* Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?*, IISD BEST PRACTICES SERIES at 2 (2011), http://www.iisd.org/pdf/2011/full_protection.pdf.

87. *See* 2012 U.S. Model Bilateral Investment Treaty, *supra* note 25, art. 5.1.

88. *Id.* art. 5.2(b).

89. Malik, *supra* note 86, at 3.

90. *Id.*

does not expressly refer to the standard of customary international law, but it does note that full protection and security requires member States to take such measures as may be reasonably necessary to ensure the protection and security of covered investments.[91] Thus, it clarifies that the standard does not impose strict liability but a duty to take reasonable measures.[92]

V. MOST FAVORED NATION TREATMENT ("MFN")

Many BITs contain an MFN clause. In early BITs, as national treatment was not granted automatically, the inclusion of an MFN treatment clause was generalized in order to insure that the host states, while not granting national treatment, would accord a covered foreign investor a treatment that is no less favorable than it accords to a third foreign investor and would benefit from national treatment as soon as the country granted it.[93] Nowadays, the overwhelming majority of BITs have an MFN provision that is granted alongside national treatment, mostly in a single provision.[94]

In practice, violations or breaches of the MFN treatment *per se* have not been controversial.[95] However, an unexpected application of MFN treatment in investment treaties has given rise to a debate that has not yet been concluded and has generated different and sometimes inconsistent decisions by arbitral tribunals.[96] The issue is the application of the MFN treatment provision to import investor–State dispute settlement ("ISDS") provisions from third treaties considered more favorable to solve issues relating to admissibility and jurisdiction over a claim, such as the elimination of a preliminary requirement to arbitration or the extension of the scope of jurisdiction.[97]

The disputed issue goes back to *Maffezini v. Spain* where the tribunal held that the MFN clause in the 1991 Argentina–Spain BIT could be used by the claimant to circumvent an eighteen–month waiting period before recourse to international arbitration was available.[98] The claimant argued that the third treaty concluded between Spain and Chile did not contain

91. *Id.*

92. *Id.*

93. Most–Favoured–Nation–Treatment, UNCTAD(2010), http://unctad.org/en/Docs/diaeia20101_en.pdf.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See* Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 56 (Jan. 25, 2000) ("[I]f a third–party treaty contains provisions for the settlement of disputes that are more favorable . . . than those in the basic treaty, such provisions may be extended to the beneficiary of the [MFN] clause . . . .").

such a requirement and that the investor State dispute settlement clause in this third treaty was therefore less restrictive.[99] It could then be imported under the MFN clause contained in the basic treaty.[100] The tribunal found that even though the MFN clause did not expressly refer to dispute settlement, there were good reasons to conclude that dispute settlement arrangements were inextricably related to the protection of foreign investors.[101]

This decision created an intense debate which is still on–going as to whether MFN treatment includes access to international arbitration as contained in the ISDS provisions of respective agreements.[102] The *Maffezini v. Spain* approach was followed in a number of cases: *Siemens v. Argentina*, *Gas Natural v. Argentina*, *National Grid v. Argentina*, *AWG v. Argentina*; however, it was rejected by arbitral tribunals in other cases, such as *Wintershall v. Argentina, Salini v. Morocco, Plama v. Bulgaria, Telenor v. Hungary,* and *Berschader v. Russian Federation.*[103] For example, in *Wintershall v. Argentina*, the tribunal gave particular weight to "consent" as the founding principle upon which jurisdiction is found.[104] The tribunal considered that the timing rule (the eighteen–month waiting period) constituted "part and parcel of Argentina's integrated 'offer' for ICSID jurisdiction," which should be "accepted by the investor on the same terms."[105] The tribunal also based its decision on an analysis of the MFN clause's wording and found that the treatment to which it extended did not include dispute settlement. It considered that the application of the MFN clause could not dislodge the dispute resolution provision in the basic treaty unless the MFN clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted.

In *Salini* and *Plama*, the tribunals have based their decision on the consideration that the contracting parties could not reasonably have intended that jurisdiction would be formed through an incorporation by reference, unless such intent had been explicitly reflected in the relevant

99. *Id.* ¶ 60.

100. *Id.* ¶ 54.

101. *Id.*

102. *Most–Favoured–Nation–Treatment, supra* note 93, at 69.

103. *Id.* at 73.

104. Wintershall Aktiengesellschaft v. Argentina, ICSID Case No. ARB/04/14, Award, ¶ 160(3) (Dec. 8, 2008) ("Besides, it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent. The principle is often described as a corollary to the sovereignty and independence of the State. A presumed consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts".).

105. *Id.* ¶ 162.

provisions of the basic BIT.

Once again, the controversy concerning the application of the MFN clause to dispute settlement provisions included in other treaties results from the fact that, in many BITs, the clause is broadly framed. For example: "[n]either contracting party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favorable than that which it accords, in like circumstances, to investments or returns of its own investors or to investments or returns of its investors of any third states."[106]

Another solution to the problem could be a better formulation of the MFN clause, clarifying that it does not apply to any procedural provisions. In other words, a second section could be added to the MFN clause clarifying that "[f]or greater certainty, the obligation referred to in paragraph 1 above shall not apply to [such and such articles or sections] of this agreement." If you take for example the Chile–Colombia FTA of 2006, it provides in its Annex 9.3 that:

> [T]he parties agree that the scope of application of Article 9.3 [the MFN clause] only covers the matters related to the establishment, acquisition, expansion, administration, conduct, operation, sale or other disposition of investments, and hence, does not apply to procedural issues, including dispute settlement mechanisms such as that contained in section B of this chapter.[107]

This is probably the right approach to follow.

VI. EXPROPRIATION

In recent years, drafters of BITs have also ensured that greater clarity is given to the definition of expropriation. The classic example of an expropriation is an act that transfers ownership or possession of the investment to the State.[108] An act that completely destroys the value of an investment is also typically regarded as an expropriation.[109] But more and more often expropriation occurs through a series of actions rather than a single act,[110] and consequently, many BITs have defined expropriation to include measures that, taken together, are equivalent to, or have the same effect as, an expropriation. Indeed, BITs include clauses that use the following terms: "expropriation, nationalization and any other measure that

106. *See e.g.,* 2008 U.K. Model Bilateral Investment Treaty art. 3(1) (2008).

107. Chile–Colombia Free Trade Agreement, Chile–Colombia, Annex 9.3, Nov. 28, 2006.

108. U.N. Conference on Trade and Development, *Investment Provisions in Economic Integration Agreements*, 107, U.N. Doc. A/CONF (Oct. 2005).

109. *Id.*

110. *Id.*

has an effect tantamount to expropriation or nationalization;" "measures that deprive the investor of their investment, either directly or indirectly;" "expropriation or nationalization or similar measures;" "direct or indirect expropriation or nationalization, or any other equivalent measure having an effect similar to dispossession;" or still "shall not, directly or indirectly, expropriate or nationalize or take any measure with equivalent character or effect."[111]

It is not clear from such language what degree of interference with ownership rights is required for an act (or series of acts) to constitute an expropriation. Furthermore, acts that only partially devalue an investment may be viewed by the host country as routine regulatory acts that are not the equivalent of an expropriation.

These problems are why recent BITs tend to contain provisions clarifying two specific aspects. First, a text has been included in order to make it explicit that the obligations regarding expropriation are intended to reflect the level of protection granted by customary international law. Second, such clarification has been complemented by guidelines and criteria in order to determine whether, in a particular situation, an indirect expropriation has taken place.

In this regard, modern BITs state that an adverse effect on the economic value of an investment, as such, does not establish that an indirect expropriation has occurred. It is further stated that, except in rare circumstances, non–discriminatory regulatory actions by a party aimed at protecting legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[112]

For example, Article 12 of the BIT between Mauritius and Comoros in 2001 states: "[n]othing in this agreement shall be construed to prevent a contracting party from adopting any measure necessary to protect its essential security interests or in the interest of public health or the prevention of diseases affecting animals and plants."[113]

Similarly, some investment treaty models used by European and American countries contain clauses relating to protection of the environment, health, and labor rights. This is true of the models used by United States, Canada, Belgium, Finland, and Austria.

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111. *See* Suzy H. Nikièma, *Best Practices Indirect Expropriation*, IISD BEST PRACTICES SERIES at 5 (2012), http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf.

112. *See e.g.*, United States–Chile Free Trade Agreement, U.S.–Chile, Annex 10–D, June 6, 2003, https://ustr.gov/trade–agreements/free–trade–agreements/chile–fta/final–text.

113. OECD Investment Policy Reviews: Mauritius 2014, OECD 108 (2014) (quoting Article 12 of the Mauritius–Comoros Free Trade Agreement).

The scope of such provisions is limited. They merely affirm the States' sovereign rights to regulate in the public interest, which is already recognized in customary international law. Often, these clauses that reaffirm the States' rights to regulate do not stipulate whether the State is relieved of its obligation to compensate in the event that the exercise of its sovereign right harms the investor. But some of them are more carefully drafted, as we will see in the following two examples that seem to be the most comprehensive articles on expropriation.

The first one is Annex 10–D of the Free Trade Agreement between Chile and the United States:

> The Parties confirm their shared understanding that:
>
> (1) Article 10.9(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
>
> (2) An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.[114]

It then goes on to explain that the expropriation article addresses two situations. The first is direct expropriation[115] and the second situation is indirect expropriation.[116] It further details:

> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case–by–case, fact based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment–backed expectations; and
>
> (iii) the character of the government action.
>
> (b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[117]

This is a very comprehensive definition of expropriation.[118]

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114. *See* United States–Chile Free Trade Agreement, *supra* note 112, Annex 10–D.

115. *Id.* Annex 10–D(3) (defining direct expropriation as "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.").

116. *Id.* Annex 10–D(4) (defining indirect expropriation as "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.").

117. *Id.* Annex 10–D(4)(a)–(b).

118. *See also* Agreement Establishing the ASEAN–Australia–New Zeeland Free

CONCLUSION

It is obvious that many BITs and FTAs, particularly the older ones, are not drafted in a sufficiently precise manner. This lack of clarity means that arbitral tribunals do not have sufficient guidance when attempting to interpret them.[119] It is therefore essential that treaties be drafted in a more precise manner in order to simplify the debate when a dispute arises or even potentially eliminate a number of disputes. More precise drafting will moreover permit to avoid inconsistencies and guarantee a higher level of predictability and reliability for both investors and governments in their efforts to comply with the law.

Trade Area, Annex on Expropriation and Compensation ¶ 2(a)–(b), Feb. 27, 2009, http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-Ne

w-Zealand-Free-Trade-Area.pdf (providing an identical definition of expropriation).

119. *See supra* note 5 and accompanying text.

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ARBITRATORS AND ARBITRAL INSTITUTIONS: LEGAL RISKS FOR PRODUCT LIABILITY?

V.V.VEEDER*

INTRODUCTION

Let us imagine a brown ginger beer bottle produced by a well-known global institution for your personal use. The bottle's label proudly proclaims that in addition to reaching regions of the world that other natural beverages cannot reach, its ginger beer is the best beverage that is better than any municipal water: not even "probably" so, like mere Danish beers, but indisputably so. This ginger beer is said to be more cost-effective, more efficient, and quicker at quenching your thirst than any other kind of beverage. The bottle's label contains no advisory, health information, or other warning whatsoever. So, this green, eco-friendly ginger beer is proclaimed as effectively "the only drink in town."

Now, let us also imagine that this global institution knows for certain that at least fifty percent of those of us who drink its ginger beer are likely to be greatly dissatisfied with this experience. In the ginger beer trade, the fifty percent of dissatisfied consumers are known as "losers" while the satisfied consumers are called "winners." Let us imagine further that those of us who would like to be winners find, once the bottle is opened, that our particular bottle contains not only a decomposed snail, which can make the

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drinking experience less than satisfactory, but worse, that the bottle contains no ginger beer at all. In the ginger beer trade, technically that is called "annulled ginger beer."

There are two additional details. First, there is a legally binding contract between the institution and the imbibers. This case is not an elderly case from an old casebook on torts or delicts. It is not exactly clear what the contract's applicable law might be or what court might have jurisdiction over any dispute between the imbibers and the institution. However, it is manifestly clear that the institution has assumed significant contractual obligations toward the imbibers of its ginger beer bottles. Furthermore, there may be certain non–contractual legal obligations on the institution as a promoter, manufacturer, and supplier of ginger beer, depending on the applicable law and the judicial forum. Second, the cost of a ginger beer bottle is not a modest five U.S. dollars or so. Taking into account all costs, the total can amount to millions, even tens of millions of U.S. dollars. However, that price will remain unfixed at the time a user purchases the bottle because it will usually be determined later by the institution itself. While this ginger beer bottle may be cost–effective, its price will not be cheap or fixed at the point of sale.

Now, on these facts, if we found the bottle empty or polluted, caused by the negligent act or omission of the institution, would we be surprised to learn that we had no legal claim against the institution? Would we also be surprised to learn that both the institution and its workers had legal immunity for any negligent act or omission on the ground of public policy? That, because ginger beer is so important to the national and global economy, ginger beer institutions and workers should not be held accountable because it might adversely affect their work? A lay person would likely be surprised because he or she would expect the contrary and so too would most regulators and legislatures. As a general principle, it is usually accepted that every institution should be legally accountable for its legal wrongs, including negligence, especially when the product sold is professionally produced, heavily promoted, and significantly expensive.[1] If we are not surprised, then we are almost certainly an arbitration user or an arbitration specialist because, traditionally, arbitration users have often been told that there was no possible legal claim against arbitrators and arbitral institutions apart from fraud, corruption, criminal activity and intentional wrongs. Other than these exceptions, there is no reported case in England of any arbitrator or arbitral institution being held liable to any

1. There is here no exact analogy with the famous case where there was a decomposed snail from Paisley in the ginger beer bottle. *See* Donaghue v. Stevenson [1932] AC 362 (holding Mrs Donaghue had no contract with the manufacturer or the tea–shop supplying the ginger beer.)

arbitration user in the long–recorded history of English arbitration. The same was also true in France, a country with a legal system and a judiciary that is even more favorable to arbitration than England. However, this is no longer the case.

First, regarding English law, the House of Lords decided two cases concerning "quasi–arbitrators" (but not arbitrators as such), *Sutcliffe v Thackrah* (1975) and *Arenson v Arenson* (1977) that the immunity for arbitrators traditionally assumed by commentators might be ill–founded at common law.[2] As a result of this new judicial approach, the position of arbitrators at English law became unclear; the Arbitration Act 1950 stated nothing about arbitral immunity. It was even more doubtful that arbitral institutions enjoyed any legal immunity at common law. In the first edition of Mustill & Boyd's *Commercial Arbitration*, the authors analyzed the different directions that English law might take in the future.[3] Their third possible direction concluded, "[a]rbitrators are not immune from suit. There is no reason of public policy to exempt them from liability."[4] They rejected that proposition on the grounds of the long tradition of arbitration in England, but also of public policy so as to avoid "the worst of all worlds."[5] There was, however, no comfort for arbitral institutions. Whereas an arbitrator might still claim a special status at common law, an arbitral institution's relations with the parties was based on contract, not status, with no room for immunity influenced by public policy at common law.

Second, more recently in France in the *FFIRC* case (2010), the claimant recovered substantial damages in contract from an arbitral institution under French law.[6] The institution was a specialist trade association that organized an arbitration service for its members under its own arbitration rules. There was a dispute between a French company and a Spanish company that was referred to the institution under the parties' arbitration clause in their contracts. In due course, the sole arbitrator made an award in France ordering the Spanish company to pay substantial damages to the French company. That award was judicially challenged by the Spanish

2. *See* Arenson v Arenson [1977] AC 405; Sutcliffe v Thackrah [1974] AC 727.

3. *See* Sir Michael J. Mustill & Stewart C. Boyd, COMMERCIAL ARBITRATION (Butterworth, 1982).

4. *See id.*

5. *See id.* at 192, 194–95; *see also* SIR MICHAEL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION 11, 224–32 (2d ed., Lexis Law Pub, 1989).

6. *See* Société Filature Française de Mohair v. Fédération Françaises des Industries Lainières et Cotonnières, (1 ère Chambre 2010) JCP(G) No 51, 20 Dec 2010, ann. Ortscheidt, Dalloz 2011.3023, ann T. Clay; *see also* Charles Price, *Liability of Arbitral Institutions in International Arbitration*, *in* THE PRACTICE OF ARBITRATION: ESSAYS IN HONOUR OF HANS VAN HOUTTE 187–93 (2012).

company, resulting in a judgment of Cour d'appel de Paris that annulled the award for failure to respect the rights of the defense. The following is what had gone wrong: the sole arbitrator made his award without an oral hearing on the basis of documentary materials sent to him by the institution. However, under the arbitration rules, the institution was solely responsible for the onward transmission of all evidentiary materials to the sole arbitrator and the parties. One document that the institution received from the French company was duly forwarded to the sole arbitrator, but by innocent mistake, it was not sent by the institution to the Spanish company. Inevitably, of course, the sole arbitrator based his award against the Spanish company on the very document that the Spanish company did not receive, depriving it of any opportunity to comment in its defense to the French company's claim. Based on these circumstances, the Cour d'appel had no difficulty in annulling the award under French law on the ground of due process ("le principe de la contradiction"), leaving the French company with a worthless, albeit expensive, piece of paper – in other words, an annulled ginger beer bottle.

In olden times, the limitation period not having expired, the French company would simply have begun new arbitration proceedings and having won once, it could reasonably anticipate winning again before a new arbitration tribunal. But, these are more aggressive times in the Twenty–First Century. Instead, the French company sued the institution for damages before the Tribunal de Grande Instance of Nanterre. That court decided that the institution was contractually liable in damages to the French company for having failed in its legal responsibility to organize the arbitration in accordance with its arbitration rules. The court awarded the French company its legal costs incurred in the annulment proceeding (some 10,000 euros) and also part of its costs of the court proceedings (some 3,500 euros). However, the court rejected the claim for the face value of the annulled award on the ground of causation given that the French company could start a new arbitration against the Spanish company and recover the same substantial damages with no apparent time bar for such claim. The court also rejected the claim for moral damages, albeit finding that there was no immunity for the institution under French law.

Why is this case of any interest to us? It is a decision by a relatively minor court and the case is not even reported in the "Revue de l'arbitrage." While it has attracted a number of legal commentaries elsewhere, the only substantive article was written by Charles Price for a foreign audience.[7] Mr. Price's article confirms that an arbitral institution can be liable in contract to its disappointed users for substantial damages under French law.

7. *See* Price, *supra* note 6; *see also* Y. Derains & L. Kiffer, *France*, *Int Handbook Comm. Arb.* 41, n. 147 (Kluwer; 2011).

Like any institution comprised of human beings, an arbitral institution can make a relatively small, innocent mistake with grave consequences for a disputing party resulting in a significant liability for the institution itself. If the applicable limitation period had time–barred the French company's renewed claim, it seems clear that the amount of the award could have been claimed as damages against the institution. The *FFIRC* dispute concerned a relatively small amount, producing a modest award with insignificant costs compared to a large international arbitration. What if such a dispute had concerned millions or billions of U.S. dollars?

The *FFIRC* case, to which we shall return later, also shows that attempts by an arbitral institution to protect itself in advance against liability are limited. In an earlier French case decided in 2009, *SNF S.A.S. v. International Chamber of Commerce (ICC)*,[8] the court declared invalid under French law the "ICC's" contractual attempt to exclude liability for itself (and its arbitrators) under Article 34 of the 1998 ICC Rules.[9] The ICC had optimistically (but mistakenly) intended that new provision to operate as an absolute immunity against all legal liability to users of ICC arbitration everywhere. In contrast to French law, English law sought to protect arbitral institutions with a limited form of statutory immunity under Section 74 of the English Arbitration Act 1996.[10] Unfortunately, such statutory immunity is confined to the institution's appointment or nomination of arbitrators unless the institution's acts or omissions are shown to have been in bad faith. Moreover, this statutory immunity only applies if the seat of the arbitration is in England and Wales; how the immunity could apply to a suit against an arbitral institution outside England under an applicable law other than English law is far from clear. Today, given the increasingly aggressive tactics deployed by one–off users

8. SNF v ICC, JDI 2009.617, ann T. Clay; JIA 2009.579, ann. L. Kiffer.

9. International Chamber of Commerce Arbitration Rules art. 34 (1998) [hereinafter "1998 ICC Rules"] ("Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration."). Following the *SNF* case, this wording was changed in Article 40 of the 2012 ICC Rules, by adding at the end: "except to the extent such limitation of liability is prohibited by applicable law."

10. Arbitration Act 1996 § 74 (United Kingdom) [hereinafter "English Arbitration Act 1996"] ("(1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith. (2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator. (3) The above provisions apply to an employee or agent of an arbitra or other institution or person as they apply to the institution or person himself.").

of international arbitration with no interest in the arbitral system beyond winning (or not losing) their case, there is clearly a growing problem with regard to the potential legal liability of an arbitral institution for its product, namely impartial arbitrators deciding a dispute with a valid award.

There is also a growing problem for international arbitrators. Increasingly, arbitrators are the collateral victims of attacks by a party on the award and the arbitration itself. These collateral attacks often take the form of a challenge to the arbitrator's impartiality and independence. In some jurisdictions, a successful challenge against one of three arbitrators may invalidate an award, even for unanimous decisions. A pending challenge may influence the adverse party toward an otherwise unfavorable settlement. In other jurisdictions, a pending challenge may automatically stay the arbitration until it is resolved by a state court, preventing the tribunal from proceeding with a partial award on liability to a final award on quantum for an indefinite period of time.[11] Recently, state courts have called an unprecedented parade of international arbitrators to account, and required several arbitrators personally to give evidence on oath before a state court (usually at their own expense). These actions have taken place in London, Stockholm, and most recently in New York and France – hardly exotic venues hostile to international arbitration. In short, functional immunity is no longer working for arbitration.

II. THE PRACTICAL PROBLEMS

With this background, let us look more closely and advance a possible solution for the current practical problems facing arbitral institutions and arbitrators regarding potential legal liability to disappointed users. I can do so only in regard to English and French law because the subject is vast and varied. Over the years, well–known treatises and articles have been published including the work edited by Julian Lew in 1990, Susan Frank's comparative survey in 2000, and Martin Meissner's more recent study.[12] I shall also say nothing at all about the laws and practices of this jurisdiction. I understand too little about the USA's different arbitral traditions.

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11. *See, e.g.*, International Centre for Settlement of Investment Disputes Arbitration Rules (2003) [hereinafter "ICSID Arbitration Rules"]. A challenge, however unmeritorious, will also suspend ICSID arbitration under ICSID Arbitration Rule 9(10).

12. *See* Julian D. M. Lew, IMMUNITY OF ARBITRATORS (London Press Ltd, 1990), reviewed J. Paulsson (1991) 107 LQR 688; Susan Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 15 (2000); Martin Maisner, *Liability and Independence of the Arbitrator*, *in* CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION – 2012: PARTY AUTONOMY VERSUS AUTONOMY OF ARBITRATORS 149 (2012); *see also* Alan Redfern, *The Immunity of Arbitrators*, *in* THE STATUS OF THE ARBITRATOR (ICC, 1995).

However, my common premise is simply stated at the outset: today, in the field of international arbitration everywhere, there are too many of us who are washing our hands like Pontius Pilate in the face of increasing legal risks to both arbitral institutions and arbitrators. As already described, England and France have taken two different paths, but regrettably, the result is materially the same. There is simply too much legal uncertainty and too much risk for individual arbitrators and arbitral institutions to bear alone. A great accident is bound to happen soon that may lead to the forced insolvency of an old arbitral institution or the involuntary bankruptcy of a much–respected arbitrator. In particular, (1) individual arbitrators are not corporations; (2) an arbitrator cannot easily limit his or her legal liability (like a law firm); (3) there is no legal cap on damages against an arbitrator or an arbitral institution (like shipowners, airlines, or the medical profession); and (4) arbitral institutions themselves, even large ones, are almost invariably non–profit organizations usually with little or no capital assets. On that future day of reckoning, we may knowingly nod to each other that we sadly saw it coming. We may also greatly regret that our laws, judges, and legal systems can be so treacherous to innocent victims unless we collectively do something. But, what can be done?

A. England and Wales

In English law, as with most common law systems, a professional person usually operates under an obligation to exercise a duty of care and skill: the breach of which may result in liability under both tort and contract law. A new bridge does not usually collapse without someone's negligent fault, probably by the engineer or the building contractor. If a new building suddenly falls down, the architect will invariably be blamed. No engineer, contractor, or architect will be entitled to immunity from suit. Therefore, expectations are high for professional products and services, particularly if that product or service is expensive. The professional person may have contractual limitations or exclusions on liability, but municipal laws and public policy will often regulate the scope of such contractual immunity. Other than death or personal injury, a professional person can usually contractually exclude a liability which he or she would otherwise attract in tort or contract to the customer, save where that person is guilty of deliberate wrongdoing (although the deliberate wrongdoing by an employee for whom the professional is vicariously liable can usually be contractually excluded).[13] Under English law, there are statutory and regulatory restrictions on the legal effect of such contractual exclusions, notably under the Unfair Contract Terms Act 1977 and, regarding

13. CLERK & LINDSELL ON TORTS ¶¶ 10–17 (21st ed., Sweet & Maxwell, 2014).

consumers, the Unfair Terms in Consumer Contracts Regulations 1999 (enacting the EU Council Directive 93/13). At the present time, English courts have yet to decide on these restrictions regarding arbitrators and arbitral institution.

Until the decisions of the House of Lords, in the two English cases in 1974 and 1977 mentioned above, for at least 250 years it was firmly assumed that an English arbitrator could not be sued in English law for damages.[14] There were many judicial obiter dicta to such effect in the law reports, but none of the reported cases actually concerned arbitrators (as distinct from quasi–arbitrators). Nonetheless, these dicta consistently suggested that English law was clear, beyond all doubt, as stated and re–stated in authoritative textbooks on arbitration.[15] The first stone cast in this still pond was *Sutcliffe v Thackrah*.[16] It concerned an architect who, acting as a certifier, allegedly issued negligent certificates for defective building work. The plaintiff–owner then paid the contractor, but he became insolvent and was unable to affect the necessary repairs. The trial judge found the architect liable for negligence and awarded damages for the cost of the repairs with no right to immunity from suit. The architect appealed. The House of Lords, dismissing the appeal, decided that a certifier was not a quasi–arbitrator and that there could be no analogy to the immunity of an arbitrator. This case was not a case about arbitral immunity, but there were important obiter dicta with four of the five judges expressing views that there was arbitral immunity under English law. Yet, the question had been raised.

The second case came before the House of Lords some two years later in *Aronson v Aronson*.[17] It concerned an auditor valuing shares in a company between the plaintiff seller and a buyer, where the sale contract provided that the auditor's valuation would be final as regards the price to be paid to the seller. The seller alleged that the valuation made by the auditor had been negligently made and was too low. Following its earlier decision in *Sutcliffe v Thackrah*, the House of Lords decided that the auditor could be liable for negligence because he was not a quasi–arbitrator. Again, it was not a decision about arbitral immunity as such; and three of the five judges concurred in stating, obiter, that there was arbitral immunity because an arbitrator, like a judge, was not liable in negligence at common law. In this

14. *See supra* note 3.

15. Until Mustill & Boyd's first edition, *see supra* note 3, in 1991, the specialist works (including *Halsbury*, *Russell*, and *Hogg*), if they thought it necessary to address the matter at all, re–stated the same position: arbitrators could not be sued in damages (apart from fraud).

16. *See* Sutcliffe v Thackrah [1974] AC 727.

17. *See* Arenson v Arenson [1977] AC 405.

case, there were important dicta from two other judges who said there should be no arbitral immunity. Lord Kilbrandon and Lord Fraser, both Scottish law lords, suggested that an arbitrator was no different from a valuer and that, like a valuer, an arbitrator had no immunity from suit at common law. It may be significant that these were Scottish and not English judges; under Scots law, the legal principles underlying judicial immunity are different from English law, making them inapplicable to a private arbitrator.[18]

These important dicta from the two senior appellate judges caused considerable concern within the English arbitral community. The Institute of Arbitrators instructed Michael Mustill QC to advise its members whether English law still conferred any immunity for damages on an arbitrator alleged by one party to have been guilty of negligence. From anecdotal evidence, it is possible that these instructions were also provoked by legal proceedings brought against the Institute of Arbitrators for allegedly appointing a wholly incompetent arbitrator without taking reasonable care to ensure his competency, ending in catastrophic results for one party. That case is not publicly reported. It may have been settled before judgment, but it is clear that the issue at the time extended beyond arbitral immunity to the position of an arbitral institution or appointing authority in nominating or appointing an arbitrator. In 1977, in a long and scholarly opinion, Michael Mustill QC advised that a degree of risk now existed that arbitrators could be held liable in tort under English law.[19] It is impossible to exaggerate the influence of Michael Mustill on the development of English arbitration over the last fifty years. He was always the House of Lords "Mark Two," even as Counsel at the English Bar, long before he began his distinguished judicial career. The result of his legal opinion, amongst others, was the first attempt by the London Court of International Arbitration (the "LCIA," then still part of the Institute of Arbitrators) to exclude liability for arbitrators and the LCIA as an arbitral institution in the LCIA's 1981 Rules.[20] Further, as explained below, Sections 29 & 78 of the later English Arbitration Act 1996 were enacted as

18. *See generally* Abimbola A. Olowofoyeku, SUING JUDGES: A STUDY OF JUDICIAL IMMUNITY (Clarendon Press, 1994).

19. This legal opinion is not published. Yet, over the years, it has entered the public domain.

20. *See* English Arbitration Act 1996 § 29 ("(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. (2) Subjection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself. (3) This section does not affect any liability incurred by an arbitrator by reason of his resigning. *But see id.* § 25 ("Section 25 addresses the position of an arbitrator who has resigned in regard to personal liability, fees and expenses, as to which the Court may (not must) grant him relief.").

mandatory provisions from which disputing parties cannot derogate in an English arbitration – that is an arbitration with an English seat.[21]

Statutory immunity for arbitrators was considered extensively by the Departmental Advisory Committee on the Law of Arbitration ("DAC") which was responsible for the content of the English Arbitration Act 1996, first chaired by (as he had become) Lord Justice Mustill. The DAC's published reports on this issue confirmed the doubts and concerns caused by the House of Lords' decision in *Aronson v Aronson*. In the DAC 1996 Report,[22] the DAC considered that at common law, there was "some arbitral immunity" because the reasons for such immunity were the same as those applying to judicial immunity under English law. The DAC added,

> It is generally considered that an immunity is necessary to enable an impartial third party properly to perform an impartial decision–making function .... We feel strongly that unless a degree of immunity is afforded, the finality of the arbitral process could well be undermined. The prospect of a losing party attempting to re–arbitrate the issues on the basis that a competent arbitrator would have decided them in favour of their party is one that we would view with dismay.[23]

That qualified phrase "some immunity" and the reasoning ostensibly limited to arbitral "decision–making" raised questions as to the full scope of such intended arbitral immunity. For example, was it intended by Parliament to exculpate an arbitrator who, by his own negligence or his own alleged negligence, failed to perform a sufficiently thorough conflict check prior to or after his appointment, as a result of which, he or she is successfully challenged by a party and the award set aside? That would not appear to form part of an arbitrator's decision–making process regarding issues comprising the party's dispute, particularly if he or she is not yet an arbitrator at the relevant time. This situation may suggest that an arbitrator's liability may not be fully exculpated by this statutory immunity. Despite Michael Mustill's valiant attempts over the years, as both a scholar and a judge, to maintain the arbitrator as having a distinct legal status under English law (such status more easily supporting a functional immunity at common law rather than a mere contractual relationship), the English courts have now recognized that even with an extra–contractual legal status, an arbitrator becomes a contractual party to a multilateral contract made with the disputing parties, and if relevant, also the arbitral institution. With such a contract for personal services, the arbitrator necessarily risks

21. *See* English Arbitration Act 1996 §§ 29, 78.

22. *See* Report, Departmental Advisory Committee on the Law of Arbitration, Report on Arbitration Bill 1996 (Feb. 1996) [hereinafter "DAC 1996 Report"].

23. *See* DAC 1996 Report, *supra* note 22, at ¶ 132; Sir Michael J. Mustill & Stewart C. Boyd, COMMERCIAL ARBITRATION: 2001 COMPANION VOLUME 417ff (Butterworth, 2001).

contractual liability, subject to considerations of public policy for arbitral decision–making.

Public policy at English common law, as the DAC had reported, was based on the assumption that English arbitrators were like English judges. However, that is manifestly not the case. First, international arbitrators are not English judges. No English judge makes a contract with litigants nor is an English judge paid by any litigant. There is no accurate analogy between a state judge with imperium and an international arbitrator with none. Moreover, England's senior judges enjoy absolute immunity under English law, but that is not so of junior judges. There is no obvious reason to equate English arbitrators, the majority of whom are not lawyers, with senior members of the English judiciary. Moreover, in other jurisdictions, we know that senior judges do not enjoy absolute immunity, such as Austria.

Most importantly, immunity under English law has significantly receded in other related areas. In *Rondel v. Worsley*, the House of Lords held that a trial lawyer enjoyed immunity from suit for negligence in the conduct of criminal proceedings.[24] However, in *Hall v Simons*, the House of Lords reversed itself, deciding that a trial lawyer enjoyed no immunity in both civil and criminal proceedings.[25] It is an important case on immunity by virtue of its new treatment of public policy considerations; the decision has been followed in New Zealand and, regarding civil proceedings, in Scotland.[26] Given that judges will decide upon immunities enjoyed by arbitrators and arbitral institutions, this decision provides no comfort in assuming that the traditional arguments for such immunity under public policy will prevail. Those arguments include, namely, that it allows disappointed parties indirectly to attack the final decision of a tribunal, that it bypasses the many procedural rules for impugning such a decision, and that the risk of personal liability unreasonably interferes with the independence and professionalism of the targeted defendant. All these arguments, as applied to trial lawyers, were examined anew by the House of Lords and firmly rejected. The result at common law is that arbitral immunity is more questionable than ever. There should be no reason to believe with any confidence that an arbitrator, still less an arbitral institution, enjoys any functional immunity at common law in England, in tort and, still less, in contract.

There is still the English Arbitration Act 1996 for arbitrations with an English seat, and as already indicated, Section 74 of that Act provides a

24. *See* Rondel v. Worsley [1967] 1 AC 191.

25. *See* Hall v. Simons [2002] 1 AC 615.

26. *See* Chamberlain v. Lai [2005] SC 19/2005 (NZ); Wright v. Paton Farrell [2006] 2006 SC 404 (Scotland).

limited immunity to arbitral institutions for wrongful failures in the appointment of arbitrators unless that wrong is shown to have been in bad faith. Does this suffice for the 21st Century? In its 1996 Report, the DAC provided two reasons for this statutory immunity.[27] The first, as with arbitral immunity, was the concern that the threat of litigation against the institution could be used to reopen matters finally decided by an award. The second was, in its words, of great importance:

> Many organisations that provide arbitration services, including Trade Associations as well as bodies whose sole function is to provide arbitration services, do not in the nature of things have deep pockets. Indeed much of the work is done by volunteers simply in order to promote and help this form of dispute resolution. Such organisations could find it difficult, if not impossible, to finance the cost of defending legal proceedings or even the cost of insurance against such costs. In our view, the benefits which these organizations and indeed individuals have in arbitration generally, fully justified giving them a measure of protection so that their good work can continue.[28]

As a matter of legal logic, this rationale should have justified a larger measure of statutory immunity for arbitral institutions. Work at the more interventionist institutions like the ICC covers the organization of an arbitration from beginning to end, far beyond the composition of the original tribunal. It may include the prima facie assessment of jurisdiction, the removal of an arbitrator, the grant of extensions of time for the award and intermediate procedural steps, the arrangement of advance payments by the parties on account of arbitration costs, the suspension of those payments in a deposit account, the determination of the final amount of arbitral fees and expenses, the scrutiny of the draft award, and the issuance of the award to the parties. This process certainly consists of far more than merely appointing ICC arbitrators. I have already described how the scope of Section 74 is also limited to an arbitration with an English seat. In short, the limited scope and application of Section 74 is no longer fit for purpose, if it ever was.[29]

As for international conventions, the International Centre for Settlement of Investment Disputes ("ICSID") Convention of 1965 was enacted into English law in 1966, whereby ICSID as an arbitral institution and ICSID

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27. *See* DAC 1996 Report, *supra* note 22.

28. DAC 1996 Report, *supra* note 22, at ¶ 301; Report, Departmental Advisory Committee on the Law of Arbitration, Supplementary Report on English Arbitration Act 1996, at ¶ 38 (1997); *see also* Mustill & Boyd, *supra* note 23, at 444, 469.

29. In 1995, the DAC had been ready to consider recommending to the UK Government a broader form of statutory immunity, but the arbitral institutions did not consider it important – at that time.

arbitrators enjoy statutory immunity.[30] But, the ICSID Convention is a solitary exception amongst arbitral conventions. There is nothing about immunity in the 1958 New York Convention.[31] There is also nothing in the 1985 United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Arbitration.[32] This omission was addressed by UNCITRAL's former Secretary, Gerald Hermann, in his 1998 Freshfields Lecture.[33] There, he explained that, at UNCITRAL, the national delegations abstained from touching the issue of arbitral immunity, preferring "to let sleeping dogs lie" for the Model Law. The trouble with sleeping dogs is that they eventually wake up. Soon, as a tactical measure, arbitrators were threatened personally with challenges and claims against them. Accordingly, twenty–five years after the Model Law, UNCITRAL reconsidered arbitral immunity when drafting its new UNCITRAL Arbitration Rules 2010.[34] It was a long and troubled debate.

That debate started with the working paper prepared for the UNCITRAL Working Group on Arbitration.[35] This unofficial working paper recommended a provision, which by contract would form part of an arbitration agreement under the new UNCITRAL rules. It was to the effect that no arbitrator (including his or her employees or assistants), secretary, or expert to the Tribunal, "shall be liable to any party for any act or omission in connection with the performance of his or her tasks under these Rules except if that act or omission was manifestly in bad faith." It was intended that "bad faith" would be included in this exception, as also a deliberate violation of the arbitration agreement and the UNCITRAL Rules. It was also suggested that UNCITRAL might consider extending this contractual immunity to persons or institutions performing the function of an appointing authority under the UNCITRAL Rules although the Permanent Court of Arbitration ("PCA") itself, as an appointing authority under the UNCITRAL Rules, was legally immune from suit. During the elephantine gestation of the 2010 Rules, the new Article 16 eventually emerged: "[s]ave for intentional wrongdoing, the parties waive to the

30. *See* ICSID Convention, Art. 21 (Apr. 2006) [hereinafter "ICSID Convention"].

31. *See generally* New York 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (UNCITRAL).

32. *See generally* Model Law on International Commercial Arbitration, UNCITRAL (1985) [hereinafter "UNCITRAL Model Law"].

33. *See* Gerold Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, 15 ARB. INT'L 211 (1999). As a consequence, several Commonwealth jurisdictions enacting the UNCITRAL Model Law added their own statutory provision on arbitral immunity (for example, Bermuda).

34. *See* UNCITRAL Arbitration Rules, UNCITRAL (rev. 2010) [hereinafter "2010 UNCITRAL Arbitration Rules"].

35. *See generally* Working Paper, Suggested Changes to the ICSID Rules and Regulations (May 12, 2005) [hereinafter "Suggested Changes to ICSID Rules"].

fullest extent permitted under the applicable law any claim against the arbitrators, the appointing authority, and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration."[36] As the accompanying UNCITRAL commentary makes clear, the rationale for this contractual exclusion was, "to ensure that arbitrators were protected from the threat of potentially large claims by parties dissatisfied with an arbitral tribunal's rulings or rewards who might claim that such rulings or rewards arose from the negligence or thought of an arbitrator."[37] This immunity is intended to protect the arbitrator's decision–making process in an UNCITRAL arbitration. However, the UNCITRAL Rules do nothing to protect an arbitral institution acting other than as an appointing authority under the UNCITRAL Rules.[38]

From an English perspective, international conventions, model laws, and rules of arbitration provide little actual guidance. We are left only with the limited statutory provisions in the English Arbitration Act 1996 and multifarious, untested contractual exclusion clauses, such as Article 31 of the 1998 LCIA Rules (as since modified by Articles 31.1 and 31.2 of the 2014 LCIA Rules).[39] Regarding immunities in the LCIA Rules, as indicated, their history began with the 1981 LCIA Rules following Michael Mustill QC's influential legal opinion in 1977. Article 14(1) of the 1981 LCIA Rules excluded liability for the LCIA Court and LCIA arbitrators for any act or omission in connection with the arbitration, but with regard to LCIA arbitrators (albeit not the LCIA Court), it excluded "the consequences of any conscious and deliberate wrongdoing" on the arbitrator's own part from this immunity. Article 19.1 of the 1985 Rules repeated this provision. It was revised in Article 31 of the 1998 LCIA rules to allow also for the liability of the LCIA Court in the case of its own conscious and deliberate wrongdoing. Article 31 of the 1998 Rules also reversed the burden of proof requiring the claimant to prove wrongdoing by the LCIA Court or LCIA arbitrator, rather than impose a negative obligation on the LCIA Court or LCIA arbitrator to disprove such wrongdoing in order to qualify for contractual immunity. To my

36. *See* 2010 UNCITRAL Arbitration Rules, *supra* note 34 art. 16.

37. *See* Report, UNCITRAL Working Group II, (Arbitration and Conciliation) on the work of its fifty–second session ealand(A/CN.9/688) ¶ 46 (2010).

38. If the arbitral institution is the PCA, it will enjoy a broader immunity under its founding treaties. It is not clear whether such a broader immunity would benefit arbitrators appointed by the PCA under the UNCITRAL Rules, outside the Netherlands (where the PCA has its headquarters).

39. *See* LCIA Arbitration Rules § 31 (1998); now LCIA Arbitration Rules § 31.1 and 31.2 (2014). Apart from liability in tort or under the LCIA Rules, there is no reason why an arbitrator could not be liable in contract under English law. *See* M. Smith, *Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment*, 8 ARB INT 17 (1992).

knowledge, none of these provisions has yet been tested in litigation in England or abroad.

It is not surprising to see a provision for the immunity of the LCIA as an arbitral institution because, like the ICC, its functions extend far beyond the appointment of arbitrators and are not simply administrative under the LCIA Rules. Although, unlike the ICC, the LCIA does not actively control the conduct of the arbitration or vet draft awards (thereby taking responsibility for both), the LCIA decides challenges to arbitrators, provides written reasons to the parties for such challenges, acts as a deposit–holder for the parties, and fixes the final amount of arbitral fees and expenses under the LCIA Rules. None of these functions are unusual for many arbitral institutions around the world. Would its contractual exclusion work in practice if tested for LCIA arbitrators and the LCIA both in English and particularly in non–English litigation? For that analysis, we need to go back to France.

B. France

Under French law, as in English law, there is a bilateral legal agreement between the contracting parties to an arbitration clause. But, even before that agreement, there is a standing offer made by the arbitration institution recommending to the world, including these contracting parties, that the institution is ready, willing, and able to administer an arbitration resulting from the parties' arbitration agreement. Once the arbitration has commenced, under French law there is a multilateral legal relationship between the parties and the institution where the arbitrators become parties upon their respective appointments.[40] This means that, unlike a French judge, an arbitrator and an arbitral institution can be sued in contract at French law. Regarding arbitrators, this position was confirmed in the 2008 decision by the Cour d'appel de Paris in legal proceedings brought by a disappointed party against three arbitrators.[41] The French courts have recognized that an arbitrator could be liable in contract under French law, holding that a French arbitrator is charged with a "mission" or task, which that arbitrator must complete in good conscience, independence, and impartiality. Although an arbitrator enjoys a functional legal immunity under French law, the French cases establish that immunity does not exclude liability for fraud, denial of justice, and gross negligence ("équivalente au dol, constitutive d'une fraude, d'une faute lourde ou d'un deni de justice"). Applied to an arbitral institution, the Paris Cour de Cassation confirmed in the 2001 *Cubic* case that an arbitral institution

40. *See* Philippe Fouchard, *Les institutions permanentes d'arbitrage devant le juge étatique (à propos d'une jurisprudence récente*, REVUE DE L'ARBITRAGE 225 (1987).

41. *Charasse c/ D* REVUE DE L'ARBITRAGE 376 (2009), ann. P. Leboulanger.

could be held liable in contract to a disputing party under French law.[42]

An arbitral institution is not an arbitrator; therefore, it is not required to respect the rights of the defense or to provide its decisions in the form of an award subject to judicial review. However, as analyzed at length by Professor Philippe Fouchard in his 1987 article: "[t]he French cases established that an arbitral institution is contractually obliged to respect its own arbitration rules, and it may also be obliged to ensure a fair procedure for the arbitration" ("un procès équitable").[43] In his article, Professor Fouchard concluded that it would be inconceivable that an arbitral institution, paid for its services, could benefit from any legal immunity under French law.[44]

It was against this legal background that the ICC introduced Article 34 of its 1998 ICC Rules,[45] ostensibly granting an absolute immunity for ICC arbitrators, the ICC Court, and the ICC without any exception. The drafting of this new article provoked considerable controversy within the ICC. However, the ICC Council decided at its meeting in Shanghai in 1997 upon the absolute form of contractual immunity, which became part of the 1998 ICC Rules.[46] Many legal scholars predicted that this broad wording, without any exceptions for fraud, corruption, or deliberate wrongdoing, could never survive judicial scrutiny in a state court. These critics included, famously, Professor Pierre Lalive and the ICC National Committees from France, Italy, and the United Kingdom. They were soon proven right.

In the *SNF* case (2009), the French courts had to consider the validity of Article 34 of the 1998 ICC Rules in legal proceedings brought by a disappointed party against the ICC as an arbitral institution.[47] This litigation was part of a larger battle between two commercial parties arising from two ICC awards made in Brussels that raged in the French and Belgian courts (where the ICC was not a party). SNF's claim against the

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42. *See* Société Cubic Defense Systems Inc v. Chambre de Commerce international, Cour de cassation 1ère ch civ: 20 (Feb. 2001); *see also* T. Clay note in *Rev arb 2001.511;* P. Lalive, *Rev arb 1999.103;* P. Lalive, "Sur l'irresponsibilité arbitrale", *Etudes de procédure et d'arbitrage en l'honneur de Jean–François Poudret* (1999); and Philippe Fouchard ET. AL, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 1153–1155 (Savage and Gaillard eds., 1999).

43. *See* Fouchard, *supra* note 40.

44. *See* Fouchard, *supra* note 40, at 225, 251.

45. *See* 1998 ICC Rules, *supra* note 9 art. 34.

46. *See* W. Laurence Craig ET. AL, ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES: WITH COMMENTARY 183–84 (1988).

47. *See SNF SAS v. Chambre de commerce international,* Cour d'appel of Paris (2009), ann C. Jarosson *Rev arb* 2010.314; *see also Rev arb* 2007.847 and R. Dupeyre, 32:2 ASA Bulletin 265.

ICC in France alleged that the ICC had effectively conspired with the arbitrators to evade illegally the European Union's mandatory competition rules contrary to French law and international public policy. During these proceedings, the Cour d'appel of Paris required the ICC to disclose its confidential papers relating to the work of the ICC Court in approving the two draft awards under the ICC rules. It further publicly criticized the ICC in its judgment for being reluctant to provide the essential papers to the Court. This criticism was without precedent in the ICC's long experience of as a litigant in France. It was a bad omen. Having examined the confidential papers, the court rejected any liability of the ICC. It then went out of its way to declare that Article 34 was invalid under French law, its absolute terms purporting to excuse the ICC wrongly for performing its essential contractual obligation as an arbitral institution towards the parties.

There were, of course, a number of "I told you so's." But, "I told you" is never a solution. The solution chosen by the ICC for its new 2012 ICC Rules is the limited language of the new exclusion in Article 40. Article 40 seeks to exclude liability for a large number of people, including ICC arbitrators, the ICC Court, and the ICC itself, "for any act or omission in connection with the arbitration except to the extent that such limitation of liability is prohibited by applicable law." Will this exclusion work any better than the old wording? Only time will tell. It will not be a benevolent arbitrator who will so decide, but a state court and not necessarily a court in France. In the meantime, little comfort is provided by the ICC Secretariat's Guide to ICC arbitration as recently published. The rationale provided there for this contractual immunity is based on the suggestion, "such bodies and individuals [were] exposed to liability"; "this could hinder their work making it difficult for them to provide the required level of service."[48] That simplistic rationale is not applied to other professions, such as engineers, architects, building contractors, trial lawyers, and even ginger beer manufacturers. It is not an argument that will carry the day in any state courts, nor indeed before any regulators.

III. A PRACTICAL SOLUTION

In a little box at the very end of the ICC Guide, "Note to Arbitrators and Experts – Liability Insurance," the following words appear: "[a]rbitrators and experts are advised to obtain insurance that adequately covers their work in arbitration matters so as to minimize the risk associated with any potential liability." Where contractual and statutory immunities are insufficient under English and French law, could such legal liability insurance be the Holy Grail as the only safe and certain solution for

48. *See* Jason Fry ET AL., *The Secretariat's Guide to ICC Arbitration*, ICC at 421ff (2012).

arbitrators and arbitral institutions? It seems to me that we are only left with professional indemnity insurance as the most effective practical solution to the potential liabilities of arbitrators and arbitral institutions.

For arbitrators who do not practice as arbitrators as a separate profession, there is usually adjectival cover for acting as an arbitrator that forms part of the professional liability insurance required by their regulator or professional body. For example, a practicing member of the English Bar has cover for arbitral liability as part of the professional liability cover required to practice as a barrister (as do avocats at the Paris Bar). However, many full–time arbitrators do not exercise a separate profession, particularly if they have retired from professional practice or from a judicial career or have chosen to pursue an academic career from the outset. Many of these arbitrators, including some of the best–known international arbitrators, may carry no professional indemnity insurance at all. Even for those arbitrators that have insurance, the geographical scope of the cover may be limited given the insurance market's traditional divisions between North American and non–North American risks. It is also difficult for an individual arbitrator personally to negotiate insurance cover: (1) the legal risks are too uncertain for underwriters; (2) they are complicated to explain satisfactorily; (3) insurers prefer high volumes and not singletons as insureds; and (3) as a result, even if cover is available, insurance premiums for individual cover can be very expensive.

If cover is to be obtained, it could be more easily done for a large group under a master policy that is agreed with one insurer, possibly even a captive operating with its own reinsurance programme. It could be done with little or no controversy, particularly because the ICC has set an important example that could be adopted and supported by other arbitral institutions, independently, or with a group cover collectively negotiated by IFCAI or ICCA. Today, the ICC carries professional indemnity cover, not only for itself and the ICC Court, but also for ICC arbitrators. This fact has only recently become publicly known, although the terms of such cover remain discretely veiled for good reason. It means that a small part of the administrative fees payable by the disputing parties to the ICC Court constitutes an insurance premium covering legal liability for both the ICC and ICC arbitrators. Is that not the basis for a practical solution to the problem?

Insurance cover, at least for arbitrators, does not need to be for a significant insured sum. An honest arbitrator is unlikely to be held liable in negligence for substantial damages measured in tens or hundreds of millions of dollars for making a wrong award as part of the decision–making process. Yet, an arbitrator is increasingly likely to be made a party to a legal proceeding brought in bad faith by a disappointed party as a collateral attack on an award. For example, this can be done not only by

challenging the arbitrator's impartiality or independence, but also by instituting disciplinary proceedings before his or her professional body, or by threatening other legal proceedings directly against him, whether for alleged contempt of court, alleged defamation, or alleged criminal conduct. What an arbitrator then needs is not so much an indemnity against legal liability for damages, but rather immediate defense cover from an insurer so as to defend against such malign proceedings. These defense costs for an individual arbitrator can be expensive and in some cases, have run into six figures (USD). It seems wrong for an individual, uninsured arbitrator to bear such costs and expenses alone, particularly when the proceedings against him or her fail or are abandoned, having exhausted their collateral purpose. It does not seem right, as we saw in the USA (regarding legal proceedings brought against three arbitrators acting in a Geneva arbitration), to rely on local arbitration specialists giving so generously of their time to defend the impugned arbitrators pro bono. The same arguments apply equally to big and small arbitral institutions. This relatively modest cover for defense costs, with a relatively small sum insured for any legal liability, ought to be possible to place in current market conditions if sufficient numbers of arbitrators and institutions were willing to subscribe to such group insurance. It is now needed, but will it be done?

CONCLUSION

Let me conclude with a story about Norwegian lemmings. As you may well know, a lemming is a small, furry, brown rodent living in large numbers in the arctic tundra. From the beginning of time, every four years the lemming population plummets to near–extinction. For reasons never fully understood and also much disputed by scientists, migrating lemmings commit mass suicide by jumping into the ocean and swimming collectively to their watery deaths. At school many years ago, I became a minor expert on Norwegian lemmings because a friend and I were applying for a travel scholarship to northern Norway to observe the lemming migration. However, our scholarly application, of which we were mistakenly proud, was summarily rejected by the scholarship committee because we had chosen the wrong year. It was an off–year of non–migration with no mass suicides by lemmings, and we were not allowed to resubmit a more timely application. Like Norwegian lemmings, we may continue our lives as arbitrators and arbitral institutions for the next several off–years. I may be wrong again about the exact time, but unless we do something soon, we can be morally certain that one day a calamity will befall the international arbitral community. We should at least attempt a solution soon. If we tried together (arbitral institutions, arbitrators, and arbitration users), we could certainly do better than lemmings.

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ARTICLES

A MODEST PROPOSAL FOR PREVENTING MULTIPARTITE ARBITRATIONS FROM BEING A BURDEN TO THE PARTIES AND FOR MAKING THEM BENEFICIAL TO THE PARTIES

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INTRODUCTION

The recent increase in so–called "mass" investment treaty claims involving Argentina, the Czech Republic, and Spain put multipartite arbitration in the spotlight. Specifically, considerable attention has been

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dedicated to whether dozens, if not thousands, of claimants should be permitted to bring their claim in one set of proceedings when a single host–State is involved.

While investment arbitration involving several claimants is common and considered *de facto* acceptable,[1] the question of whether a very high number of claimants can bring their claims together has not been asked or debated until recently. Strikingly, the question of whether such disputes *should* necessarily be litigated together has not yet been given the same importance.

In this paper, the authors consider arbitral practice in respect of multipartite arbitration, but also dedicate special focus to the factual and legal circumstances that may arise to alter whether it is efficient and fair to continue a multipartite arbitration. We will show that, in certain complex circumstances, this is not always the case.

In doing so, the authors focus on the three common scenarios that give rise to multipartite arbitration: a parent company and an investment vehicle as joint claimants, investors in the same investment as joint claimants, and investors in different investments as joint claimants.

The authors conclude by recommending that, in multipartite proceedings, tribunals consider carefully whether to hold a separate phase during which it will be debated and decided whether, and if so, how, proceedings should be consolidated.

II. WHERE THE PARENT COMPANY AND THE INVESTMENT VEHICLE ARE JOINT CLAIMANTS

A. Arbitral Practice

This situation commonly arises in circumstance where an investment vehicle brings a claim, together with its parent company, and wishes to invoke the nationality of the latter. This is directly envisaged at Article 25(2)(b) of the International Centre for Settlement of Investment Disputes ("ICSID") Convention, which refers to the possibility that "because of foreign control," the parties to an investment treaty agree to treat a legal person as "a national of another Contracting State for the purposes of this Convention."[2] Numerous investment treaties contain such provisions, and

1. Christoph H. Schreuer ET AL., THE ICSID CONVENTION: A COMMENTARY, Article 25, ¶¶ 277–82 (2d ed. 2009); *see also* HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 406 (1968) (quoting the British expert, Mr. P.J. Allot, who considered implicit that "there might will be more than two [parties to a dispute], as other provisions of the draft seem to admit.").

2. ICSID Convention art. 25(2)(b), Apr. 10, 2006.

these are frequently invoked in ICSID and other types of investment treaty arbitration.

For instance, in *MTD Equity v. Chile,*[3] MTD Equity was the 100% owner of MTD Chile, a company organized under the laws of Chile.[4] MTD Chile could therefore avail itself of the nationality of its parent company because such a purpose was directly envisaged in Article 6(2) of the Chile–Malaysia bilateral investment treaty.[5]

As the above example illustrates, it is uncontroversial that, in the presence of adequate treaty language, there are no bars to a parent company and its investment vehicle bringing a claim jointly against the host–State.

B. Practical Considerations

At first glance, no issue could arise from the parent company and the investment vehicle bringing the claim simultaneously. Indeed, one might think it makes little difference whether the parent company, the investment vehicle, or both entities bring the claim.

However, various circumstances may arise in which the investment vehicle does not have the same legal rights as its parent company under investment treaty law. This is particularly the case when considering the right to fair and equitable treatment ("FET"), which is commonly set out in investment treaties.[6]

A key determinant of the content of the standard is the legitimate expectation of the investor at the time of investment. Broadly defining the standard, the ICSID Tribunal in *Técnicas Medioambientales Tecmed v. Mexico* stated that the FET standard "requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[7] In modern investment treaty arbitrations, whether or not the investor could, at the time of the investment, legitimately expect certain actions of the host–State has thus become a crucial determination on which the outcome of the arbitration often depends.

However, consider the following hypothetical facts: domestic nationals set up Company A, which massively invests into the exploration of natural resources. The exploration is successful, and Company A starts producing.

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3. MTD Equity Sdn. Bhd. v. Chile, ICSID Case No. ARB/01/7, Award, (May 25, 2004).

4. *Id.* ¶ 94

5. *Id.*

6. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, Article 15; Energy Charter Treaty, Article 10(1).

7. Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003).

At that moment, the original owners sell fifty–one percent of Company A to a foreign investor. The foreign investor does not have Company A make any additional investments. It just purchases the fifty–one percent holding.

An investment dispute arises and the foreign investor and Company A are both claimants. The FET standard undoubtedly protects the legitimate expectations that the investor had when it purchased the fifty–one percent holding in Company A. The question is, though, whether Company A has the same legitimate expectations and if so, whether they are protected by the FET standard.

Company A made massive investments, but it was not an "investor" within the meaning of the applicable investment treaty at that time because it was domestically owned. Should Company A be able to rely on legitimate expectations that it had at that time?

In a similar vein, Company A became a deemed foreign investor only when the "real" foreign investor bought fifty–one percent of its shares, but Company A did not make any investment at that time. Its stock changed hands, but nothing more happened. Should Company A be able to rely to the legitimate expectations that it had at that moment, even though it did not make any investments?

These are very important questions because they may result in the disposition of forty–nine percent of the overall claim.

In the authors' view, this simple example illustrates that when assessing the legitimate expectations of the claimants in circumstances where a parent company and the investment vehicle are joint claimants, a Tribunal should carefully distinguish between the expectations of the parent company and those of its investment vehicle. As the two entities may have different histories and interactions with the host–State, it may follow that the parent company and the investment vehicle have distinct legitimate expectations. From such differences would necessarily arise different legal protections under the fair and equitable standard.

III. WHERE INVESTORS IN THE SAME INVESTMENT ARE JOINT CLAIMANTS

A. Arbitral Practice

It is also common for claims to be brought jointly against the same host–State but under different investment treaties. For example, in the case of *Goetz v. Burundi*, six shareholders instituted proceedings jointly.[8] The Tribunal upheld its jurisdiction.[9] Likewise, in *Klöckner v. Cameroon*, Klöckner and two of its subsidiaries jointly claimed against Cameroon in

8. Goetz v. Burundi, ICSID Case No. ARB/95/3, Award, ¶ 18 (Feb. 10, 1999).

9. *Id.* ¶¶ 86 –89.

respect of the same investment, and the Tribunal upheld its jurisdiction.[10] It is reported that, in both cases, the host–State did not contest jurisdiction on that ground.[11]

However, in *Guaracachi America, Inc. v. Bolivia*, Bolivia objected to multipartite arbitration on the ground that its silence did not constitute consent. The case involved claims by Guaracachi America, Inc. and its subsidiary in respect of the same investment but under two different bilateral investment treaties.[12] The Tribunal laconically rejected Bolivia's objection, agreeing with an earlier decision that "it is evident that multi–party arbitration is a generally accepted practice in ICSID arbitration, and in the arbitral practice beyond that, and that the institution of multi–party proceedings therefore does not require any consent on the part of the respondent Government beyond the general requirements of consent to arbitration."[13]

Interestingly, in *Alasdair v. Costa Rica*, 137 investors brought a claim against Costa Rica under at least ten investment treaties on the ground that the host–State did not sufficiently protect their deposits in a private scheme.[14] Unfortunately, the issue of multipartite arbitration was not considered because the Tribunal declined jurisdiction on the ground that there was no investment in accordance with the law of Costa Rica.[15]

A crucial distinction, however, must be made in such circumstances between proceedings under the ICSID Rules (both the Arbitration Rules and the Additional Facility Arbitration Rules) and other arbitration rules, and in particular the UNCITRAL Arbitration Rules.

In ICSID procedure, it is the practice of the Secretary–General to register disputes as part of a single set of proceedings when several claimants file a single request for arbitration.[16] Perhaps as a result, the *de facto* practice is

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10. Klöckner Industrie–Anlagen GmbH v. Cameroon, ICSID Case No. ARB/81/2, Award, 21 October 1983.

11. *See* Alemanni v. Argentina, ICSID Case No. ARB/07/8, Decision on Jurisdiction, ¶285 (Nov. 17 2014) (where the Tribunal noted that it appeared that the Tribunals in these cases appeared to have received "the particular assent of both parties ad casum" to consolidation).

12. Guaracachi Am., Inc. v. Bolivia, PCA Case No. 2011–17, Award, ¶ 3, 5 (Jan. 31 2014) (noting reliance on the United States–Bolivia Bilateral Investment Treaty and the United Kingdom–Bolivia Bilateral Investment Treaty).

13. *Id.* ¶¶ 341–43 (quoting Ambiente Ufficio S.P.A. v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction, ¶ 141 (Feb. 8 2013)) (stating that the silence of a particular provision does not limit the scope of consent already given).

14. Anderson v. Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, ¶¶ 2–3 (May 19, 2010).

15. *Id.* ¶ 59.

16. Christoph H. Schreuer ET AL., THE ICSID CONVENTION: A COMMENTARY, Article 25, ¶ 277 (2d ed. 2009).

that the host–State accepts that it is bound by the registration. Indeed, as shown by the ICSID cases summarized above, challenges to the jurisdiction of the Tribunal on the ground that distinct shareholders in the same investment cannot bring their claims are rare and, so far, unsuccessful.[17]

The UNCITRAL Arbitration Rules, in contrast, do not require an administrator to register a request.[18] A Notice of Arbitration must be sent to the opposing party.[19] Consequently, if that party wishes object to any form of consolidation, it might respond to that effect.[20] Further, to make its intention unequivocal, that party might appoint a different co–arbitrator in respect of each set of claims brought by a claimant.[21]

This was the course of action followed by the Czech Republic in respect of the claims filed against it in 2013.[22] The claims followed changes in its legislation that affected photovoltaic power producers.[23] Specifically, faced with claims brought under multiple investment treaties by multiple claimants with investments in different operations, the Czech Republic agreed to the consolidation of the claims that involved the same investment operation and the same investment treaties.[24] For those claims that did not, however, the Czech Republic objected to consolidation, and appointed a different arbitrator in each set of claims.[25]

One group of claimants objected to the Czech Republic's response and asked the Secretary–General of the Permanent Court of Arbitration to

17. It is, however, accepted that such challenges can be brought, as ICSID Institution Rule 7(e) indeed requires the Secretary–General, when sending the Notice of Registration, to remind the parties that the registration of the request is without prejudice to the powers and functions of the Conciliation Commission or Arbitral Tribunal in regard to jurisdiction.

18. *See generally UNCITRAL Arbitration Rules*, UNCITRAL, http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRALArbitration–Rules–2013–e.pdf (last revised 2013).

19. *See id.* art. 3(1).

20. *See id.* art. 4(1).

21. *See generally id.* art. 9.

22. *See e.g.*, Press Release, Ránana Solar, IPVIC: Solar Arbitration Commencing Today (May 9, 2013) (on file at photovoltaic power producers) (announcing that eight international investors filed a notice against the Czech Republic).

23. *See e.g., id.* (stating that the claims alleged severe financial damages caused by the introduction of "retroactive and discriminatory measures, such as a solar levy of twenty–six percent on the revenues of solar installations").

24. *See* Luke Eric Peterson, *Following PCA Decision, Czech Republic Thwarts Move by Solar Investors to Sue in Single Arbitral Proceeding; Meanwhile Spain Sees New Solar Claim at ICSID*, Invest. Arb. R. (Jan 1, 2014), http://www.iareporter.com/articles/following–pca–decision–czech–republic–thwarts–move–by–solar–investors–to–sue–in–single–arbitral–proceeding–meanwhile–spain–sees–new–solar–claim–at–icsid/

25. *See id.*

designate an appointing authority under the UNCITRAL Arbitration Rules to appoint an arbitrator in lieu of the arbitrators selected by the Czech Republic.[26] In other words, these claimants sought to force the consolidation of their claims.

The Secretary–General refused to designate an appointing authority, noting that the purpose of such designation is to safeguard the constitution of an arbitral tribunal when, for example, one party fails to appoint the second arbitrator or when an agreement cannot be reached on the appointment of a presiding arbitrator.[27] As, *prima facie*, the Czech Republic had actively participated in a timely manner by appointing an arbitrator, the Secretary–General concluded that no vacancy existed to justify an intervention to facilitate the constitution of an arbitral tribunal.[28] As a consequence, the arbitrations proceeded together where the Czech Republic had agreed to consolidate, and separately where the host–State had not.

In sum, it is easier for an investor to consolidate proceedings where the rules provide for registration by an administrative authority. In contrast, it is easier for a host–State to oppose joint claims by investors where the rules afford the respondent the opportunity to appoint an arbitrator prior to registration of the case.

B. Practical Considerations

The potential complexities that arise from having several shareholders bring together claims in the same investment are manifold.

The complexities described above concerning the fair and equitable treatment standard, which is in part premised on legitimate expectations, also arise. However, the differences in legal protections may be even more intricate because the claimants will likely have different backgrounds, different negotiation histories with the host–State, different investment terms, a different investment timeline, and may bring their claims under different instruments.

For example, it could very well be the case that one claimant is an experienced corporation that negotiated specific protections with the host–State and agreed to specific written investment terms, while the other party might be a high risk speculative fund that purchased the funds years later at a price that was discounted because the investment climate in the host–State deteriorated significantly. It is apparent that these two claimants, although they might bring their claims together, are in fact not entitled to

26. *See id.*
27. *See id.*
28. *See id.*

the same legal protection.

The protection available to each claimant may also be widely different because, commonly, the claimants are protected by different legal instruments. This is the case when, as in *Klöckner v. Cameroon* and *Guaracachi America, Inc. v. Bolivia*, the claimant invoked different investment treaties (whether bilateral or multilateral, such as the Energy Charter Treaty or the North American Free Trade Agreement ("NAFTA")) because they hold different nationalities. In those circumstances, the claimants will have different legal rights as provided for in the applicable instruments.

Consequences may be important where key protections are provided under one agreement but not the other. For instance, not all investment treaties include an umbrella clause or a most favoured nation clause.[29]

The jurisdictional issues facing the claimants may also be very different. The most clear–cut example is that some investment treaties only allow the arbitration of disputes involving expropriation.[30] Non–expropriation claims thus may be available only to some of the multiple claimants.

Another example is the denial of benefits under some treaties that allows a Contracting Party to deny investment protection where the claimant is owned or controlled by nationals of that Contracting Party and the claimant has no substantial business activities in the area of the Contracting Party where it is organized.[31] The denial of benefits is not possible under all treaties, and thus, it is possible that it can be invoked only against some of the multiple claimants.

The fundamental difficulty with these differences is that they tend to be ignored in the multiple claimants' pleadings. The multiple claimants generally choose to present one storyline and one set of legal claims, as if all the facts and legal arguments apply to all claimants alike. It is then for the defendant state to properly differentiate among the individual claimants in its defense—and this imposes a great burden on the defendant state, when one would expect the claimants to have to demonstrate jurisdiction and clearly set out the claims on the merits asserted by each of the multiple claimants.

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29. *See e.g.*, Agreement on Economic Co–operation Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya, Nov. 9, 1970, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1793.

30. For example, the China–Peru Bilateral Investment Treaty, signed on June 9, 1994 envisages arbitration only in respect of "a dispute involving the amount of compensation for expropriation." *See* Agreement Between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments art. 5 (Sept. 6, 1994.)

31. Article 17–1 of the Energy Charter Treaty is a notable example.

IV. WHERE TWO OR MORE CLAIMANTS IN DIFFERENT INVESTMENTS ARE JOINT CLAIMANTS IN PROCEEDINGS ARISING FROM THE SAME MEASURE

A. Arbitral Practice

Until recently, two or more investors in separate investments acting as joint claimants in proceedings arising from the same measure were generally not considered to cause any difficulty. In *Funnekotter v. Zimbabwe*, for instance, 13 claimants with investments in different farms—but all protected under Agreement on Encouragement and Reciprocal Protection of Investments Between Zimbabwe and the Netherlands—brought claims against Zimbabwe in a single set of proceedings.[32] The Tribunal had no difficulty upholding its jurisdiction and it appears that no objection was raised by Zimbabwe on that ground.[33]

This issue received more attention in recent years in the context of "mass" claims following the three claims brought against Argentina by numerous holders of unpaid sovereign bonds, and a string of cases against Spain and the Czech Republic arising from changes to legislation affecting photovoltaic power producers in both countries. The Argentinean cases, in particular, drew attention because they concern thousands of claimants with no relation to each other beyond the fact that their similar investment was similarly affected by Argentina. We summarized above the outcome of the procedural dispute in the Czech dispute. As to the Argentinean cases, all three Tribunals refused to decline jurisdiction.

The majority in *Abaclat v. Argentina* considered that, although the ICSID Convention was silent on whether collective claims are admissible, it had the power to fill the gap and admit such claims:

> [I]n the light of the absence of a definition of investment in the ICSID Convention, where the BIT covers investments which are susceptible of involving a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment, it would be contrary to the purpose of the BIT, and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration.[34]

The Tribunal therefore admitted the claim of 60,000 Italian bondholders.[35] The host–State's arbitrator, Professor Georges Abi–Saab, dissented,

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32. Funnekotter v. Zimbabwe, ICSID Case No. ARB/05/6, Award, ¶¶ 3, 19 (Apr. 22, 2009)

33. *Id.* ¶ 95.

34. Abaclat v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction, ¶¶ 517–20 (Aug. 4, 2011).

35. *Id.* ¶ 519.

considering that the silence of the ICSID Convention could not mean consent.[36]

In *Ambiente Ufficio v. Argentina*, the Tribunal ruled that the action brought by ninety claimants amounted to multiparty proceedings (in contrast to a "class action" or a "mass claim") of a type generally accepted in ICSID arbitral practice.[37] The Tribunal therefore considered that "it is evident that multi–party arbitration is a generally accepted practice in ICSID arbitration, and in the arbitral practice beyond that, and that the institution of multi–party proceedings therefore does not require any consent on the part of the respondent Government beyond the general requirements of consent to arbitration."[38] The Tribunal also noted that the nature of claims involving mass instruments such as bonds would typically lead to collective proceedings.[39] The Tribunal therefore upheld jurisdiction. The host–State's arbitrator, Judge Santiago Torres Bernárdez, dissented on the ground that the silence of the ICSID Convention did not mean consent.[40]

The Tribunal in *Alemanni v. Argentina* had to decide upon its jurisdiction in a case brought by seventy–four bondholders.[41] The three arbitrators considered that there are three sets of circumstances where arbitration is possible with a multiplicity of parties: (i) when it is specifically provided for (*e.g.*, in an applicable treaty or set of arbitration rules); (ii) when it receives the particular assent of both parties, which could be express or inferred; and (iii) where the instrument setting up the arbitration or establishing the respondent's consent to it can properly be interpreted, on the particular facts of the case, as covering the particular multiplicity of claimants within that consent.[42] The arbitrators concluded that an investment treaty could be interpreted to cover multiple claims where they pertained to the same dispute because the bilateral investment treaty referred to "*investors*" (plural, thereby envisaging multiple claimants) in relation to a "*dispute*" (singular, thereby envisaging a single dispute).[43] However, the Tribunal held that the decision on whether there was the required substantive unity in the dispute submitted to arbitration

36. *See generally id.* ¶¶ 154–75 (Professor Georges Abi–Saab dissenting).

37. Ambiente Ufficio S.P.A. v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction, ¶ 114 (Feb. 8, 2013).

38. *Id.* ¶¶ 141–46.

39. *Id.* ¶ 144.

40. *Id.* ¶¶ 76–82 (Bernárdez, J., dissenting)

41. Alemanni v. Argentina, ICSID Case No. ARB/07/8, Decision on Jurisdiction, ¶ 1 (Nov. 17, 2014).

42. *Id.* ¶ 285.

43. *Id.* ¶ 287.

could only be determined during the merits phase, and therefore concluded that the arbitration should proceed but that its decision on that point should be deferred.[44]

Overall, as the above decisions illustrate, host–States have been generally unsuccessful when objecting to multipartite arbitration. To date, only the Czech Republic, in conformity with the UNCITRAL Arbitration Rules, has been successful in opposing consolidation using the method set out above.

B. Practical Considerations

In the situations contemplated here, the difficulties summarized in the two preceding sections reappear.

Specifically, it is possible that the claimants will have made their investment in a different manner, following a different timeline, and under the protection of different legal instruments. As a result their jurisdictional, substantive, and even procedural rights may be vastly different. Various examples were contemplated in the preceding sections. Moreover, because the claimants will have made distinct investments, the difficulties are magnified, making it increasingly probable that the rights of each claimant will be different. When claims by thousands of claimants are considered, as has recently been the case, the difficulties are multiplied exponentially.

Faced with these issues, the approach of the Tribunal in *Abaclat v. Argentina* stands apart. The Tribunal, after upholding jurisdiction, decided to dedicate a first phase of the arbitration to establishing the core issues that would affect the merit of the thousands of claims, and in particular the conditions that a claimant would have to fulfill for its claim to be granted.[45] The Tribunal envisaged that it might find three types of issues at the end of this first phase: (i) issues that might be of a general nature and would apply to all claimants uniformly could be decided at once with regards to all claimants; (ii) issues that, while generally applicable to all claimants, might present certain objective features that would require making certain distinctions among groups of claimants, and could be decided through a sampling procedure; and (iii) issues to claimant specific that they would require a case–by–case analysis.[46] The Tribunal therefore expressly envisaged a multiplication of distinct proceedings within the same arbitration. Surprisingly, the Tribunal envisaged the use of a "sampling procedure" to determine the outcome of some of these proceedings, in other words that the decision in a test case involving certain claimants

44. *Id.* ¶¶ 286–295.

45. Abaclat v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction, ¶ 668 (Aug. 4, 2011).

46. *Id.* ¶ 669.

might be extrapolated to other claimants.[47]

The Tribunal in *Ambiente Ufficio v. Argentina* took a different approach, premised on its conclusion that it was not dealing with a "mass claim" but with simpler multiparty proceedings. The Tribunal decided that it would proceed normally, and that the proceedings were not "unmanageable", even if they involved ninety claimants.[48] The Tribunal stated: "the Tribunal cannot see a fundamental problem in taking evidence regarding, and assessing, the individual case of each and every of the [ninety] Claimants remaining in the case."[49] Interestingly, the Tribunal deemed irrelevant the question of whether it was most efficient to decide the claims in a single set of proceedings, as it held that this question had no bearing on whether it had the right to conduct multipartite proceedings.[50] Obviously, the task of considering the individual case of ninety claimants would have been colossal. As the case was discontinued in May 2015, the Tribunal was not granted the opportunity to set out how it intended to carry out this enterprise. Similarly, the case in *Alemanni v. Argentina* was discontinued in August 2015 before the Tribunal could issue procedural directions concerning the ensuing proceedings.

It is also worth highlighting the two efficient procedural arrangements agreed between the forty–six claimants and Mexico in *Bayview Irrigation District v. Mexico*,[51] and the 109 groups of claimants and the United States in the case known as *Canadian Cattlemen for Fair Trade v. United States*.[52] In both cases, the parties agreed that, at least for preliminary objection purposes, the individual claims would be heard in one proceeding. The underlying assumption was that if the host–State's objection was upheld, all claims would be disposed of.

In *Bayview Irrigation District v. Mexico*, Mexico's pleadings show that notwithstanding Mexico's objection to the claimants having unilaterally joined their claims in a single proceeding, Mexico consented to having the tribunal's jurisdiction for all claims determined in a single proceeding.[53]

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47. *Id.* ¶¶ 666–67, 669. The Tribunal also referred to these as "bell weather proceedings", likely intending to reference the bellwether approach sometimes followed by United States courts when there is no other feasible way for the courts to handle an enormous case load. In such proceedings, the court's decision on a common issue is extrapolated to the other claimants. *Id.* ¶ 666.

48. Ambiente Ufficio S.P.A. v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction, ¶ 166 (Feb. 8, 2013).

49. *Id.* ¶¶ 168; *see also id.* ¶¶ 164–72.

50. *Id.* ¶ 172.

51. Bayview Irrigation Dist. v. Mexico, ICSID Case No. ARB(AF)/05/1, Award (June 19, 2007).

52. Canadian Cattlemen for Fair Trade v. United States of America, UNCITRAL Cattle Cases, Award (Jan. 28, 2008).

53. *Bayview*, ICSID Case No. ARB(AF)/05/01, Memorial on Jurisdiction ¶ 75

Mexico eventually prevailed on jurisdiction and all claims were dismissed, saving considerable time and costs.[54] In *Canadian Cattlemen for Fair Trade v. United States*, the Tribunal's first Procedural Order recorded the fact that, although 109 Notices of Arbitration were filed, the parties had agreed to consolidate the claims.[55]

CONCLUSION

The above review shows that Tribunals have, so far, shown a propensity to continue multipartite proceedings. Indeed, no Tribunal is known to have "deconsolidated" proceedings. Only where the procedural rules allow the host–State to block multiparty arbitration (namely, the UNCITRAL Arbitration Rules) has a host–State been able to stop multipartite arbitration from going ahead.

Perhaps even more strikingly, only one Tribunal is known to have given extensive consideration to how, in practice, conduct the proceedings in a manner that is most efficient for the parties.[56] In contrast, the Tribunal in *Ambiente Ufficio v. Argentina* took the view that whether or not it was most efficient to decide the claims in a single set of proceedings was irrelevant.[57]

Overall, the authors consider that the arbitral debate should not only focus on whether there *can* be multipartite proceedings, but also on whether there *should* be multipartite proceedings, and, if so, how to best conduct these proceedings so that the rights of all parties are respected.

In most circumstances, it would likely be most efficient to conduct multipartite proceedings, without impacting due process, rather than have separate Tribunals determine each issue. The Tribunals, however, must be very attentive to the differences between claimants and their claims, and they should strictly require that the differences be explained and respected in both parties' pleadings, especially in the claimants' statement of claim or memorial.

Furthermore, as shown above, there may be circumstances where the facts, the applicable legal framework, and the legitimate expectations of the parties are so complex or vary to such an extent that it becomes inefficient—and potentially undesirable—to continue consolidated proceedings.

(Apr. 19, 2006).

54. *Id.* ¶ 77.

55. Canadian Cattlemen for Fair Trade v. United States, UNCITRAL Cattle Cases, Procedural Order No. 1, ¶ 4 (Oct. 20, 2006).

56. *See generally* Abaclat v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction (Aug. 4, 2011).

57. Ambiente Ufficio S.P.A. v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction, ¶ 172 (Feb. 8, 2013).

For instance, assuming that the situation of each of the ninety claimants in *Ambiente Ufficio v. Argentina* had been vastly different, it could possibly have been extremely inefficient to have ninety subsets of proceedings decided together by the same Tribunal. Three highly sought after arbitrators might find such endeavor extremely time consuming, leading to inevitable delays.

Or, to take the example of an ongoing case, assuming that the Tribunal in *Abaclat v. Argentina* eventually reaches decisions through a "sampling procedure," the Tribunal will face the challenge of ensuring that the decision that is extrapolated to other parties indeed applies squarely to each party that is bound by it. Any other outcome would, obviously, be contrary to due process.

The authors therefore recommend that, when faced with multiple claimants, the parties and tribunals take the time to consider whether it is actually more efficient and consistent with due process to proceed on a consolidated basis.

First, if all parties agree, multipartite arbitration should naturally go ahead. Indeed, it may very well be more efficient to do so. Consolidation need not be agreed for the entirety of the proceedings. For instance, as in *Bayview v. Mexico*, the parties might agree to determine jurisdictional claim together, so that they might either all be dismissed together, or that a decision might later be taken as to whether the claims should be split in the following proceedings.

Second, if there is no agreement, the authors suggest that the tribunal should carefully consider whether to hold a separate phase during which it will be debated and decided whether, and if so, how, proceedings should be consolidated. While it will rarely be necessary to hold such phase, there may be circumstances where the issues are so complex that it is necessary to do so to ensure that an appropriate decision is reached.

This suggestion resembles—but also differs from—the approach taken by the Tribunal in *Abaclat v. Argentina*, which decided to hold a separate phase between the jurisdiction and merits phases to determine the core issues that would affect the merit of the thousands of claims, and in particular the conditions that a claimant would have to fulfill for its claim to be granted. In contrast to that decision, the authors recommend that this phase take place prior to the jurisdictional phase. Indeed, the jurisdictional phase is particularly likely to give rise to complex and differing claims as multipartite proceedings often involve different jurisdictional requirements and different sets of facts.

The authors believe that this exercise of additional caution and, when necessary, of an additional procedural phase to decide how to carry the arbitration, will, through debate and the emergence of best practices, result

in more efficiency and a better arbitral process. It would benefit the Parties because it would be an additional safeguard for efficiency and due process. And it would, also, lighten the burden on the host–State and the Tribunal to distinguish between the rights of each claimant.

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THE EXTENSION OF THE ARBITRAL AGREEMENT TO NON–SIGNATORIES IN EUROPE: A UNIFORM APPROACH?

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INTRODUCTION

Nowadays, there is no doubt that – under certain circumstances – an arbitral agreement can be extended to non–signatories. Many theories have been developed to this effect, such as *implicit* consent, pierce of the corporate veil, and incorporation by reference, among others.[1]

In the last two or three decades, especially among international arbitration practitioners, consensus has emerged on the requirements to apply these theories. Most notably, there is *general* agreement on the fact that – all things being equal – active participation by a non–signatory in the negotiation, execution, performance and/or termination of the contract containing an arbitral agreement can be taken as evidence of *implied* consent to arbitrate.

However, when the theory is put into practice, as commonly occurs, dissimilar approaches resurge. This appears especially true when looking at national courts' decisions. Indeed, whereas some judges interpret the circumstances that may reveal *implied* consent in a *strict* way, others show a more *relaxed* approach and are willing to find consent more easily. We believe this is due, at least *partially*, to the different stance taken by jurisdictions (and thus judges) towards factors that may exercise great influence on the final decision to extend or not an arbitral agreement, such as good faith, the group of companies doctrine and the avoidance of a denial of justice.

In the pages that follow, after identifying the law applicable by default to arbitral agreements in a number of European jurisdictions (the "Jurisdictions") (which, as can be intuited, is also of relevance to the final decision on the extension of arbitral agreements), we will then describe the contrasting approaches taken in these same Jurisdictions towards the analysis of *implied* consent, emphasizing – as mentioned above – the different factors given relevance to in each Jurisdiction. Finally, we will finish our analysis with some conclusions.

The Jurisdictions covered in this paper are England, Sweden, Switzerland, Spain and France, which, according to ICC statistics, are some of the countries chosen most often as seat of international arbitration in Europe.[2]

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1. *See generally* Eduardo Silva Romero, El artículo 14 de la nueva *Ley Peruana de Arbitraje: Reflexiones sobre el contrato de arbitraje – realidad*, 4 Revista del Círculo Peruano de Arbitraje 53 (2011) (detailing anaylsis of these theories).

2. 2015 ICC Dispute Resolution Statistics, *ICC Dispute Resolution Bulletin 2016 No. 1* (2016).

II. THE LAW APPLICABLE TO THE ARBITRAL AGREEMENT

The analysis of the extension of the arbitral agreement to non–signatories should begin by identifying the law applicable to said agreement. When parties are silent on that point, the Jurisdictions adopt different approaches to determine this law:

England and Sweden establish a strict and clear–cut procedure to determine the applicable law;

Switzerland and Spain provide the arbitral tribunal with discretion to determine the applicable law; and

France does not require the arbitral tribunal to refer to any national law when analyzing the validity and/or scope of an arbitral agreement.

How strict or flexible the approach to determining the law applicable by *default* to the arbitral agreement is, and how much discretion is given to the arbitral tribunal for this purpose, may impact the final decision on the extension of the arbitral agreement. For instance, a system which does not require referring to a national law to determine the scope of an arbitral agreement avoids potential idiosyncratic requirements that may otherwise prevent its extension to non–signatories.

In the following paragraphs, we quote the relevant provisions for each of the Jurisdictions.

A. England

In the *Sulamérica* case, the United Kingdom Court of Appeals developed a clear–cut, three prong test to determine the law applicable to the arbitral agreement. It held that:

> [T]he proper law [applicable to the arbitral agreement] is to be determined *by undertaking a three–stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection.* As a matter of principle, those three stages ought to be embarked on separately and in that order, since any choice made by the parties ought to be respected.[3]

B. Sweden

Pursuant to Art. 48(1) of the Swedish Arbitration Act, in the event of a lack of agreement between the parties, the law of the country in which the proceedings take place will apply to the arbitral agreement:

> Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. *Where the parties have not reached such an agreement, the arbitration*

3. *See* Sulamérica Cia. Nacional de Seguros S.A. v. Engenharia S.A. [2012] EWCA (Civ) 638 [25] (Eng.) (emphasis added).

> *agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.*[4]

C. Switzerland

Art. 178(2) of the Swiss Private International Act adopts the principle of *in favorem validitatis*, which provides that an arbitral agreement will be deemed valid as long as it complies with one of three different laws. The Swiss Act provides, in relevant part, "an arbitration agreement is valid if it conforms *either* to the law chosen by the parties, or to the law governing the subject–matter of the dispute, in particular the main contract, or to Swiss law."[5]

In the words of the Swiss Supreme Court in the case of *X. Ltd v. Y. and Z. S.p.A*:

> It behoves [the Arbitral Tribunal] to determine which parties are bound by that agreement and if necessary to find out if one or more third parties not designated there nonetheless fall within its purview. Such an issue of jurisdiction ratione personae, which relates to the merits, must be resolved on the basis of Art. 178 (2) PILA .... That provision recognizes three alternative means in favorem validitatis, without any hierarchy between them, namely the law chosen by the parties, the law governing the object of the dispute (lex causae) and Swiss law.[6]

D. Spain

Art. 9(6) of the Spanish Arbitration Act also adopts the principle of *in favorem validitatis*:

> 6. In respect of international arbitration, the arbitration agreement shall be valid and the dispute shall be capable of arbitration if *it complies with the requirements established by the juridical rules chosen by the parties to govern the arbitration agreement, or the juridical rules applicable to the merits of the dispute, or Spanish law.*[7]

E. France

As indicated above, French courts have taken a different approach. They do not deem it necessary to refer to any national law to assess the validity and/or scope of an arbitral agreement. The arbitral agreement remains

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4. Article 48(1) of the Swedish Arbitration Act (1999).

5. Article 178(2) of the Swiss Federal Act on Private International Law (1987).

6. *See* X. Ltd v. Y. and Z. S.p.A, Bundesgericht [BGer] [Federal Supreme Court] Aug. 19, 2008, No. 4A 128/2008 134 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 565 (Switz.) (emphasis added).

7. Article 9(6) of the Spanish Act 60/2003 of 23 December 2003

independent (or delocalized) from the various national laws, which might, in other jurisdictions, apply to it.

In *Comité Populaire de la Municipalité de Khoms El Mergeb v. Dalico Contractors*, the Cour de Cassation said that:

> [B]y virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and *the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.*[8]

Similarly, French arbitrator Yves Derains has said that "[t]his prominent role given to the common intent of the parties is part of a substantive rule of French law that French courts apply *without any regard to any national law that might be applicable to the arbitration clause pursuant to a conflict of laws rule.*"[9]

III. THE CONTRASTING APPROACHES TOWARD IMPLIED CONSENT

We now turn to comment on the approach taken by courts in the Jurisdictions when assessing whether implied consent exists. As will become apparent from our analysis, we attribute the courts' contrasting approaches – at least partially – to the different stances taken by the Jurisdictions towards factors such as good faith, the group of companies doctrine, and the avoidance of a denial of justice.

This idea is strengthened by the fact that, with the exception of England, all of the Jurisdictions adopt a similar theoretical approach towards implied consent. In some cases, we will also make reference to other regulations that reinforce the approach – whether strict or flexible – endorsed by each Jurisdiction on binding non–signatories.[10]

A. England: very stringent approach towards implied consent

1. Overview

Based on the evolution of international arbitration with regard to implied consent, England can be considered a rare case. Indeed, we have not found decisions where an English court accepted to extend an arbitral agreement

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8. Comité Populaire de la Municipalité de Khoms El Mergeb v. Dalico Contractors, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Bull. civ. II, No. 372 (Fr.) (emphasis added).

9. Yves Derains, *Is there A Group of Companies Doctrine?, in* MULTIPARTY ARBITRATION 131, 135 (Eric Schwartz and Bernard Hanotiau eds., 2010).

10. *See infra* Section III.

to non–signatories based on implied consent due in large part to the fact that the doctrine of privity of contract has been given high importance.

For instance, in *Arsanovia Ltd. & Ors v. Cruz City 1 Mauritius Holdings*, the High Court said that "English law requires that an intention to enter into an arbitration clause *must be clearly shown and is not readily inferred.*"[11]

In a similar vein, in the partial award rendered in ICC case 13777, the arbitral tribunal said that "*English law contains no statutory provisions empowering a Tribunal to compel arbitration against an unwilling non–signatory.*"[12]

This rationale was confirmed by the United Kingdom Supreme Court when, in the famous case – *Dallah Real Estate and Tourism Holding Co. v. Pakistan* – it had to assess the extension of the arbitral agreement to Pakistan under French law. After explaining what the standard was, the Court said:

> This then is the test which must be satisfied before the French court will conclude that a third person is an *unnamed* party to an international arbitration agreement. *It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied.*[13]

2. Particularities

The *very stringent* approach of English courts is reinforced by two factors. First, the rejection of the group of companies doctrine (*i.e.,* no weight is given to the fact that non–signatories and signatories belong to the same corporate group).[14] Second, the rejection of a general principle of good faith.

In *Interfoto Picture Library v Stilletto*, for example, the United Kingdom Court of Appeals said:

> In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith .... **English law has, characteristically, committed itself to no such overriding principle** but has developed piecemeal solutions in response to demonstrated problems of

11. Arsanovia Ltd. & Ors v. Cruz City 1 Mauritius Holdings [2012] EWHC (Comm) 3702 [35] (Eng.) (emphasis added).

12. ICC Case 13777, partial award on jurisdiction dated April 2006.

13. Dallah Real Estate and Tourism Holding Co. v. Pakistan [2010] UKSC 46 [10] (Eng.) (emphasis added).

14. Peterson Farms Inc. v. C&M Farming Ltd. [2004] EWHC 121 [62] (Eng.).

unfairness.[15]

Based on the above, we can identify as particularities of the English system:

- The adoption of a clear–cut, three prong test, to determine the law applicable by *default* to arbitral agreements;
- The courts' very stringent approach towards the analysis of implied consent to arbitrate;
- The rejection of the group of companies doctrine; and
- The rejection of an overriding principle of good faith.

B. Sweden: Stringent Approach toward Implied Consent

1. Overview

Non–signatories may be bound by an arbitral agreement based on their behavior. In a recent case, *Profera AB v. Blomgren*, the Court of Appeal of Western Sweden found that negotiations and exchange of drafts created an oral arbitral agreement binding upon the parties:

> The Court found that the parties had agreed orally in regard the main and determining issues of the agreement, which was the purchase price. The parties had thus entered into the agreement, despite the fact that some issues remained to be agreed upon. *The Court then considered whether the parties were bound by the arbitration clause in the drafts exchanged.* The court found that the parties were bound by the arbitration clause as almost all of the discussed drafts had contained arbitration clauses that referred to the Swedish Arbitration Act. *Further, the Defendant–Appealed had never specifically objected to or protested against, or otherwise demonstrated its disagreement with the arbitration clause.*[16]

In general, Swedish courts appear to have a *stringent* approach towards binding non–signatories. In another recent case, the Supreme Court construed *restrictively* the reference made in an arbitration clause to disputes "*arising out of or in connection with*" the contract that contained it, concluding that disputes that arose out of a related transaction (to said contract), and its parties, were not bound by the arbitral agreement. The Court reasoned that "[t]he arbitration clauses that are relevant in the present case *do not specify* any legal relationship except the agreement that is regulated by the respective contractual document. *Thus, the arbitration clauses govern only the rights and obligations that arise under these*

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15. Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd. [1989] QB 433 [439] (Eng.) (emphasis added).

16. Profera AB v. Blomgren [HovR] [Court of Appeal] 2008–03–12 p.1 T 2863–07 (Swed.) (emphasis added).

agreements."[17]

2. Particularities

The group of companies doctrine is not endorsed in Sweden.[18]

On the other hand, in exceptional circumstances, consent to arbitrate may be inferred from passivity. In an unpublished decision, the Svea Court of Appeal said that:

> In this case, the court noted that the party not singing or wishing to be bound by an arbitration agreement has to take active steps to make his disagreement known to the other party. *Whereas passivity normally would not result in the formation of a contract the case should be distinguished when a party should or ought to realize that the other party believes or assumes that a binding agreement has been concluded.* This was the case here. In such a situation, which applies to the Profura case, *there is an obligation to inform the other party that no such agreement has been formed.*[19]

Based on the above, we can identify as particularities of the Swedish system:

- The adoption of a clear–cut rule to determine the law applicable by default to arbitral agreements;
- The courts' *stringent* approach towards binding non–signatories;
- The rejection of the group of companies doctrine; and
- The acceptance, in exceptional circumstances, that consent can be inferred from passivity.

C. Switzerland: Intermediate Approach toward Implied Consent

1. Overview

Non–signatories may be bound by an arbitral agreement based on their behavior. Consent will be deemed to exist when the non–signatory is involved in the performance of the contract that contains an arbitral agreement.

The Swiss Supreme Court has said that "a third party involving itself in the *performance of the contract* containing the arbitration agreement is deemed to have adhered to the clause by conclusive acts *if it is possible to infer from its involvement its willingness to be bound by the arbitration*

17. Concorp Scandinavia v. Karelkamen Confectionary [HD] [Supreme Court] 2012–04–05 p.5 Ö 5553–09 (Swed.).

18. Anders Relden & Olga Nilsson, INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER'S GUIDE 67 (Ulf Franke, et al. eds., 2013).

19. Ukraine v. Norsk Hydra [HovR] [Court of Appeal] 2007–12–17 T 3108–06 (Swed.).

clause."[20]

The Supreme Court has added, however, that in case of doubt regarding the existence of consent, a *restrictive* interpretation shall be observed:

> To interpret an arbitration agreement, its legal nature must be taken into account; in particular *it must be taken into account that renouncing access to the state court drastically limits legal recourses.* According to the case law of the Federal Tribunal, *such an intent to renounce cannot be accepted easily, therefore restrictive interpretation is required in case of doubt.*[21]

In a similar vein, commentators have said that:

> As a consequence, it is clear that under Swiss substantive law participation in the performance of a contract may result in an extension of the arbitration agreement to a third party. However, in order to [honor] the principle of relativity of contractual obligations, the requirements for such an extension are rather strict.[22]

2. Particularities

The group of companies doctrine is not endorsed in Switzerland.[23] In this regard, the Supreme Court has said that:

> The Group of Companies doctrine does not per se justify extending an arbitration clause to another company within the group. Unless there is an independent and formally valid manifestation of consent of the other company of the group to the agreement to arbitrate, such an extension will be granted only in very particular circumstances that justify a bona fide reliance of a party on an appearance caused by the non–signatory.[24]

However, Swiss courts do consider good faith when assessing the extension of the arbitral agreement. In a decision rendered in 2014, the Supreme Court held that "*the principle of good faith (Art. 2 CC26) would nonetheless require the recognition of X._____'s right to act against Y._____ Group directly* on the basis of the arbitration clauses contained in the Contracts in consideration of the circumstances of the case at

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20. X. v. Y Engineering S.p.A., Tribunal Fédéral [TF] Apr. 7, 2014, ATF 4A_450/2014 7 (Switz). (emphasis added).

21. FC X. v Y., Tribunal Fédéral [TF] Jan. 17, 2013, 4A_244/2012 11 (Switz.) (emphasis added).

22. Thomas Muller, *Extension of Arbitration Agreements to Third Parties Under Swiss Law*, *in* CROSS BORDER ARBITRATION HANDBOOK 11 (2010) (emphasis added).

23. Matthias Scherer, *Introduction to the Case Law Section*, 27 ASA Bulletin 488, 494 (2009) ("Under Swiss law, mere affiliation to the same group of companies is not sufficient to extend an arbitration clause signed by a group company to a parent or sister company.").

24. X. Ltd v. Y. and Z. S.p.A, Bundesgericht [BGer] [Federal Supreme Court] Aug. 19, 2008, No. 4A 128/2008 134 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 565 (Switz.)

hand."[25]

And in another similar decision, the Supreme Court said that "[i]t has already been admitted that in specific circumstances, a certain behavior may substitute compliance with a formal requirement *on the basis of the rules of good faith*."[26]

- Based on the above, we can identify as particularities of the Swiss system:
- The adoption of the principle of *in favorem validitatis*, which provides for the application of up to three different laws to the arbitral agreement
- The *restrictive* interpretation given to consent in cases of doubt;
- The rejection of the group of companies doctrine; and
- The relevance given to the good faith principle.

D. Spain: Flexible Approach toward Implied Consent

1. Overview

Non–signatories may be bound by an arbitral agreement based on their behavior. Consent will be deemed to exist when the non–signatory is *directly implicated* in the performance of the contract that contains an arbitral agreement.

The Supreme Court stated that "[a]t all times, we shall ascertain that in the instant case the arbitration agreement contained in the contract dated 31 July 1992 *entails its application to the parties directly implicated in the performance of the contract*."[27]

Any finding that consent exists shall be strongly supported. In this regard, the Spanish Superior Court has said that:

> [M]ore controversial is the problem of the extension of the arbitration agreement to legal and natural persons that have not signed it, not only as a result of the requirement of consent for the existence of the arbitral agreement (art. 9.1 LA) – *which does not exclude implicit consent, inferred from conduct – but also because, in any case, inferring such will, when it is not expressed, shall be strongly supported* given its radical legal consequences, i.e., the waiver of the right to access jurisdiction, hard core – in the words of the Constitutional Court – of the

25. X. v Y Engineering S.p.A., Tribunal Federal [TF] Apr. 7, 2014, No. ATF 4A_450/2014 19 (Switz.) (emphasis added).

26. X. S.A v. Z Sarl, Tribunal Federal [TF] Oct. 16, 2013, ATF 4P_115/2003 16 (Switz.) (emphasis added).

27. Interactive Television, S.A. c. Banco Bilbao Vizcaya, S.A. y SATCOM NEDERLAND BV, IGNACIO SIERRA GIL DE LA CUESTA, Case No. 404/2005, decision from the Supreme Court (1st Chamber) dated 26 May 2005, at *Fundamentos de Derecho*, First Item (emphasis added).

right to an effective access to justice.[28]

2. Particularities

Two factors relax the apparently stringent approach of Spanish courts.

First, according to commentators, the group of companies doctrine has certain weight in Spain. In the IBA Spanish Guide for 2012, for instance, it is said that "[a]rbitration agreements *may bind non–signatories if they have a very close and strong relationship with a signing party*, or they have played a strong role in the performance of the contract."[29]

And Yves Derains adds that:

> On the basis of the above, one may be tempted to conclude that the group of companies doctrine represented a brief momentum in the evolution of the French case law relating to the application of arbitration clauses to non–signatories. As a matter of fact, *this doctrine has been firmly excluded in other jurisdictions with the apparent exception of Spain.*[30]

Second, good faith plays a very important role in the courts' assessment of whether implied consent exists. For instance, in case 68/2014, the Superior Court said: "[i]n sum, as already stated, the Chamber understands that the extension to DIMA and GELESA of the arbitration agreement contained in the Shareholders Agreement is a natural consequence of the contract, and is *consistent with a good faith interpretation.*"[31]

Finally, since it points into the same direction, it is worth briefly referring to the rules – provided in the Spanish Arbitration Act – for arbitrating in the corporate context. These rules effectively *force* minority shareholders and administrators to arbitrate their disputes.

Art. 11 (bis) of the Spanish Arbitration Act provides, in relevant part, that:

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28. Dima Distribución Integral, S.A., y Gelesa Gestión Logística, S.L. v. Logintegral 2000, S.A.U., Jesús María Santos Vijande, Case No. 68/2014, decision from de Superior Court, Civil and Criminal Chamber, dated 16 December 2014, at *Fundamentos de Derecho,* Fourth Item (emphasis added).

29. IBA Arbitration Committee, *Arbitration Guide: Spain* 7 (March 2012), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj_u4Ti—bMAhWGFj4KHYyXD_YQFggfMAA&url=http%3A%2F%2F; www.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3DE5431E65–E56C–4866–8E48–FF9996CF1AC5&usg=AFQjCNEqgbsqXwroSDATg2h0_q9oMkW–Zw (emphasis added).

30. Derains, *supra* note 9, at 135 (emphasis added).

31. Dima Distribución Integral, S.A., y Gelesa Gestión Logística, S.L. v. Logintegral 2000, S.A.U., Jesús María Santos Vijande, Case No. 68/2014, decision from de Superior Court, Civil and Criminal Chamber, dated 16 December 2014, at *Fundamentos de Derecho,* Fourth Item (emphasis added).

> 2. The inclusion in the bylaws of an arbitration clause will require approval of, at least, two thirds of the capital shareholders.
> 3. The bylaws may establish that the challenge of corporate agreements by the shareholders or administrators is subject to the decision of one or more arbitrators . . . .[32]

Furthermore, in a recent decision, the Superior Court of Catalonia extended an arbitral agreement (contained in the original bylaws of the company) to shareholders that acquired their shares after the company's incorporation. The Court held:

> By–laws, as a constitutive agreement that has its origin in the will of the company's founders, can contain an arbitral agreement for the resolution of corporate conflicts. *An arbitral agreement is an accessorial rule to the by–laws and as such is independent from the founders' will and represents a further corporate rule that binds – due to its inscription in the Commercial Registry – not only its signatories but also the present and future shareholders.*[33]

Based on the above, we can identify as particularities of the Spanish system:

- The adoption of the principle of *in favorem validitatis*, which provides for the application of up to three different laws to the arbitral agreement;
- The strong support needed to justify any finding of *implied* consent;
- The importance given to the group of companies doctrine and the good faith principle; and
- The innovative provision of the Spanish Arbitration Act for arbitrating in the corporate context.

E. France: very flexible approach towards implied consent

1. Overview

Non–signatories may be bound by an arbitral agreement based on their behavior. Whether or not this is possible – based on the particular circumstances of each case – will depend on the common intention of the parties. This common intention was initially analyzed by French courts through a subjectivist lens, but nowadays an objectivist approach is mainly used.

As explained by Pierre Mayer:

> [i]nitially there was a certain insistence on the fact that when the non–

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32. Article 11(bis) of the Spanish Act 60/2003 of 23 December 2003.

33. Case No. 9/2014, decision from the Superior Court of Catalonia dated 6 February 2014 (RJ 2014, 1987). This decision follows another one rendered by the Supreme Court on 9 July 2007 (RJ 2007, 4960) (emphasis added).

> signatory had participated in — generally — the performance of the contract, *and had been aware of the existence of the clause*, it was to be presumed that it had accepted to be bound by the clause. I would call this the subjectivist trend. But more recently a more objectivist trend has surfaced.[34]

Below we briefly describe the subjectivist and objectivist approaches.

Under the subjectivist approach, implied consent exists when (i) the non–signatory has an active role in the performance of the contract, and (ii) it is aware of the existence of the arbitral agreement (which is, in principle, presumed).

In *Société Ofer Brothers v. The Tokyo Marine and Fire Insurance Co.*, the Paris Court of Appeal said:

> Considering that the arbitration clause present in an international contract has its own validity and efficacy, such as to require its extension to the parties directly involved in the performance of said contract *provided their situation and activities indicate that they were aware of the existence and the scope of such clause*, which was agreed upon according to the usages of international commerce.[35]

Emphasizing the requirement of awareness, the Paris Court of Appeal has said that an arbitral tribunal lacks jurisdiction over third parties who did not, and could not, know about the existence of an arbitral agreement. In one such case, it affirmatively stated that "[the arbitral agreement was] manifestly inapplicable to SOLEIL DE CUBA, third party to the contract, *who could not know about the existence of said clause given its confidential nature*."[36]

Under the objectivist approach, implied consent is only assessed based on behavior. Awareness as to the existence and/or scope of an arbitral agreement is irrelevant.

In the *Alcatel* case, the Cour de Cassation said that "[t]he effects of the international arbitration clause extend to parties directly involved in the performance of the contract and the disputes that may result from it."[37]

Similarly, in the *Kosa France* case, the Paris Court of Appeal said that

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34. Pierre Mayer, *The Extension of the Arbitration Clause to Non–Signatories – The Irreconcilable Positions of French and English Courts*, 27 AM. U. INT'L L. REV. 831, 831–32 (2012) (emphasis added).

35. Société Ofer Brothers v. The Tokyo Marine and Fire Insurance Co., Cour d'appel [CA] [regional court of appeal] Paris, civ., Feb. 14, 1989 (Fr.) (emphasis added).

36. S.A. Cubana de Aviación v. Societé Becheret Thierry Senechal Gorrias, Cour d'appel [CA] [regional court of appeal] Paris, civ., Oct. 23, 2012, 12/04027 (Fr.) (emphasis added).

37. Société Alcatel Bus. Sys. v. Amkor Tech., Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 27, 2010, Bill civ. II, No. 129 (Fr.) (emphasis added).

the arbitral agreement should be extended "to the parties *directly involved in the performance of [the] contract and in the disputes that may result from it.*"[38]

2. Particularities

In general, French courts have taken a flexible approach when assessing whether implied consent to arbitrate exists. This is clearly evidenced by the decision rendered in the famous *Dallah* case by the Paris Court of Appeal (referenced below).

This flexible approach is supported by two factors. First, the endorsement of the group of companies doctrine. As explained by Yves Derains, "the existence of a group of companies is a circumstance that plays an important role in revealing the intent of parties."[39]

Second, the weight given to justice considerations. Commenting on the decision of the Paris Court of Appeal in the aforementioned famous *Dallah* case, where a contract and its concomitant liability were extended to Pakistan, non–signatory party, Pierre Mayer said that:

> Is the French position shocking? At first sight it is, since the consent of the parties to arbitrate is the cornerstone of arbitration, and *the Government of Pakistan had made clear its intention not to be a party to the contract* containing the arbitration clause. However, *the refusal to recognize the award would have meant a denial of justice*, since the Trust had disappeared and there was no other defendant against which Dallah could have acted than the Government.[40]

Based on the above, we can identify as particularities of the French approach:

- There is no need to refer to a national law to analyze the validity and/or scope of an arbitral agreement;
- The use of a preeminently objectivist approach when assessing whether implied consent exists; and
- The relevance given to the group of companies doctrine and justice considerations.

Based on what has been said, the figure below shows the placement of each Jurisdiction in terms of "stringent approach v. flexible approach" towards *implied* consent:

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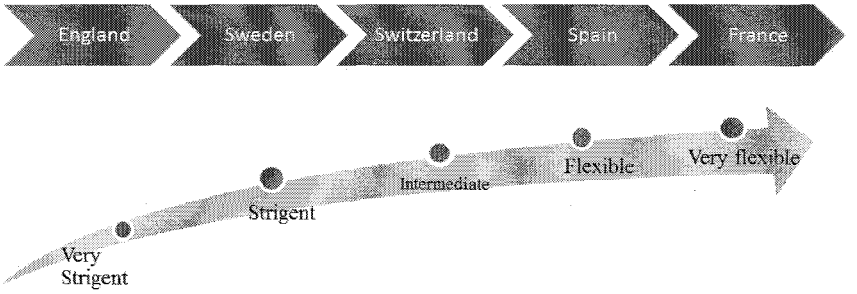
38. Kosa France v. Rhodia Operations, Cour d'appel [CA] [regional court of appeal] Paris, civ., May 5, 2011, No. 10–04688 (Fr.) (emphasis added); *see also* Amplitude v. Promodos, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 7, 2012, Bill civ. II, No. 11–2589 (Fr.) (supporting the same approach as the *Kosa France* case).

39. Derains, *supra* note 9, at 137 (emphasis added).

40. Mayer, *supra* note 34, at 836 (emphasis added).



CONCLUSION

The explanation given in section III above shows that, with the exception of England:

- All of the Jurisdictions accept that consent to arbitrate can be given implicitly;
- Active participation is the common way to show implied consent; and
- A finding of implied consent needs to be strongly supported.

However, on similar facts, courts in the Jurisdictions may reach opposite conclusions because they weigh different factors in their analysis. If appertaining to the same corporate group may be indicative of intent, then it is easier to bring a non–signatory parent company to an arbitration agreed upon by its subsidiary. The same applies to justice considerations, which – it may be argued – allow binding non–signatories in total absence of a contractual basis.

Developments that make it easier to bind non–signatories have also taken place in the legislative arena, as evidenced by the innovative provisions of the Spanish Arbitration Act to bind minority shareholders and administrators.[41] If one goes beyond Europe, Article 14 of the Peruvian Arbitration Act can be considered as a move in the same direction.[42]

Finally, as pointed out earlier,[43] the placement of Jurisdictions in the figure shown above is generally consistent with the higher or lower discretion they give to arbitral tribunals to determine the law applicable by *default* to arbitral agreements.

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41. Article 11(bis) of the Spanish Act 60/2003 of 23 December 2003.

42. Peruvian Arbitration Act, art. 14 (stating that "[t]he arbitral agreement extends to those whose consent to arbitrate, according to the good faith, can be inferred from their active and determinant participation in the negotiation, execution, performance or termination of the contract that includes the arbitral agreement or to which the agreement relates . . . .").

43. *See supra* notes 28–35 and accompanying text.

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RECENT DEVELOPMENTS IN KEY LATIN AMERICAN JURISDICTIONS TO ATTRACT INTERNATIONAL COMMERCIAL ARBITRATION

HENRY BURNETT*

INTRODUCTION

Although there is a long tradition of using arbitration to resolve commercial disputes in Latin America, in recent years, most Latin American jurisdictions have revised or amended their national arbitration laws to make their jurisdictions even friendlier toward and supportive of arbitration as a method of alternative dispute settlement. This trend suggests that Latin American jurisdictions are even more committed to using arbitration to resolve commercial disputes, especially given the

* Partner, King & Spalding. This Article draws upon remarks made by Henry (Harry) G. Burnett at the Third Symposium on International Commercial Arbitration, which took place at American University Washington College of Law in Washington, D.C. on November 17, 2015. The specific panel on which he participated focused on developments in international commercial arbitration in Latin America. Mr. Burnett made four main observations, which are discussed below. Mr. Burnett would like to thank his colleagues Viren Mascarenhas and Alberto Madero for the invaluable assistance in putting together both the presentation and this Article.

backlog of cases being litigated in the national courts.

Second, it is insufficient to look at the arbitration laws as they are written in the books to assess whether a jurisdiction is supportive of arbitration. When advising a client about seating an arbitration, in a particular Latin American jurisdiction, one must assess the attitude of the judiciary to determine the level of respect given to the arbitral process and the degree of judicial involvement (or interference) with the arbitral process. In this regard, a review of recent case law reveals that there is generally healthy support on the part of national judiciaries toward arbitration.

Third, there is a proliferation and flourishing of arbitration institutions throughout Latin America. This may be regarded as a sign that the business and legal communities believe that arbitration will be used more frequently to resolve commercial disputes. However, it is insufficient to simply look at the number of arbitral institutions in a particular jurisdiction to assess its local arbitration culture. Rather, one must be more sophisticated in assessing the relevance and use of the various institutions, which can be accomplished by examining their institutional rules and practices; reviewing their caseloads, including the types of disputes they hear and examining the identities of the parties in those cases to determine whether the institution deals primarily with domestic, regional, or international disputes.

Fourth, the use of mediation is in its relative infancy compared to the use of arbitration as a mechanism for alternative dispute resolution. However, it is likely that, over the course of the twenty–first century, mediation will become a more popular form of alternative dispute resolution in Latin America. In part, this move toward mediation will be driven by costs, as international arbitration and litigation practices are becoming increasingly expensive. Accordingly, it is likely that parties will turn to mediation in an attempt to reach a compromise before continuing down the path of binding dispute settlement (whether before a court or an arbitral tribunal). In some cases, legislation in various jurisdictions (for example, Brazil) will require the parties to engage in good faith mediation in complex commercial cases before proceeding to litigation. Thus, it is likely that we will see more recourse to mediation in Latin America than has previously been witnessed.

II. ARBITRATION LAWS IN LATIN AMERICA: OVERHAUL AND FINE–TUNING OF PRIOR LEGISLATION

Arbitration is by no means a new method of dispute resolution in Latin America. Indeed, the use of arbitration to resolve a wide range of disputes, both inter–state and private commercial disputes, dates back centuries in some Latin American jurisdictions. Nevertheless, it was not until the twentieth century that arbitration became codified in the national

legislations of most Latin American jurisdictions as a viable mechanism to resolve commercial disputes. In particular, the market–oriented reforms witnessed in a number of Latin American jurisdictions in the last quarter of the twentieth century brought an increased focus on improving the use and availability of arbitration to resolve commercial disputes. During this period of reform, many Latin American jurisdictions signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and promulgated national arbitration laws that were based in large part on the UNCITRAL Model Law on International Commercial Arbitration of 1985. Thus, the stage was set for arbitration to be used as an effective and popular form of dispute settlement, especially given the judicial backlog prevalent in many Latin American jurisdictions.

Latin American jurisdictions have spent the early years of the twenty–first century fine–tuning and improving their national arbitration laws. In particular, many jurisdictions have amended or revised their national laws in the last ten years to make sure that they are up–to–date and represent international best practices. Examples of jurisdictions that have made such changes to their national arbitration laws include Argentina (2015), Brazil (2015), Panama (2013), Colombia (2012), Costa Rica (2011), Ecuador (2009), Peru (2008), and Chile (2004). This is by no means a comprehensive list of Latin American jurisdictions that have revised or amended their national arbitration laws during the past ten years. However, this illustrative list demonstrates that improving or revising arbitration laws has been a recent focus of many jurisdictions in Latin America that are leading the way in the use of arbitration to resolve commercial disputes.

Of course, it is important to look at the specific changes that have been made in each country's legislation. When advising a client on whether to seat an arbitration in a particular jurisdiction, or whether the laws of a country are arbitration–friendly, it would be improper and insufficient to generalize Latin America as an arbitration–friendly climate. Rather, it is important to get into the specifics and ask the right questions. For example, it would be prudent to inquire as to whether the recent revisions to the laws signify an overhaul or merely a fine–tuning of prior legislation. For example, in Brazil, Law 13.129/2015, enacted in July 2015, amended some of the provisions of the Brazil Arbitration Act that had been passed in 1996. This was the first change to the country's arbitration regime in nineteen years. The arbitral community has generally regarded Brazil's 1996 arbitration law as a relative success, but the Brazilian legislature wished to make the arbitration law even more efficient. Accordingly, some fine–tuning was in order. The revised law contains an express provision authorizing arbitrators to issue partial arbitral awards, which courts may enforce. It had already become common practice to enforce a partial award

in Brazilian courts — the amendment simply codified this judicial practice to make it clear that courts may enforce partial awards, even if they are not final awards, and to prevent a party from raising an objection to such enforcement. The amendment also contains an express provision granting arbitrators the power to issue provisional remedies, a prevailing practice confirmed by the legislative amendment. Thus, it appears that the 2015 amendment to the 1996 Brazilian legislation falls more into the category of fine–tuning, rather than an overhaul, of the arbitration regime.

Similarly, the 2011 modifications to the Mexican Commercial Code provisions addressing arbitration also fall into the category of fine–tuning. Four main amendments were made in 2011. First, Articles 1464 and 1465 confirmed the arbitral tribunal's authority to decide its own jurisdiction (the principle of *kompetenz–kompetenz*). Second, Article 1466 introduced a special summary procedure for courts to decide enforcement and set–aside applications. Third, Article 1478 confirmed existing practice that Mexican courts could issue interim measures in aid of arbitration. Fourth, Article 1479 provided that interim awards issued by arbitrators were judicially enforceable, and could be enforced using a fast–track procedure. As was the case with Brazil, the main focus of the amendments was to codify existing practice and make a strong domestic arbitral regime even stronger.

In other cases, there has been a more significant overhaul of prior national arbitration laws. For example, in July 2012, Colombia enacted a revised version of its arbitration statute in the adoption of Law 1563/2012. Law 1563 adopted a dualistic approach by providing separate legal regimes for domestic and international arbitration. The international arbitration chapter is based on the UNCITRAL Model Law on International Commercial Arbitration, including the amendments approved in 2006. However, minor changes were made in order to adapt the UNCITRAL Model Law to the Colombian legal tradition and to introduce certain innovations adopted in other jurisdictions, such as France and Belgium.

The detailed provisions of the new arbitration statute differ significantly from the preceding legal framework, Law 315/1996, which contained just five articles. When applying Law 315/1996, Colombian courts relied on local procedural rules to fill in the gaps and determined the degree to which they were willing to intervene in international arbitration proceedings. The new arbitration statute sought to end the local courts' discretion to intervene in the arbitral process. Article 67 of Law 1563 expressly limits the intervention of local courts in international arbitration proceedings to those few instances where the arbitration statute expressly authorizes it, in compliance with the procedures codified in the statute (based on Article 5 of the UNCITRAL Model Law).

All of these new rules are modeled, to a great extent, on the UNCITRAL

Model Law: (i) appointment of arbitrators; (ii) grounds for challenge of an arbitrator; (iii) substitution of an arbitrator; (iv) enforcement of an arbitration agreement; (v) interim measures by a court before or during arbitral proceedings; (vi) authority of the arbitral tribunal to rule on its own jurisdiction; and (vii) other procedural rules.

The 2012 statute includes rules on a series of matters that were absent in the preceding arbitration statute. A major innovation of the 2012 arbitration statute is that it no longer allows courts to have recourse to local procedural rules as grounds upon which to deny recognition and enforcement of an award. The 2012 arbitration statute expressly provides that the New York Convention is the only legal instrument that governs enforcement and recognition proceedings of foreign arbitral awards. This was not always the case under the prior arbitral regime. In 1999, the Colombian Supreme Court relied previously on the grounds listed in Art. 694 of Colombia's Civil Procedural Code to deny the recognition and enforcement of foreign arbitral awards, in addition to those grounds provided for in Article V of the New York Convention.[1] Subsequently, in December 2011, the Colombian Supreme Court adopted a different position in *Drummond Ltda. v. Ferrovías en Liquidación and Ferrocarriles Nacionales de Colombia.* The court concluded for the first time that the *exequatur* of foreign arbitral awards should be analyzed only under the regime established in Article V of the New York Convention.[2] This was a change from the Supreme Court's prior jurisprudence, and this position was codified in the 2012 arbitration statute.

In sum, Colombia's revisions to the existing arbitration law constitutes more of an "overhaul" than a "fine-tuning." While overhauling a previously weaker body of law demonstrates commitment on the part of the jurisdiction towards arbitration, it also means that the new laws are relatively untested. It remains to be seen how the judiciary will respond to the overhauled laws. Only time will tell.

III. ATTITUDE OF THE COURTS TOWARDS ARBITRATION

While legislative innovation is welcome to make arbitration more robust and effective, it is insufficient to simply scrutinize the law on the books. One must also assess how the courts apply those laws. A review of recent decisions from courts of various Latin American jurisdictions regarding the

1. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 12 mayo 2011, M: W. Vargas, Expediente 11001-0203-000-2011-00581-00 (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], 1 marzo 1999, M.P: J. Ramirez Gomez, Expediente E-7474 (Colom.).

2. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 diciembre 2011, M.P: F. Gutierrez, Expediente 11001-0203-000-2008-01760-00 (Colom.).

arbitral process and recognition and enforcement of awards reveals a pro–arbitration trend. It is beyond the scope of this article to comprehensively review the recent decisions from all Latin American jurisdictions. However, the informal survey that has been conducted demonstrates sufficient evidence that the leading jurisdictions are in favor of the use of commercial arbitration as an alternative to courtroom litigation.

For example, recent decisions from the Chilean Courts interpreting Chilean Law No. 19971 (2004) show restraint on the part of the courts with interfering in the arbitral process. In these cases, the Chilean courts declined to annul an award when doing so would have improperly required the courts to scrutinize the merits of the award rendered by the arbitral tribunals. In the case *Ann Arbor Food S.A. v. Domino's Pizza*,[3] Ann Arbor Food S.A., the award debtor, sought to set aside an arbitral award rendered by an International Chamber of Commerce (ICC) arbitral tribunal on the basis that the award violated the public policy of Chile. The underlying dispute in the arbitral proceedings concerned the alleged breach by Ann Arbor Foods S.A. of a franchise agreement that granted it the exclusive right to exploit the Domino's Pizza brand in specified areas of Chile. The ICC arbitral tribunal issued an award in favor of Domino's Pizza. Ann Arbor Foods S.A. initiated set–aside proceedings before the Court of Appeals of Santiago. It claimed that the arbitral tribunal made substantive errors by enforcing allegedly punitive clauses of the franchise agreement that violated Chilean public order, including provisions of the Chilean Civil Code and Constitution.

The Court of Appeals rejected all of the claims. Of particular relevance, the court held that annulment is the only action allowed under Chile's Arbitration Statute – Law 19971 of 2004 – to set aside an award. Moreover, it cautioned that annulment may be initiated only in the limited circumstances set forth in Article 34 of Law 19971, which reproduces the grounds for denying recognition and enforcement of a foreign award specified in the New York Convention. The court also explained that not every alleged procedural deficiency in the arbitral process gives rise to a valid claim to annul an award. Against this background, the Court determined that Ann Arbor Foods' arguments did not fall under any of grounds to annul an award provided for in Law 19971. Rather, the arguments were styled more in the manner of seeking appellate review of a lower court's decision, which the court declined to do.

The Court of Appeals of Santiago reaffirmed its non–interventionist approach regarding international arbitration in the case *Productos Naturales de la Sabana S.A. v. Corte Internacional de Arbitraje de la*

3. Corte de Apelaciones de Santiago (C. Apel.) [Courts of Appeals], 9 octubre 2012, "Ann Arbor Food S.A. c. Domino's Pizza," Rol de la causa: 1420–2010 (Chile).

Cámara de Comercio.[4] An ICC arbitral tribunal ordered Productos Naturales de la Sabana S.A. ("Productos Naturales") to pay 50% of the claimant's administrative fees and legal expenses. Thereafter, Productos Naturales sought partial annulment of the award on the basis of section 3.4(a)(iii) of Law 19971, alleging that the decision on allocation of costs dealt with a dispute not contemplated within the terms of the submission to arbitration. Specifically, the award debtor argued that the arbitral tribunal's decision to allocate costs breached the arbitration agreement, which expressly provided that the parties would bear their own costs and legal expenses. Productos Naturales also argued that the arbitral tribunal erred when it reached the conclusion that the parties' legal representatives modified the arbitration agreement when they requested the arbitral tribunal to order the other party to bear its costs.

The court rejected the argument advanced by the award debtor. The court concluded that the claimant and respondent both authorized the arbitral tribunal to rule on costs, having requested the arbitral tribunal in their written submission to order the opposing party to pay its costs. In particular, the court relied heavily on the fact that the Terms of Reference for the arbitration, agreed upon both parties, expressly included cost and expenses allocation as one of the issue that the arbitral tribunal would decide in the arbitration.

In addition, the court observed that, under Articles 4 and 16 of Law 19971, a party forfeits its right to challenge the arbitral tribunal's authority if it fails to raise its objections during the arbitral proceeding at the appropriate time. Given that Productos Naturales had not raised this objection during the arbitral proceeding the court concluded that the party had waived its right to challenge the arbitral award on the grounds that the tribunal acted in contravention of the arbitral agreement regarding allocation of costs and expenses.

The court also rejected the requesting party's claim that the formal amendment procedure provided for in the contract prevented its legal representatives from modifying the arbitration agreement, which expressly provided that each party would bear its own costs. The court determined that the formal amendment procedure was limited to modifications pertaining to "the material object of the contract," relying on the language of Article 17 of the contract. The court reasoned that Articles 7 and 16 of Law 19971 espouse the principle of *kompetenz–kompetenz*, pursuant to which the arbitration agreement may be considered to be independent from the contract in which it is contained. To this end, the court concluded that the arbitration agreement was not part of the material object of the contract,

4. Corte de Apelaciones de Santiago (C. Apel.) [Courts of Appeals], 29 abril 2012, "Productos Naturales de la Sabana S.A.," Rol de la causa: 6975–2012 (Chile).

and thus the formal amendment procedure did not preclude the parties from modifying the arbitration agreement by requesting the arbitral tribunal to rule on court fees and expenses. The court concluded that the arbitral tribunal was competent to decide on the court costs and expenses since it was an issue expressly requested by the parties in their submissions. Thus, the court exhibited a practical approach in declining to review the merits of the arbitral tribunal's decision on costs and upholding the award.

Shortly after *Productos Naturales de la Sabana S.A. v. Corte Internacional de Arbitraje de la Cámara de Comercio*, the Supreme Court of Chile granted the application for recognition and enforcement of an award in the case *Laboratorios Kin S.A. v. Laboratorios Pasteur S.A.*[5] The arbitral tribunal, seated in Spain, had concluded in its award that Laboratorios Pasteur S.A. had breached the exclusive distribution agreement it had entered into with Laboratorios Kin S.A. In this case, Laboratorios Kin S.A. initiated *exequatur* proceedings seeking the enforcement of an arbitral award issued pursuant to the Rules of the Chamber of Commerce of Barcelona, and the enforcement of a judicial decision of a Spanish Court that rejected the application for annulment of the award in Spain.

In the recognition and enforcement proceedings, Laboratorios Pasteur S.A. argued that the Court should refuse the enforcement of the arbitral award and judicial decision, which denied its annulment application, based on several of the grounds to deny enforcement set forth in Article 36 of Law 19971. Among its various objections, it argued that the arbitral tribunal had not been established in accordance with the arbitration agreement; the award dealt with a dispute not covered by the arbitration agreement; and the arbitration agreement was not valid.

The Supreme Court rejected Laboratorios Pasteur's allegations on the basis that it had no authority to review neither the merits of the arbitral award nor the merits of the Spanish judicial decision that denied the request for annulment. The Supreme Court determined that these objections were timely raised and dismissed in both the arbitral proceeding and the annulment proceeding before the Spanish court. In particular, the Supreme Court pointed to the fact that the arbitral tribunal and the Spanish court had already found that the arbitration agreement was valid, the arbitral tribunal had properly been established, and that the dispute was covered by the arbitration agreement. Therefore, the Supreme Court refrained from reviewing these issues again.

In addition, the Supreme Court elaborated on the limits of Chilean courts

5. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 octubre 2014, "Laboratorios Kin S.A. c. Laboratorios Pasteur S.A.," Rol de la causa: 1270–2014 (Chile).

to review the merits of arbitral awards. The Supreme Court cautioned that the ultimate objective of *exequatur* proceedings of an arbitral award "is to verify the fulfillment of certain minimum requirements and is not intended in any way to analyze the intrinsic justice or injustice of the decision, thus it does not constitute in any way an instance to review what [the decision] resolves." The court also rejected Laboratorios Pasteur S.A.'s allegation that the decision of the Spanish court denying annulment could not be enforced pursuant to Law 19971, given that it was not a decision of an arbitral tribunal (but rather a judgment of a foreign court relating to an arbitral award). The court concluded that an arbitral award and a judicial decision that denies an annulment application against that award together constitute an "indivisible unit," and thus decided to enforce both decisions under the recognition and enforcement procedure set forth in Law 19971. In sum, these decisions show a restraint on the part of the Chilean courts to avoid unduly interfering with the arbitral process.

There is also some positive case law from Peru where the Peruvian courts have rejected a request by the losing party seeking to vacate an award where such vacatur application essentially required them to review the merits of an arbitral award. In a decision dated April 17, 2015, the Superior Court of Lima refused to set aside an arbitral award in the case *Pure Biofuels v. Blue Oil*.[6] Pure Biofuels and Blue Oil had entered into a contract for the storage of hydrocarbons, which provided for arbitration before Lima's Chamber of Commerce. Pure Biofuels initiated arbitration proceedings, but the arbitration tribunal dismissed all of its claims and ordered it to pay the damages sought by Blue Oil.

Pure Biofuels sought annulment of the award on the grounds that (i) the arbitrators did not deliberate in the final decision because one of them (the dissenting arbitrator) allegedly had been excluded from deliberations; (ii) two arbitrators did not fulfill their duty of disclosure, undermining the impartiality of the tribunal; and (iii) the decision on damages was not reasoned. The Court rejected all of these claims.

Regarding the first ground, the Court pointed to the fact that neither the Peruvian arbitration statute nor the Rules of Arbitration of Lima's Chamber of Commerce contained a detailed procedure for how an arbitral tribunal should conduct deliberations. Notwithstanding the fact that the dissenting arbitrator chose not to provide comments, the Court found that the parties and arbitrators acknowledged that all of the arbitrators received two drafts of the award and had ample opportunity to comment on them. Indeed, the allegedly excluded arbitrator had indicated that he disagreed with the draft award and, instead of making revisions to the draft award, would issue a

6. Superior Court of Justice of Lima, *Pure Biofuels v. Blue Oil*, April 17, 2015.

dissenting opinion. On this basis, the court concluded that the dissenting arbitrator had sufficiently participated in the deliberations for due process purposes.

Next, on the duty to disclose, the court determined that the requesting party failed to demonstrate how the undisclosed fact, that two arbitrators had served together in previous arbitral tribunals, was sufficient to conclude that the two arbitrators were biased or partial in favor of one of the parties. Finally, regarding the lack of proper reasoning of the award, the court was careful not to second–guess the methodology adopted by the arbitral tribunal to determine the amount of damages. After a careful examination of the arbitral tribunal's reasoning, the court concluded that the procedure to calculate the damages was reasonable and equitable. Throughout its decision, the court was cautious not to overstep its boundaries given its limited role in enforcing an award.

Thus, we have seen examples of courts from various jurisdictions, such as Chile and Peru, exercising restraint and adopting a practical approach that results in the recognition and enforcement of arbitral awards. Admittedly, we cannot conclude from these examples that Latin American courts inevitably, or as a matter of course, will remain within their limited remits when reviewing applications to annul or deny recognition and enforcement of an award. However, these recent examples point towards a pro–arbitration trend whereby courts are cautious to overstep their roles, especially given how those roles have been more narrowly demarcated in recent amendments to national arbitration laws.

IV. INSTITUTIONS AND ARBITRATION IN LATIN AMERICA

In addition to the law on the books and the attitude of the courts, another indicator of the health of an arbitral regime is the vitality of national arbitral institutions. Generally, there has been an increase in the number of arbitral institutions worldwide, with some of these institutions, at least regionally, competing with each other. For example, there is a healthy rivalry between the Singapore International Arbitration Center and the Hong Kong International Arbitration Center to become the institution of choice for administering international arbitrations seated in Asia. Likewise, there is a healthy rivalry between the London Court of International Arbitration, headquartered in London, and the ICC Court of Arbitration, headquartered in Paris, with regard to arbitrations seated in Europe. The question that arises then is which of the institutions based in the various Latin American jurisdictions will rise to prominence with regard to international arbitrations seated in Latin America. The answer to this question will depend, in part, on the aims of each individual institution. Does it seek to cater to disputes of a particular nature? For example, the

World Intellectual Property Organization Arbitration and Mediation Center focuses on disputes concerning intellectual property. Does it cater to domestic arbitrations? Does it seek regional prominence? International prominence?

It is beyond the scope of this article to explore and discuss all of the arbitral institutions found in all of Latin America. But the informal survey undertaken of several jurisdictions suggests that there is healthy competition among arbitral institutions in each jurisdiction. For example, here are some of the national institutions found in Peru alone: American Chamber of Commerce of Peru; Center of Arbitration of the Lima Chamber of Commerce; Center of Arbitration and Mediation of the Arequipa Chamber of Commerce and Industry; Center of Mediation and National and International Arbitration of the Piura Chamber of Commerce; andCenter of Mediation and Arbitration of the Pontificia Universidad Católica del Peru.

Now this is just a list of some of the leading arbitration institutions in Peru. But to really find out about the vibrancy of the system, one needs to dig deeper into the details of each institution. How many arbitrations does the institution handle per year? Do those arbitrations primarily involve domestic, regional or international parties? When did the institution last revise its arbitration rules? Do the rules contain provisions found in more recent versions being promulgated by the leading institutions, such as the ability to obtain provisional measures from an emergency arbitrator prior to the constitution of an arbitral tribunal? What are the institution's fees to administer an arbitration? For example, with regard to the Mexican Arbitration Center, statistics for the year 2012 (the most recent year for which this information is publicly available) indicate that ninety–seven percent of the arbitrations it administers are conducted in Spanish, eighty–one percent of the arbitrations are seated in Mexico City, and ninety–eight of the arbitrators appointed in its arbitrations have Mexican nationality. Clearly, there is a strong national flavor to the arbitrations that the Mexican Arbitration Center administers. Thus, local disputes are its specialty.

More recent figures are available with regard to the number of arbitrations administered by the leading institutions in Brazil. The statistics for the year 2014 are as follows: Center for Arbitrations and Mediation of the Chamber of Commerce Brazil–Canada: ninety–five arbitrations; Center for Arbitration and Mediation of the American Chamber of Commerce for Brazil: eighty–two arbitrations; Business Arbitration Chamber – Brazil: thirty–two arbitrations; Chamber of Conciliation, Mediation and Arbitration of São Paolo: forty–one arbitrations. These statistics are helpful in that they allow comparison of the relative caseload of each institution, which can guide a user seeking to choose one of the institutions to administer the arbitration.

The growing number of arbitral institutions in Latin American jurisdictions indicates that the trend is in favor of using arbitration to resolve commercial disputes. After all, these institutions would not have been created unless consumers anticipated that a market would exist for their use. That being said, one cannot conclude that the presence of a relatively large number of arbitral institutions in a specific jurisdiction means that jurisdiction is arbitration–friendly, or that it is a destination of choice for international parties to seat their arbitrations. Rather, one must dig beneath the surface to assess the true vitality of each individual institution. Thus, when advising a client about where to seat an arbitration, one must look to the arbitration laws as well as the recent judicial decisions to determine whether the jurisdiction is pro–arbitration. Thereafter, when choosing a particular institution's rules, one must canvass the available options, which requires reviewing the latest versions of each institution's rules; the case law to assess whether there is anything unfavorable in the judicial record about the institution's rules and procedures; the case load of each institution; and the composition of the parties to the arbitration and the kinds of disputes being resolved (in particular, to get a flavor for whether the institution is chosen for primarily national, regional or international disputes). Certainly, a lot of options exist now in Latin America to choose among arbitration institutions. However, some more vetting needs to be done as these institutions, for the most part, are relatively young and are still finding their footing in the arbitration landscape.

V. MEDIATION IN LATIN AMERICA

Arbitration is better developed as a means of alternative dispute resolution in Latin America than mediation, which relatively is in its infancy. The current trend is in favor of increased use of mediation to resolve disputes, especially given the backlog of cases in the judiciaries of several Latin American jurisdictions, and the high costs of binding dispute settlement (both litigation and arbitration). Recently, the International Development Bank helped create or strengthen around 230 mediation centers throughout Latin America, and has trained more than 2,000 mediators since 2004. The national chambers of commerce in the various jurisdictions tend to be one of the strongest supporters of mediation throughout Latin America.

Here are some observations that can be made about the use of mediation to resolve commercial disputes in Latin America. First, some jurisdictions have adopted legislation whereby mediation or conciliation must be exhausted before a party is able to continue with a lawsuit. Such legislation usually provides that the settlement agreement that results from mediation or conciliation should have the same effect as an arbitral award

for purposes of enforcement and *res judicata*. Such countries include Bolivia, Colombia, Ecuador, and Peru. In the United States, it is not uncommon for a judge to require the parties to mediate a dispute before trial in the hopes that the parties will settle the litigation. It is possible that in addition to mediation that is statutorily mandated, court–ordered mediation may become more popular in Latin America as well.

Second, an increasing number of Latin American jurisdictions are focusing on mediation as a viable means of dispute settlement. For example, Brazil enacted the Mediation Statute, Law 13,140, which will enter into force in January 2016. The Mediation Statute promulgates rules for mediation between individuals as well as disputes with public, State–owned entities. The Mediation Statute also outlines the basic requirements of due process in a mediation: (a) impartiality of the mediator; (b) equality between the parties; (c) verbal communication between the parties and the mediator; (d) free will of the parties (they cannot be coerced into a decision); (e) a focus on obtaining consensus; (f) confidentiality of the mediation proceedings; and (g) good faith. The Mediation Statute will be interpreted hand–in–hand with the revised Brazilian Code of Civil Procedure, which will go into effect in March 2016. The Civil Code provides for mandatory mediation or conciliation hearings in the early stages of major lawsuits. It is expected that the Mediation Statute and the revised Civil Code will boost the use of mediation in Brazil.

Third, it appears that the rate of recovery of disputed amounts of money in mediation (and arbitration) is higher than the recovery rate in judicial proceedings. In 2006, the Multilateral Investment Fund of the Inter–American Development Bank conducted a study of alternative dispute resolution methods in Latin America.[7] The study surveyed owners of small and medium–sized enterprises about the effectiveness of recovering credit through alternative dispute resolution procedures (i.e. arbitration, mediation and conciliation) *vis–à–vis* traditional judicial proceedings. The study revealed that sixty–two percent of those surveyed admitted recovering less than fifty–percent of the amounts in dispute through traditional judicial proceedings. However, this percentage dropped to thirty–eight percent of those surveyed when the proceedings used were either arbitration or mediation.[8] This statistic suggests that mediation (as well as arbitration) may be more effective when it comes to recovery of damages in Latin America than proceeding through the national courts. This may be another reason why mediation (and arbitration) will be on the rise in Latin America.

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7. MULTILATERAL INVESTMENT FUND, INTER–AMERICAN DEVELOPMENT BANK, THE COSTS OF DISPUTES IN COMPANIES AND THE USE OF ADR METHODS: LESSONS FROM NINE LATIN AMERICAN COUNTRIES 41 (2006).

8. *Id.* at 41.

CONCLUSION

Generally, it appears that Latin American corporate counsel are keen to use other means of dispute resolution as an alternative to litigation in the national courts. In particular, there is growing use and acceptance of international commercial arbitration in Latin American jurisdictions. In part, this development reflects stronger national arbitration laws, and courts that are more friendly towards arbitration, as exhibited by their recent decisions. Recent amendments to national arbitration laws have focused on issues that previously made arbitration more cumbersome, and have clarified the limited role of courts with regard to arbitration–related litigation. For example, some amendments have developed a summary procedure for a court to decide an application to enforce or vacate an award. Other amendments have focused on provisional measures, clarifying both that arbitrators have the power to issue interim measures, and then providing that such interim awards are judicially enforceable. Thus, recent changes and amendments to national arbitration laws tend to make clear that the judiciary should support the arbitral process.

However, there is still work to be done. This section discusses two issues that need to be assessed – likely through the passage of time – to determine the true attitude of Latin American jurisdictions towards commercial arbitration. The first is the use of the *amparo* procedure and the second is the manner in which national courts will enforce adverse awards against State or State–owned entities. The two topics are discussed in turn.

A. The Continued Use of Amparo

Although there are positive decisions from various courts indicating that the judiciary will be respectful of the arbitral process, some uncertainty remains. For example, in the past, courts have granted *amparo* as an extraordinary remedy that could be invoked to annul arbitral awards. The question remains whether courts will continue to do so in the aftermath of amendments to the national arbitration laws in various jurisdictions.

Colombia is a jurisdiction that illustrates this uncertainty. Colombia's 2012 arbitration law provides that annulment is the only means to set aside an award. This might indicate that the procedures of *amparo* (called *acción de tutela* in Colombia) are no longer available to a party seeking to annul an award. However, no court has decided this issue. It may be possible that a party will argue that, in addition to the grounds provided for in the 2012 law, it is still possible to use the constitutional remedy to annul an award in order to safeguard a party's constitutional rights.

Indeed, prior to the enactment of the 2012 arbitration statute, the Constitutional Court had repeatedly confirmed that *amparo* was available

to annul arbitral awards. In *Departamento del Valle del Cauca v. Arbitral Tribunal* (SU–174/07), the requesting party had already sought to annul the arbitral award before the Council of State, but the court refused to grant annulment. Subsequently, the requesting party filed an *amparo* against the arbitral award and the Council of State's annulment decision alleging that both of them violated its due process rights.[9] The court assessed whether *amparo* was available to challenge arbitral awards. The court determined that *amparo* could be used to annul arbitral awards to protect fundamental constitutional rights of the requesting party. Nonetheless, the court restricted recourse to *amparo* to exceptional cases where arbitral awards and annulment decisions are patently arbitrary or the product of *voie de fait* (*vía de hecho*).[10]

The court did try to impose some limitations on when a party could use *amparo* to annul an award. First, courts may not review the merits of the arbitral award in *amparo* proceedings. Second, the arbitral award must directly damage or threaten fundamental rights of the requesting party for *amparo* to be available. Third, the requesting party must have exhausted all other legal actions available to challenge arbitral awards (i.e. annulment proceedings) before invoking *amparo*. Fourth, *amparo* is only available where the arbitral tribunal's decision is patently arbitrary or the product of *voie de fait*.[11] In addition, the court further explained that an arbitral award is patently arbitrary or the product of *voie de fait* only in the following four cases: (i) the arbitral tribunal exercised its legal powers for a purpose that does not correspond to the purposes for which these powers have been conferred (*e.g.* the award is based on a legal or contractual provision that is not applicable to the case); (ii) the arbitral tribunal has no competence to decide the subject matter of the dispute; (iii) the arbitral tribunal issued its award by completely deviating from or disregarding the applicable legal procedure; and (iv) the arbitral tribunal issued a decision without evidentiary support. [12]

The court reaffirmed the availability of *amparo* against arbitral awards in *Municipality of Turbo v. Arbitral Tribunal* (T–466/11). In that case, the Municipality of Turbo invoked *amparo* against an arbitral award alleging that the arbitral tribunal had violated its constitutional due process rights. The requesting party claimed that the arbitral award was the product of *voie de fait* because the tribunal failed to consider legal rules applicable to the dispute (*vía de hecho por defecto sustantivo*) and had assessed some

9. Constitutional Court, Decision No. SU–174/07, March 14, 2007, ¶¶ 2.1 – 2.2.
10. *Id.* ¶ 5.4.
11. *Id.* ¶ 5.4.
12. *Id.* ¶¶ 5.4.1 – 5.4.4.

evidence in a patently arbitrary manner (*vía de hecho por defecto fáctico*).[13] The court considered that the arbitral tribunal had breached the requesting party's due process rights, having supported its decision on the isolated assessment of documentary evidence that other evidence in the record showed was not reliable. The court considered that such error in the assessment of evidence was material to the outcome of the case, and thus the requesting party's due process rights were affected. The court issued its decision revoking the arbitral award.[14] Considering the use of *amparo* to annul arbitral awards in Colombia prior to the enactment of the 2012 arbitration laws, it remains to be seen whether courts will continue this tradition notwithstanding the new legislation.

The Peruvian Constitutional Court has left the door open to invoke *amparo* to protect constitutional rights. In the case *Sociedad Minera de Responsabilidad Ltda. María Julia*, decided in 2011, the court confirmed that *amparo* against an arbitral award was available, but in exceptional and limited circumstances. The requesting party filed an *amparo* against an arbitral award on the grounds that the arbitral tribunal had violated its due process rights and other procedural rights. In particular, the requesting party argued that the arbitral tribunal erroneously interpreted contract provisions, having relied on legal provisions that did not apply to the dispute, and failing to adequately examine all facts and evidence in the proceeding.[15]

The Peruvian Constitutional Court determined that the general rule is that *amparo* proceedings are not available to challenge arbitral awards. The court reasoned that annulment proceedings against arbitral awards under Peruvian legislation were "a true procedural option with a purpose that, technically speaking, may substitute *amparo* in cases where the defense of constitutional rights is sought."[16] Nonetheless, the court identified three exceptional circumstances where *amparo* may still be invoked against arbitral awards, namely in cases where: (i) the basis to request *amparo* is the direct contradiction by the arbitral tribunal of binding legal precedents of the Constitutional Court; (ii) the arbitral tribunal does not apply a legal provision, which the Constitutional Court has found to be constitutional, on the basis that its application would produce unconstitutional results (*control difuso*); and (iii) a third party to the arbitration agreement initiates *amparo* proceedings against an arbitral award that directly impinges on its constitutional rights. To be able to

13. Constitutional Court, Decision No. T–466/11, June 9, 2011.

14. *Id.*

15. Constitutional Court, *Sociedad Minera de Responsabilidad Ltda. María Julia*, Case No. 00142–2011–OA/TC, September 21, 2011, ¶ 28.

16. *Id.* ¶ 17.

invoke *amparo* in the first two situations, the requesting party must first raise the objection before the arbitral tribunal.[17] Ultimately, the court reached the conclusion that the requesting party's arguments for requesting *amparo* against the award were not valid grounds to invoke this action, and thus dismissed the complaint.[18]

These cases from Colombia and Peru show that, in the past, recourse has been made to *amparo* as a basis to annul an award, even if such a procedure is not recognized by national arbitration laws (which tend to limit the grounds upon which the losing party can seek to annul an award, usually to those grounds specified in the UNCITRAL Model Law). It remains to be seen whether courts will resort to this procedure to annul arbitral awards, notwithstanding recent amendments to national arbitration laws that expressly specify – and limit – the grounds upon which an award can be annulled. It may be difficult to put an end to the recourse to the *amparo* procedure to annul an award given the relatively long tradition of making such applications in a number of Latin American jurisdictions.

B. Arbitrating Against State or State–Owned Latin American Entities

Latin American jurisdictions have shown themselves to be more hostile towards arbitration when one of the parties in the arbitration is a State or State–owned entities. Here, it is important to distinguish between investment treaty arbitration – where one of the parties (in the vast majority of cases, the respondent) is a State or State–owned entity – and international commercial arbitration, where the majority of arbitrations will concern private parties, and only occasionally involve public entities. There has been a considerable backlash against investment treaty arbitration in some Latin American jurisdictions. Some countries, such as Bolivia, Ecuador and Venezuela, have denounced the Convention on the International Centre for Settlement of Investment Disputes (the "ICSID Convention"). In addition, some countries, such as Ecuador, have terminated some of their bilateral investment treaties ("BITs") with other trading parties on the basis that the BITs have not brought in sufficient foreign direct investment when measured against potential liabilities for which the government may be accountable under those BITs. Other countries, such as Argentina, have refused to pay awards owed to claimants that have prevailed in arbitrations initiated under these BITs. What these States – Argentina, Bolivia Ecuador and Venezuela – have in common is a sense that the regime of investment arbitration is unfairly stacked against developing States. Some of these States have taken this view because they

17. *Id.* ¶ 21.
18. *Id.* ¶ 29.

have been the respondents in a relatively large number of arbitrations (Argentina, for example). And others have taken this position because, in their view, relatively large damages awards have been rendered against them. For example, ExxonMobil has been awarded US$1.6 billion by an arbitral tribunal in *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, and Ecuador has very recently partially annulled the award in *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, reducing the damages award from US$1.7 billion to US 1.1 billion, which is still a considerable amount given Ecuador's GDP.

For purposes of this article, it is sufficient to note that there is a distinction between the attitudes of these jurisdictions towards investment arbitration versus their attitudes regarding international commercial arbitration. While States may not like being hauled before arbitral tribunals constituted under BITs and MIAs to be held accountable for alleged violations of these international law instruments, nonetheless, as has been discussed throughout this article, Latin American jurisdictions remain keen to develop arbitration as a means of dispute resolution, especially for private disputes. Thus, we see the changes in the laws and the attitudes of the courts towards international arbitration, discussed in the preceding sections.

That being said, the test for the true receptivity by Latin American jurisdictions to the systematic use of commercial arbitration will be assessing how the judiciaries respond when the award debtor is a State or State–owned entity. There remains some concern on the part of commercial parties that the odds will be stacked against them if they choose to seat an arbitration against a State–owned entity in a Latin American jurisdiction, and, in particular, in the jurisdiction of the adverse entity. In some cases, this may be inevitable if the private party wishes to do business with the State–owned entity. The laws of some countries require that contracts between a commercial party and a State–owned entity call for dispute resolution in the host country (usually, before the courts of that country, but occasionally through arbitration seated in that country). We have seen repeatedly that the national courts have bent the rules when it comes to enforcing adverse awards against State–owned entities. Consider, for example, the case of *Corporación Mexicana de Mantenimiento Integral v. Pemex–Exploración y Producción*, where the District Court for the Southern District of New York concluded that the Mexican courts violated basic notions of justice when they retroactively applied Mexican statutory law that was not in effect at the time a private party, COMMISA, entered into a contract with the Mexican state agency that controlled Mexican hydrocarbons, to annul an arbitral award rendered by an arbitral tribunal seated in Mexico. So, one question that arises is, even if investment arbitration and commercial arbitration are viewed differently by Latin

American governments, will an international party be unfairly disadvantaged if it arbitrates against a State–owned entity in Latin America? Fair resolution of such disputes will be the true test of the attitude of Latin American governments towards the use of arbitration to resolve commercial disputes. It should not be the case that attitudes differ depending on whether arbitration concerns private parties only or a State/ or State–owned entity as well.

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THE FUTURE OF INTERNATIONAL ARBITRATION IN CENTRAL AND EASTERN EUROPE

WOJCIECH SADOWSKI*

INTRODUCTION

Central and Eastern Europe (CEE) is an amorphous geopolitical concept, employed mostly as a collective name for the broadly conceived former Soviet bloc in Europe, and frequently extending into Albania, the former Yugoslavia, and Romania. Accordingly, neither Finland nor Greece is typically mentioned as CEE countries, although they geographically both lie east of the Czech Republic and Slovenia.[1] The purpose of this paper is to discuss whether there are any existing idiosyncratic considerations

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1. There are different approaches to defining CEE. *See* Central and Eastern European Countries (CEES), OECD (Nov. 2, 2001) ("Central and Eastern European Countries (CEECs) is an OECD term for the group of countries comprising Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, and the three Baltic States: Estonia, Latvia and Lithuania", leaving Ukraine or Serbia outside), https://stats.oecd.org/glossary/detail.asp?ID=303 (last visited June 7, 2016); *cf. Central & Eastern Europe*, FIN.TIMES (including Russia and Austria as well), http://www.ft.com/intl/reports/central-eastern-europe (last visited June 7, 2016); *cf. 2013 Statistical Report*, 25 ICC INT'L CT. OF ARB, BULL. (including Turkey and Greece).

involving CEE which could help explain the current condition of international arbitration in the region. With this understanding of CEE, I will make informed predictions concerning the possible trends in dispute resolution in the future.

The central conclusion I will make in this paper is that the cycle of development of international commercial arbitration in CEE may be approaching a low mark. The forces that were driving the development of international arbitration in this part of the world before 1989, such as the East–West dichotomy and the subsequent increased commercial, legal, and political risk connected to the "emerging–economy" status of CEE countries, exhausted most of its potential, which is unlikely to rebound. At the present moment, there are no compelling reasons why international arbitration in CEE should flourish. It is clear, however, that its future development will have to respond to the changing needs and preferences of the business community and the individual CEE states, rather than the objectives immediately relied upon after the fall of Communism.

This paper starts with a brief historical note explaining the traditional motivations leading commercial parties to agree on international arbitration in the CEE–related business context, both before and after the fall of Communism in 1989. I will present the developments of the past twenty–five years that help explain the current position and potential of international commercial arbitration in CEE. Due to the significant diversity among the countries in the region, I will not offer a detailed analysis of the particular legal frameworks in each individual CEE state. The differences between various national laws within the region do not play a primary role. Instead, I will emphasize the existing and potential interests and reasons that may convince the business community across CEE to use international arbitration to resolve commercial disputes. These enticing factors do not depend as much on the legal particularities of individual CEE jurisdictions as on the broader economic and cultural considerations of the region generally.

II. HISTORY

A. Cold War

The genesis of the current condition of international commercial arbitration in CEE goes back to the Cold War, when Europe was divided into two opposite camps founded on conflicting ideologies.[2] Western

2. Obviously, arbitration in Central and Eastern Europe existed for centuries, and most countries in the region had arbitration laws operating both before the Second World War and in the Cold–War era. *See, e.g.*, Matthew Hodgson, *The Rebirth of Arbitration in Central and Eastern Europe*, 6 GLOBAL ARB. REV. (July 4, 2011). Those

Europe developed on the premise of the free market ideology, supported by democratic values and the rule of law. Eastern Europe struggled to implement the "socialist utopia" of centrally planned economies and authoritarian regimes that were imposed and maintained by the Soviet Union's political and military hegemony in the region. In such a hostile environment, international commercial arbitration had clear advantages as a method of dispute resolution between the East and the West. The main rationale for selecting international arbitration was the ideological polarization of the respective political, economic, and military camps, which led to mutual distrust. Western companies had no confidence in the Eastern European legal and court systems, which—apart from political or ideological issues—were also ill–equipped to deal with issues of international trade, contractual freedom, or complex commercial relations. Most of the industry in Eastern Europe was nationalized after the Second World War. State–owned enterprises, which had little inclination to surrender to the jurisdiction of Western European state courts, contributed to the bulk of economic activity. From that perspective, East–West arbitrations in Communist times were prevailingly mixed arbitrations—disputes between states and state–owned entities from the East, and private entities from the West.[3]

International arbitration naturally arrived on the scene as an attractive option for resolving commercial disputes, primarily because it allowed for a certain degree of neutrality. Not accidentally, Austria (initially various regional courts, followed by the creation of the Vienna International Arbitral Centre),[4] Sweden (Arbitration Institute at the Stockholm Chamber of Commerce)[5], and, to a lesser extent, Switzerland, were the most frequently used fora for arbitrating the East–West disputes at that time.[6]

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historic considerations, however important to the sense of continuity of arbitration culture, do not seem, however, to be highly relevant business or legal factors affecting the possible future development of arbitration in this part of the world. For this reason, they will not be further discussed in this paper.

3. *See* Kazimierz Grzybowski, *Arbitral Tribunals for Foreign Trade in Socialist Countries, Law and Contemporary Problems* 597 et seq. (vol. 37, 1972); *see* Thomas E. Carbonneau, *Law and Practice of Arbitration* 626 (5th ed. 2014); Andrzej W. Wiśniewski, *Międzynarodowy arbitraż handlowy w Polsce* (1st ed. 2011).

4. *See* Werner Melis, *The Formation of the VIAC*, 1 VIAC – SELECTED ARBITRAL AWARDS, 16–17 (Austria), http://www.viac.eu/images/documents/05_Einleitung_en.pdf; Gary B. Born, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 54 (4th ed. 2013).

5. With respect to Stockholm, reference is usually made to an agreement between the American Arbitration Association and the USSR Chamber of Commerce and Industry to regard the SCC as the neutral place for resolution of US–USRR commercial disputes. *See About Arbitration in Sweden*, SWISS ARB. ASS'N, http://swedisharbitration.se/about–arbitration–in–sweden/ (last visited Apr. 7, 2016).

6. In particular with respect to contracts made with Yugoslavian entities, *see*

This is due in large part to the fact that these three states were not aligned with the East or the West. Indeed, none have ever become NATO members.[7] Austria and Sweden joined the European Union only in 1995, shortly after the fall of Communism in Europe.

It would be inaccurate, however, to associate commercial arbitration behind the Soviet bloc with exclusively East–West interactions. Communist legislatures envisaged arbitration to be useful for domestic commercial arbitration as well as within the CMEA (Council for Mutual Economic Assistance), pursuant to the 1972 Moscow Convention. This led to the creation of a number of arbitration institutes within CEE in the 1950s and 1960s, most of which have continued to operate to this present day. However, the experience those institutions gained before 1989 has held only limited relevance in the new political, economic, and legal reality of the post–1989 era. Accordingly, many of those institutions had to undergo deep transformations in order to re–adapt to their new legislative and economic models. As it will be shown, most CEE arbitration cases are today still managed by these institutions.

B. Transformation (1989–2015)

After the fall of Communism in 1989–1990 and the announcement by the former members of the Soviet Bloc of their intention to transform into market economies, CEE became one of the most attractive locations in the world for investment. Beginning in the 1990s, both international companies and international law firms began to establish offices in the major cities of the region, including Budapest, Prague, and Warsaw. The economic transformation and the influx of foreign direct investment have brought a radical transformation to region's economic, legal, and political landscape since the fall of the Communism. It would be far beyond the limits of this paper to provide a comprehensive analysis of this unprecedented phenomenon, even if limited solely to the evolution of international arbitration. For this reason, the following analysis is, by necessity, simplified and selective.

In any event, the most important feature of the post–1989 period in CEE is the increasing lack of homogeneity between the paths that the various CEE states adopted and pursued, resulting in stark differences between their current political and economic conditions.[8] The CEE region includes, on the one end of the transformation spectrum, Slovenia—a small, well–

Michael Wietzorek, *Arbitration in Serbia*, in *Austrian Arbitration Yearbook 2009* 357, 360 (Gerelad Zeiler et al. eds., 2009).

7. *NATO Member Countries*, N. ATLANTIC TREATY ORG. http://www.nato.int/cps/en/natolive/nato_countries.htm.

8. Wietzorek, *supra* note 6, at 358.

developed economy that is closely integrated with Northern Italy and Southern Austria, a member of NATO and the European Union, maintaining a per capita GDP of $24,002 (USD) (2014).[9] On the other end of the spectrum is Belarus—an authoritarian regime, closely integrated with Russia, with a per capita GDP of $8,040, and the only European state that has not become a party to the European Convention of Human Rights. Other countries from the CEE region are placed between these two extremes.

The second critical issue is the scale of the development that has occurred in CEE since 1990 and how CEE states now compare against other world economies. For example, the gross domestic product of Poland in 1990 was $64.7 billion, while the GDP of Norway in the same year was nearly $120 billion.[10] By 2014, however, Poland's GDP reached ca. $545 billion and has surpassed Norway's current GDP of $500 billion.[11] However, the GDP per capita in Poland in 2014 was still only $14,337, compared to e.g. $47,774 in Germany.[12] This basic economic analysis is essential for two reasons. First, it proves that CEE–based clients are on average less affluent and hence will be more sensitive to the costs of international arbitration than their Western European counterparts. Second, the scale of economic development of CEE countries should be kept in mind when assessing the growth of related arbitration disputes over the last twenty–five years. Nevertheless, such analysis should not solely be made by reference to absolute figures. The analysis should be considered in proportion to the overall economic development of the region. As I will discuss below, even though the number of CEE arbitrations continues to grow, this growth is disproportionately low in relation to regional economic growth. This suggests that international arbitration remains underused in CEE.

The undisputed economic growth of the region is inexorably linked to the transformation and development of political and legal systems, both domestic and international. Domestically, CEE states combined the growing sophistication of lawmakers, regulators, and courts with increasing effectiveness of law enforcement and respect for the rule of law. Internationally, the accession of most CEE states to the Council of Europe and the European Convention of Human Rights—and submission to the jurisdiction of the European Court of Human Rights—prompted a giant

9. *GDP Per Capita (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (last visited June 8, 2016).

10. *GDP at Market Prices (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries?page=5 (last visited June 8, 2016).

11. *Id.*

12. *GDP Per Capita (Current US$)*, *supra* note 9.

leap in the region's development. The integration process of most CEE countries into the European Union (EU) in three subsequent enlargements of the EU in 2004,[13] 2007,[14] and 2013[15] was another great step forward, which has led to the contraction of the legal, economic, and civilizational gap between Western and Eastern Europe.

The radical developmental changes that took place in CEE had a tangible impact on the use of international commercial arbitration. Trends in CEE–related international arbitration panels during the past twenty–five years have been dynamic. In the years immediately following 1989, arbitration was still the preferred dispute resolution method for Western (particularly U.S.–based) corporations and individuals doing business in CEE. However, unlike in the pre–1989 era, when external forces limited the choice of dispute resolution due to the need for neutrality, after 1990 arbitration was preferred by the Western parties in their business contracts with CEE parties because of the weakness of the CEE state organizations. Accordingly, the underdevelopment of the legal and judicial systems of CEE states, their vulnerability to various types of fraud and abuse, and the perceived or actual risk of corruption that mandated the transfer of CEE–related dispute resolution before international arbitral tribunals. In short, the position of international business in the first years after 1989 was conducive to arbitration with CEE parties. However, such arbitrations were frequently seated outside CEE, in countries, which were known for their pro–arbitration approach.[16] Enforcement of foreign arbitral awards in CEE was then perceived as a risk, especially due to the frequent discretionary use of the public policy exception by state courts. However, most CEE countries were parties to the New York Convention[17] and, eventually, successfully enforcing foreign arbitral award became more

13. *EU Member Countries*, EUROPA EU (April 11, 2015), http://europa.eu/about–eu/countries/member–countries/ (adding Czech Republic, Cyprus, Hungary, Malta, Poland, Slovakia, Slovenia, Latvia, Lithuania, and Estonia).

14. *Id.* (adding Bulgaria and Romania).

15. *Id.* (adding Croatia).

16. Wietzorek, *supra* note 6, at 360.

17. *See Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U. NATIONS COMMISSION ON INT'L TRADE L. (noting that the NYC entered into force with respect to the following states: Albania (25 September 2001), Belarus (13 February 1961), Bulgaria (8 January 1962), Czech Republic (1 January 1993), Croatia (8 October 1991), Estonia (28 November 1993), Hungary (3 June 1962), Latvia (13 July 1992), Lithuania (12 June 1995), Poland (1 January 1962), Romania (12 December 1961), Russia (22 November 1960), Moldova (17 December 1998), Serbia (27 April 1992), Slovakia (1 January 1993), Slovenia (25 June 1991), Macedonia (17 November 1991), Ukraine (8 January 1961)), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on Apr. 8, 2016).

predictable in most states in the CEE region.[18]

In the post–1989 era, Stockholm and Vienna remained, for historic reasons, important arbitral institutions for CEE. Both private–public deals included arbitration clauses, such as privatization agreements, as well as joint–venture agreements with CEE–based companies and individuals. Disputes emerged in both types of transactions and exposed the CEE–based private companies to their first practical experiences with international arbitration. This in an important point because the state ownership of parties to the pre–1989 East–West arbitrations meant that on the Eastern side, chiefly state and state–owned entities were involved. Thus, due to the overall scarcity of exchangeable currency, the principal problem was the availability of funds and not the risk–benefit analysis of arbitration versus other forms of dispute resolution management. Therefore, following the transformation of 1998, there was not only very little institutionalized knowledge of arbitration among CEE states, but also the available knowledge was much dispersed and partially inadequate.

As time progressed, the situation began to change. Foreign entities grew accustomed to doing business in CEE and the perceived commercial risk began to wane. On the other hand, arbitration standards in the region were constantly increasing. As a part of wider process of legislative reforms, all CEE states have amended their respective arbitration laws. In general, the present national arbitration laws in the region reflect the provisions of the UNCITRAL Model Law, albeit some important distinctions among the arbitration laws of various countries. Stockholm and Vienna gradually began to lose ground to other centres of international arbitration. By 2009, the ICC was already the most frequently chosen arbitral institution. However, the Russian and Ukrainian companies would also often choose arbitration in accordance with the LCIA arbitration rules.[19]

The arbitration disputes that ensued, involving multiple parties from the region, help explain the dynamics of this dispute resolution method to the CEE business and legal community. The conclusions drawn from those cases were not always encouraging. A relevant example is the *Elektrim* case, which took place in Poland and became notorious because of the problem of possible extra–territorial application of Polish bankruptcy laws and its impact on foreign–seated international arbitration proceedings

18. *See generally* Illeanu M. Smeureanu, *Five Facts About Recognition and Enforcement of Foreign Awards in Central and Eastern Europe*, KLUWER ARB. BLOG (June 26, 2014), http://kluwerarbitrationblog.com/2014/06/26/five–facts–about–recognition–and–enforcement–of–foreign–awards–in–central–and–eastern–europe/.

19. The fact is well–known across international arbitration community in Europe. *See* Dmitry Davydenko, *Every Third LCIA Case Involves a CIS–related Party*, CIS ARB. FORUM (Nov. 3, 2015), http://www.cisarbitration.com/2015/11/03/each–third–lcia–case–involves–a–cis–related–party/, for written sources.

involving a bankrupt party.[20] The point here, however, is that apart from revealing idiosyncrasies of the Polish legal system, the dispute itself was essentially a ten–year battle over control of a leading Polish mobile communications company. The dispute produced staggering legal representation costs and, for some time, kept the company in a conundrum that prevented it from fully exploiting its business potential. Another Polish example is the case of PZU, the biggest Polish insurance company and CEE's largest financial institution, which from 2001 to 2010 was hostage to a shareholders' dispute known as the *Eureko* case.[21] The commercial wisdom gained from such cases in the region was that international arbitration comes at a high price and does not always lead to commercially satisfactory results.

In parallel to the big–ticket arbitrations common in London, Paris, Geneva, Zurich, Vienna, and Stockholm, thousands of CEE commercial cases in both the domestic and international context were referred to state courts and domestic arbitration institutes. This trend had a colossal impact on the development of the legal systems in CEE, as it helped to build a body of case law that ultimately improved legal predictability and filling some of the existing lacunae. It also helped to shape and reinforce the arbitral practice at the national level in CEE. In terms of volume, leading national arbitral institutions in CEE countries have had much larger inflow of cases than most of the recognized international centres, such as the LCIA, VIAC, and SCC. For example, in 2014 the VIAC registered only fifty–six cases, whereas, in Poland alone, each of the two arbitral courts (Lewiatan and the Court of Arbitration at the Polish Chamber of Commerce) have a larger yearly intake of cases.[22] Most of these disputes,

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20. Deyan Draguiev, *The Effect of Insolvency on Pending International Arbitration: What Is and What Should Not Be*, 32 J. INT'L ARB., 511, 537 (2015); *see* Elektrim SA v. Vivendi Universal SA, [2007] EWHC (QB) 571 (Eng.) reprinted in INTERNATIONAL ARBITRATION: CASES AND MATERIALS 800–10 (Gary Born, 2d ed. 2015). *See generally* Elizabeth Williamson, *Deutsche Telecom Strives for Key Role In Poland Stake in Elektrim Units*, WALL ST. J. (Dec. 19, 2000, 12:00 AM), http://www.wsj.com/articles/SB977173664332936144; *Deutsche Telekom Enters into an Agreement to Secure Undisputed Ownership over Polish Mobile Operator PTC*, DEUTSCHE TELEKOM (Dec. 15, 2010), https://www.telekom.com/media/company/69124.

21. *See Eureko* B.V. v. Republic of Poland, *Partial Award (Encouragement and Reciprocal Protection of Investment Trib. 2005), http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf.* The ten–year dispute inclusively served as a case study for Harvard Business School, *see* Francesca Gina ET AL., *Poles Apart on PZU (A), in* HBA CASE COLLECTION 912–013 (2012, *revised* 2014).

22. In Poland, for example, the Court of Arbitration at the Polish Chamber of Commerce resolved approximately 350 disputes in 2013, with an aggregate value of PLN 1 billion (EUR 200 million). According to the President of the Court of Arbitration, the inflow of cases to the Court is rather stable and varies between 300 and 400 annually, PULS BIZNESU (last visited June 8, 2016), http://www.pb.pl/3650342,955

however, are either small or very small in size.

Another essential point that should be taken into consideration in the context of CEE–related international arbitration is the frequent appearance of states and state agencies as parties to disputes. This phenomenon is driven by three major categories of matters: privatization disputes, investment treaty disputes, and infrastructure disputes. While privatization disputes are now largely considered a historic category, both investment treaty and infrastructure disputes continue to play a central role in the development of international arbitration in CEE.

Between 1987 and 2000, CEE countries concluded hundreds of bilateral investment treaties, in particular with more developed Western economies.[23] The relevance of bilateral treaty arbitrations in this context is due to the fact that most of the significant arbitration disputes involving CEE in the last twenty–five years were either petitioned on the basis of bilateral investment treaties or developed into bilateral investment treaty disputes. Although ICSID adjudicated most of these disputes, the inclusion of the SCC in the arbitration provisions of the Energy Charter Treaty and some other bilateral investment treaties allowed Stockholm to remain one of the most significant venues for resolution of investment treaty disputes.

The emergence of infrastructure disputes is due primarily to CEE states' vast needs for all sorts of infrastructure: roads, highways, railways, airport, and seaport facilities. From around the year 2000, both the European Commission and most multilateral development banks that provide funds for large infrastructure projects began to promote FIDIC conditions for construction contracts as the model imposed on developing states, in particular in CEE. This led to the inclusion of an ICC arbitration clause (the default dispute resolution clause) in many infrastructure–related FIDIC construction contracts, usually with the participation of states, state agencies, or municipalities as employers. As a consequence, a number of arbitration proceedings ensued, which sometimes left the state parties defeated.

CEE and other states' involvement in international arbitrations have gradually led some of those states to adopt a less favourable approach to

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95,sad–arbitrazowy–przy–kig–rozpatrzyl–ok–350–spraw–wartych–1–mld–zl–w–2013–r.; there were 280 cases registered by that Court in 2014, including 35 international cases. The Lewiatan Court of Arbitration registered 56 new cases in 2013 and 58 new cases in 2014, Działalność Sąduw 2014 roku [Proceedings in 2014], LEWIATAN, http://www.sadarbitrazowy.org.pl/pl/podstrony/dzialalnosc–sadu–w–2014–roku.html (last visited June 8, 2016).

23. In particular, the Czech Republic currently has 79 bilateral investment treaties, Slovakia – 54, Romania – 82, Bulgaria – 67, Poland – 61; Ukraine – 73, Lithuania – 54; Latvia – 44, Estonia – 27. *International Investments Agreements Navigator*, INV. POL'Y HUB (last visited Apr. 1, 2016), http://investmentpolicyhub.unctad.org/IIA.

arbitration as a matter of policy. For example, the Polish state agency responsible for construction of highways and motorways decided to amend the standard FIDIC contract terms following a few arbitration disputes with foreign contractors in way so as to replace ICC arbitration with exclusive jurisdiction of the Polish state courts. From that state agency's perspective, this was not an unreasonable step, because the Polish rules of litigation before state courts are crafted in such way that it is very hard for contractors to establish their case. Accordingly, the statistics of road construction disputes before state courts are usually very favourable to public employers. In Hungary, Article 4 of the Arbitration Act provides that disputes where the subject matter qualifies as a national asset (within the meaning of the Act CXCVI of 2011 on National Assets) within the boundaries of Hungary including the rights, claims, and privileges related to such asset are not arbitrable. This essentially excludes all state property from arbitration. Romania, following the *Micula*[24] award and the response adopted by the European Commission against the enforcement of the award, has found itself between Scylla and Charibdis. This may lead Romanian authorities to take a more cautious approach to arbitration in the future.

III. PRESENT SITUATION

The current situation of international commercial arbitration in CEE is undoubtedly impacted by the overall economic and political crisis affecting Europe, as well as the relative stability of the region. CEE is no longer the most promising world market, nor is it such a risky place where international arbitration should be considered as the only reasonable dispute resolution method. The historic reasons why disputes involving CEE states were referred to neutral arbitration fora are no longer relevant. This change of paradigm is well reflected in the transformation that has happened in recent years by the two international arbitration centres that were traditionally associated with the resolution of East–West disputes; the SCC and the VIAC. The SCC managed to readjust to the changing posture of international arbitration by opening itself to investment arbitrations under the Energy Charter Treaty and commercial disputes involving Ukraine, Russian Federation, and China. In contrast, the VIAC has failed to find its own niche, and instead purported to capitalize on the historic position of Vienna as the former capital of the Austro–Hungarian Empire and a cultural regional centre for Southern Poland, Czech Republic, Slovakia, Hungary, Slovenia, and Croatia. However, these efforts have had

24. *Ioan Micula, Viorel Micula,* S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013).

limited success and the VIAC has gradually decayed to the position of a reputable national arbitration institution with limited international significance.[25]

In 2011, M. Hodgson reported that international arbitration was flourishing in CEE.[26] However, that growth appears to have slowed since 2011. The plain truth is that for many reasons, international arbitration is no longer as attractive in this part of the world as it was in the years immediately following the Cold War. For example, the potential to rely on the New York Convention in order to enforce both the arbitration agreement and the arbitral award in most states is regarded as the most important advantage of international commercial arbitration.[27] Without a doubt, the New York Convention has been one of the most significant successes in the treaty–making practice of the United Nations. There is no similar global instrument to enforce court decisions. Within the European Union, however, the benefits of the New York Convention are dwarfed by the now much stronger and robust system of judicial cooperation in civil and commercial matters in the European Union. Since the European Commission launched a law–making offensive in this arena, starting in December 2000 with the enactment of the Regulation 44/2001 (Brussels I Regulation), EU member states now benefit from a number of regulations that have to be applied directly in a uniform manner across Europe.

The key advantage of the presently binding Brussels I Regulation on jurisdiction and enforcement of judgments in civil and commercial matters (Regulation 1215/12)[28] over the New York Convention is that judicial decisions, which are issued and enforceable in a Member State of the European Union, are automatically enforceable in all other Member States of the European Union without requiring any declaration of enforceability.[29] A Member State can only refuse to enforce a judgment

25. It is remarkable that the 2015 QMUL Arbitration Survey does not even mention Vienna as a preferred forum for international arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, WHITE & CASE (2015), http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul–international–arbitration–survey–2015_0.pdf.

26. Hodgson, *supra* note 2.

27. *See 2015 International Arbitration Survey*, *supra* note 25 (mentioning enforceability as the most important perceived advantage of international arbitration among users).

28. Council Regulation 1215/2012 of December 12, 2012, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1 (EU) (known as Brussels I Regulation 'recast') (replacing Council Regulation No 44/2001 of the European Parliament of December 22, 2000, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters).

29. Council Regulation 1215/15, art. 39, 2012 O.J. (L 351) 1.

upon an application of the interested party and only on the basis of a few narrowly crafted grounds that are subject to interpretation of the Court of Justice of the European Union. Therefore, even though Regulation 1215/12 provides for a theoretical possibility to refuse enforcement on public policy grounds, the practical scope of application of this exception is very narrow.[30] The territorial application of the Brussels I Regulations is further extended by virtue of the Lugano Convention[31] onto certain non–EU countries, such as Switzerland, Iceland, and Norway. As a result, almost all of Europe is covered by highly efficient tools to enforce international judgments. At present, that territorial scope covers most of the geographic reach of CEE business entities.

Furthermore, while Regulation 1215/12 provides for a generally applicable framework in civil and commercial matters in the European Union, other instruments provide alternative possible advantages to litigants. Regulation 805/2004 introduced the European Enforcement Order for uncontested claims in order to facilitate cross–border enforcement in situations where defendants do not oppose the claims but merely refuse to pay.[32] Regulation 1896/2006 introduced the European Payment Order Procedure,[33] which is a standardized procedure ideally suited for vindication of outstanding liabilities. Regulation 861/2007 was designed to deal with small claims,[34] which is also very important for small and medium enterprises. Those regulations are supported with secondary Regulations on taking of evidence, service of documents, and European Account Preservation Order.

As a result of the foregoing, companies operating in CEE have a strong

30. *See, e.g.*, Case C–681/13, Diageo Brands BV v. Simiramida–04 EOOD, 2015 E.C.R. I–350 ("*In accordance with the Court's settled case–law, while the Member States in principle remain free, by virtue of the proviso in Article 34(1) of Regulation No 44/2001, to determine, according to their own national conceptions, what the requirements of their public policy are, the limits of that concept are a matter of interpretation of that regulation. Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is none the less required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State (see judgment in flyLAL–Lithuanian Airlines, C-302/13, EU:C:2014:2319, paragraph 47 and the case–law cited).*").

31. Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Oct. 30, 2007 [hereinafter Lugano Convention].

32. Council Regulation 805/2004, 2004 O.J. (L 143) 15 (creating a European Enforcement Order for uncontested claims).

33. Council Regulation 1896/2006, 2006 O.J. (L 399) 1 (creating a European order for payment procedure).

34. Council Regulation 861/2007, 2007 O.J. (L 399) 1 (establishing a European Small Claims Procedure).

reason to reconsider using arbitration as the preferred route of resolution for cross–border disputes. Statistically, in the vast majority of cases, intra–EU court litigation could be an attractive alternative to these companies, especially in terms of cost effectiveness and the speed of the proceedings.

Could non–CEE parties seriously consider litigation in CEE as a reasonable option? It is beyond contention that CEE state courts cannot be compared with some of the most reputable Western European courts, such as the London courts. However, measured against courts in other parts of the European Union, such as Spain, Belgium, or Greece, the outcome of the comparison is not readily obvious. For many years, observers viewed corruption as the largest problem with the CEE judiciary. To an extent, corruption continues to be a major challenge in some CEE states and it concerns both national courts and arbitral institutions.[35] However, this notion is not necessarily true in the broad–brush sense. For example, Estonia is ranked twenty–sixth in the Transparency International 2014 Corruption Perceptions Index, *ex aequo* with France, and ahead of Spain, Portugal, Italy, and Greece. Other CEE countries, such as Lithuania, Poland, and Slovenia also received relatively high marks.[36]

Secondly, most of the CEE region has been a part of the European Union since 2004. The legal regimes within individual EU member states are required to have some degree of uniformity and the degree to which the EU integration process has managed to harmonize large parts of business law across Europe should not be underestimated. Vast areas of CEE were dominated until 1918 by either the German Empire or the Austro–Hungarian Empire. Hence, the core of the private law systems in the CEE countries is strongly influenced by the great Austro–German codifications of the 19th and 20th centuries. For these reasons, there are clearly demarcated division lines within the region, most noticeably between those states that joined the EU in 2004 and those that have not yet joined the EU, such as Serbia, Montenegro, Albania, Moldova, Kosovo, and Macedonia.

The foregoing provides evidence that, with respect to the CEE states that are members of the EU, there are strong arguments in favour of using harmonized tools of cross–border litigation in civil and commercial matters

35. N. Eastwell, J. Logesova, ET AL., GUERRILLA TACTICS AND HOW–TO–COUNTER THEM IN NATIONAL LITIGATION: [H] EXCURSUS: COMPLIANCE AND CORRUPTION IN THE CEE/SEE AND TURKEY, IN GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 229 (S. Wilske & G.J. Horvath eds., 2013); Stephen Wilske, Lars Markert, & Laura Bräuninger, *Chapter IV: Investment Arbitration, Pertinent Issues in Investment Arbitration against Romania: A Case Study in Challenges and Pitfalls of Investment Disputes in Central and Eastern Europe*, *in* AUSTRIAN ARBITRATION YEARBOOK 2015 476, 493 (Christian Klausegger et al., eds. 2015).

36. *2014 Corruption Perceptions Index*, TRANSPARENCY INT'L (Apr. 3, 2016, 4:38 PM), http://www.transparency.org/cpi2014/results.

over resorting to arbitration. This may be one of the reasons why arbitration seems to be still underused in CEE. In this respect, the current state of play is reflected in the recent statistics of the arbitral institutions traditionally selected to resolve CEE commercial disputes, such as the VIAC, SCC, LCIA, and ICC. Apart from the ICC, none of these institutions appear to expand their CEE–related dockets.

In the VIAC, the annual intake of new cases fell from seventy–five in 2011 to fifty–six in 2014 (with seventy new cases in 2012 and fifty–six new cases in 2013). This appears to be a long–term trend. CEE states rarely include dispute resolution clauses providing for arbitration under the VIAC. Local Austrian and German companies are now the principal users of the VIAC. Of the seventy newly registered cases in 2012, forty–eight parties were Austrian, while twenty–nine parties were German. The third–most frequent party nationality was Romanians with nine cases. Overall, the CEE states, Cyprus, Malta, and the Russian Federation were parties to fifty–seven cases registered by the VIAC. In 2014, parties from these same states were parties in only thirty–four cases before the VIAC. This could be construed as proof that CEE cases occupy an important share of the VIAC docket. However, fifty–six cases per year is not an impressive result *per se* and it is certainly not commensurate to the growth of economic exchange by the CEE parties between 1990 and 2015.

The yearly intake of new cases in the SCC is more significant. Domestic Swedish cases constitute around 50–60% of the volume. With respect to international cases (that are defined as cases in which at least one party is non–Swedish), the volume has remained at a relatively constant level since 2008, varying from seventy–five to eighty–five new cases per year. The principal non–Swedish users of the SCC have been a relatively stable group of states, including Russia, Germany, China, the UK and the US, Denmark, Norway, and Finland. CEE companies appear before the SCC much less than the aforementioned states. In eithy–three international cases registered by the SCC in 2013, only eight parties were from the Baltic states, two from Ukraine, and one from Belarus, Czech Republic, Poland and Romania each. These are not impressive figures by any standards.

The LCIA Registrar report for 2013 indicated that 290 arbitration cases were initiated in that year. In terms of the percentage of users from CEE, Russian entities appeared in 3.4% cases, whereas other CEE parties totalled 3.6%. The combined 7% was lower than the use of LCIA arbitration by US or BVI entities (7.1% each). In 2012, the figures were similar with Russian cases making up 3.25% of the LCIA docket, and CEE cases amounting to an aggregate of 4%. Admittedly, some Eastern European cases may be hidden among cases with Cypriot involvement (3.8 to 4.5% cases). Nevertheless, the volume in which CEE entities use LCIA is very low. The 7.1% of 290 is roughly equal to twenty cases.

The ICC Court of Arbitration is the unquestionable leader among international institutions dealing with CEE arbitration. According to ICC statistics, 275 CEE parties were involved in cases in 2014. Even without Greece and Turkey in this category (totalling ninety parties), the remaining countries from CEE would amount to 185 parties. Among those, Bulgaria, Russia, Romania, Cyprus, and Hungary are the most frequent users.[37] These figures show that the ICC Court of Arbitration is the most popular arbitral institution. The preference for ICC arbitration likely results from the juxtaposition of various considerations, such as promotion of the ICC Court of Arbitration in the FIDIC contract conditions. Additionally, the structure of the Court of Arbitration is a factor, which includes the role of its National Committees and the interactive approach of the Secretariat in developing good working relations with arbitration practitioner communities in the CEE countries. Still, the CEE parties' (including Turkey and Greece) case volume in the ICC Court of Arbitration corresponds to only 40% of the cases from Northern and Western Europe (30% cases excluding Turkey and Greece). Remarkably, the percentage of states and parastatal parties in all cases from CEE (7.6%) was significantly higher than the same ratio with respect to Northern and Western Europe (0.4%).

What seems to be important, however, is that these reputable arbitral institutions serve only a share of all arbitration cases resolved in CEE. As noted above, many disputes in both a purely domestic and mixed (domestic versus foreign party) context are referred to the national arbitral centres that exist in most CEE states. Some of them have international ambitions, including the Court of Arbitration at the Polish Chamber of Commerce, the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic, Court of Arbitration at the Hungarian Chamber of Commerce and Industry or the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania in Bucharest.[38] However, none of these national arbitral institutions has managed to rise to the level of an arbitral centre for its surrounding region. This could be due to various possible reasons, three of which I shall present here.

First, no CEE state has focused on making an international arbitration an institution of commercial and political strategy. Development of an arbitral

37. *2014 ICC Dispute Resolution Statistics*, ICC DISP. RESOL. BULL. 2015/No. 1, p. 6.

38. *See* Grigore Florescu & Christina Florescu, *Part I: International Commercial Arbitration, Chapter 5: The Latest Developments in Commercial Arbitration in Romania, in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 95, 109 (S. Köll ET. AL, eds., 2011).

institution clearly involves a combination of factors, ranging from an adequate hearing centre, appropriate marketing and funding, organization of a quality, and pro–arbitration approach of the legislatures and courts. So far, no CEE state has managed to offer this to the international community.

Second, the newly created legal systems of the CEE states have been overtly or covertly suspicious of arbitration. In part, this is the result of the initial weaknesses of the state institutions, which were abused and exploited in many unethical ways, especially at the beginning of their transformation process. Back then, CEE–seated arbitration was not a synonym for professional ethics and integrity, but secretive private courts which could rule in contempt of the law to support murky business interests. This was the reason, for example, why Polish bankruptcy law of 2003 provided that initiating bankruptcy proceedings terminates *ex lege* all arbitration clauses of the bankrupt party and discontinues all pending arbitration proceedings. Latvia is the most recent example of this problem. There, a new arbitration law entered into force on January 1, 2015, aiming to radically reduce the number of arbitration courts. The problem the law attempted to address was the reality in which more than 120 arbitration courts operated in a country populated by approximately two million people. Most of those courts were shabby, non–transparent organisations that rendered services of dubious quality and dissuaded businesses from using arbitration.

Third, horizontal ties between various CEE states are very weak and insufficient. Most CEE states would rather look to Western European countries or to the United States to engage in international relations than purport to engage in an exchange or initiative with their neighbouring states. To a large extent, these problems are due to historical reasons, including past dominance of certain countries in the region over the territories of others. In these surroundings, there is no obvious candidate for leadership, even as a regional centre of international arbitration.

However, there may be no need for such a centre in the first place. It is likely that national arbitral institutions will continue to resolve most CEE–related disputes at a domestic level, and refer other cases to the existing reputable institutions, such as the ICC. For the present time, such scenario has two important advantages for the users. First, local arbitration is often less expensive than international arbitrations before the most recognized institutions. T his responds to the critical feature of the CEE–based businesses, which is cost–sensitivity. Domestic arbitration also tends to be quicker, and in the majority of cases, the quality provided is commeasurable to the value and complexity of the case. Second, the legal and language differences between various CEE states also play an important role in individual cases, and circulation of arbitrators and lawyers among various CEE jurisdictions is seriously hindered.

IV. PERSPECTIVES

The problem with international arbitration in CEE is that its past growth occurred in response to some important deficit—whether that was ideological neutrality, corruption, or lack of adequate rule of law. Even recently, increases in the number of arbitration cases from certain countries in CEE were caused by grave problems of the judicial systems in those countries. However, barring these types of emergency situations that are unlikely to persist, what edge does international arbitration over other forms of dispute resolution?

As I have demonstrated, enforcing arbitral awards is no longer its clear advantage, at least in the EU context. Time and money seem tugging at the hearts of commercial actors in today's economy. However, both CEE–based arbitration under the rules of some local arbitral institution and domestic court proceedings are likely to provide the party with a cheaper, and possibly faster decision, sometimes granted *ex parte*. These considerations are of paramount practical importance. Although CEE–based businesses have much more limited resources than Western European businesses, they have to compete both in the European Union and beyond. Hence, they put strong emphasis on cost–cutting and dispute management, which has often evolved from dispute resolution to dispute aversion. At the beginning of the transformation process, a number of international law firms opened their offices in CEE. These firm's applicable hourly rates at that time were exorbitant compared to the local fee arrangements that domestic lawyers and law firms used. Nonetheless, CEE clients honoured and accepted these international firms both as the risk premium for acting on unstable and unpredictable markets, and as consideration for superior quality of legal work.

With time, however, many skilled partners and associates established their own legal firms and boutiques, providing clients with legal services of international quality for a fraction of what international legal brands would charge. As the business conditions in CEE became more stable, domestic companies began to prefer these less expensive law firms with increasingly established reputations over the big and expensive brand name firms. Even if such small domestic law firms or boutiques do not have brand recognition for international arbitration, or even the know–how to conduct an international arbitration, they can provide cost–efficient, good–quality advice, and representation before the domestic courts. The saturated legal market prompted aggressive competition and low pricing. To explain the scale of this problem, in CEE, a typical budget for a court representation in a fairly complex commercial dispute by a well–regarded local law firm could still be lower than the proposal a US or UK–based service provider would make merely for management and storage of electronic files related

to the same matter. Hence, cost efficiency is a highly pragmatic consideration that should not be underestimated.

The next major problem with international arbitration in CEE is the lack of trust the private sector has for non–state judicial business. This is partially a legacy of the communist mentality and post–1989 abuses. Businesses in this part of the world generally have little trust, and this approach is even more acute with respect to institutions they ignore, and cannot always be linked to ostensible forms of judicial authority, such as court buildings, gowns, wigs, etc. Research conducted in 2005 in Southern and Eastern Europe confirmed that ignorance and distrust were the two most important factors limiting the use of arbitration by lawyers and parties in some CEE states.[39] A related problem is that, with respect to international arbitrations in key institutions, CEE parties do not feel that they own the process. T his is evidenced, for example, in the number of appointments of CEE arbitrators in those disputes. The ratio of appointments of CEE arbitrators is dramatically low and corresponds to only a fraction of CEE cases handled by the arbitral institutions. This is to a large extent the result of the scarcity of international arbitrators with established reputations in CEE, and by the fact that much international arbitration involving CEE are still handled by international law firms' Paris, London or U.S. offices. This is changing and will need to change even more in the future if CEE is to play larger role in the development of international arbitration.

Another important feature of Central and Eastern Europe is the short history of business organizations—the potential users of international arbitration. Many companies opened only within the last twenty–five years and are still run by their founders. This means that key decisions are still taken by people with strong entrepreneurial spirit, who were most likely brought up in a different environment when CEE was not as open to the world as it is today. Those decision makers do not have the inclination to look abroad to find solutions to their problems. The short track record of these new companies also implies that they do not rely on procedures and internal policies as much as Western organizations do, with a longer history and more sophisticated internal corporate structures. This implies that it is rather unlikely to find a CEE–based company that would agree to international arbitration in all of its commercial contracts because of its internal policies against international arbitration. Rather, the analysis of pros and cons will be done on a case–by–case basis, leading to sometimes chaotic results.

The conclusion is that future international commercial arbitration in CEE

39. Bruno Schönfelder, *The Puzzling Underuse of Arbitration in Post–Communism – A Law and Economics Analysis*, FREIBERG WORKING PAPERS, no. 7, 2005, at 19.

will have to respond to different needs than in the past, and it will have to be managed differently. The model CEE arbitrating party is a risk–averse and cost–sensitive client, who has achieved success on the domestic market with relatively limited experience in international operations and international dispute settlement mechanisms.[40] For such user, international commercial arbitration could be a reasonable choice in three types of matters.

The first type of matter that would benefit from international arbitration is high–value agreements that are likely to provoke fact–intense and issue–complex disputes on close technical questions. Construction, infrastructure, and IT–related contracts are the typical representatives of this matter. The same would also apply to financial disputes, including M&A transactions, which may require commercially oriented approach and financial expertise. In this respect, the key advantages of international commercial arbitration—regardless of the geographic origin of the parties—will include the possibility to appoint a knowledgeable tribunal, provide party–appointed witness–expert reports and obtain documents from the other party in the course of document production. Court litigation in Europe, and in CEE in particular, does not and will not respond to these needs in the foreseeable future because they are all civil law systems.

The second category includes matters in which arbitration may be chosen in negotiations as a way to ensure a level playing field for the parties. This would include the cliché scenario of neither party being ready to concede to the jurisdiction of the courts of the opposing party, and where neither party has the bargaining strength allowing it to impose its will in this respect on its opposing party. Such arbitration agreements are most frequently leading to surprising and/or unwanted results. This is because the deals over arbitration clauses in such situations are generally struck for psychological and unmeritorious reasons, and are unsupported by any previous transactional analysis that would refer to the most probable adverse scenarios in the light of the applicable substantive and procedural laws. These "midnight" clauses then lead to excessively costly and redundant arbitrations over matters that should have been rather referred to state courts, even in the opposing party's jurisdiction. On top of that, incidental inclusion of arbitration clauses by non–trained parties often leads to pathological arbitration clauses, generating even more costly, protracted, and redundant disputes. Nonetheless, the limited lack of experience with international dispute settlement, including limited trust in foreign judicial

40. *See generally id.* (providing an interesting insight into the possible reasons of underuse of arbitration in South–Eastern Europe before 2005, suggesting legal illiteracy coupled with a specific approach to business acquired during communism, were the two main factors).

systems on the part of many CEE businesses, is likely to be responsible for midnight arbitration clauses to continue to be inserted into multiple international contracts in the years to come.

The third category of matters includes transactions between CEE parties and their business partners from states that are perceived as representing an increased political, legal or commercial risk. In recent years, many CEE–based entities have been expanding into new markets, including the African and Asian markets, still largely unknown to them and which present increased risks. In this new reality, CEE companies entering international markets will need international arbitration to protect their commercial interest in the same manner as the Western European and the U.S. companies sought to protect their CEE interests after 1990. As a part of this wider trend, there seems to be an ever more visible division between the states that joined the European Union in 2004 and those CEE countries that have not joined the EU to date. The distinction manifests itself primarily in the appearance of a number of investment treaty arbitrations, such as Czech entities as claimants against Southern European states. Such cases are a recent phenomenon and are indicative of the increased legal, political, and commercial risk of doing business in the southern part of Central Europe. The same risk, although with lower visibility, is also present on the commercial side of arbitration.

CONCLUSION

What will be the position of international commercial arbitration in CEE in ten years from now? This question may be difficult to answer, as it cannot be taken for granted that arbitration will generally have the same status as it has now. The changes permeating within both the economy and human behaviour may demand that arbitration evolve into a cheaper, faster, and more standardized procedure. With this caveat, it is reasonable to assume that CEE parties will follow the prevailing worldwide trend.

Based on the changing landscape, experts can predict two regional trends. First, CEE states' involvement in international arbitrations is likely to decrease. This will involve investment treaty arbitration, as the European Commission is likely to intensify its efforts to cause the Member States of the European Union to terminate the intra–EU bilateral investment treaties. Within 20 years this should lead to a radical decrease in the number of bilateral investment treaty arbitrations involving the CEE countries. Additionally, states' involvement in significant arbitrations from infrastructure disputes is also expected to drop.

The second trend should involve an increasingly more sophisticated use of international arbitration by CEE entities in an international context. This will be a consequence of the increasing presence of such entities on

international markets and, inevitably, before various dispute resolution fora. However, loyalty to international arbitral institutions is not to be expected too soon, if ever. Rather, the selection of an arbitration clause is likely to be preceded with a detailed SWOT analysis in each individual case, as a result of which arbitration may be chosen for those disputes, where it can most clearly show its advantages over other forms of dispute resolution.

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CHALLENGES TO THE CREDIBILITY OF THE INVESTOR-STATE ARBITRATION SYSTEM

MICHAEL NOLAN*

INTRODUCTION

Investor-state dispute settlement ("ISDS") has been put through the ringer in recent public comment as a system that "threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems" and "weakens the rule of law."[1] One such foreign corporation is Philip Morris Asia Limited ("Philip Morris Asia"), which brought a claim against Australia in 2012 for compensation based on the state's cigarette packaging legislation.[2] The case, along with Philip Morris's similar case

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1. Letter from Professor Erwin Chermerinsky ET AL., to Senator Mitch McConnell ET AL., Mar. 11, 2015 (letter to United States Congressional leaders signed by nearly 100 law and policy professors) [hereinafter "Chermerinsky Letter"].

2. *See generally* Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015).

against Uruguay, created global controversy over states' ability to regulate in the public interest.[3] Some critics argued that the cases created a "chilling effect" on other states that were considering similar tobacco regulation.[4] On December 17, 2015, Australia defeated the multibillion dollar claim when the arbitral tribunal declined jurisdiction over the matter. In response to the tribunal's award, Philip Morris International Inc.'s ("Philip Morris") general counsel appeared to respond to the controversy: "This case has never been about a government's undeniable authority to regulate in the public interest."[5] Nevertheless, the vocal critics of the Philip Morris cases are among many who question whether the ISDS system interferes with democratic regulatory authority.

This Article will describe how the Philip Morris case falls within criticism against the ISDS system over the past decade. Next, the Article will compare similar ideas voiced in the current public debate about the negotiations of the Trans Pacific Partnership and Transatlantic Trade and Investment Partnership. Finally, this Article will assert that the ISDS system will survive in the face of criticism as states begin to reform their ISDS systems.

II. ISDS CRITICISM

A. Philip Morris Asia v. Australia

The Tobacco Plain Packaging Act 2011 became law in Australia on December 1, 2011.[6] Among other requirements, the law mandated certain health warnings and limited branding on cigarette packages.[7] On June 27, 2011, Philip Morris Asia filed a Notice of Claim against Australia pursuant to the Hong Kong-Australia Bilateral Investment Treaty (1993) ("Hong Kong-Australia BIT").[8] This claim was the first ISDS dispute that was

3. *See* Sebastian Perry, *Australia Defeats Claim over Tobacco Policy*, GLOBAL ARB. REV. (Dec. 18, 2015) (subscription required).

4. *Id.*

5. *Philip Morris Asia Limited Comments on Tribunal's Decision to Decline Jurisdiction in Arbitration Against Commonwealth of Australia Over Plain Packaging*, BUSINESSWIRE (Dec. 17, 2015, 7:34PM), http://www.businesswire.com/news/home/20151217006627/en/Philip-Morris-Asia-Limited-Comments-Tribunal%E2%80%99s-Decision.

6. *See Tobacco plain packaging—investor-state arbitration*, AUSTRALIAN GOVERNMENT DEPARTMENT OF ATTORNEY GENERAL, https://www.ag.gov.au/tobaccoplainpackaging (last visited Jan. 27, 2016).

7. *See* Matthew C. Porterfield & Christopher R. Byrnes, Philip Morris v. Uruguay*: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing Up in Smoke?*, IISD (July 12, 2011), http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/.

8. *See supra* note 6. *See generally* Philip Morris Asia Ltd. v. Australia, PCA

brought against Australia.[9] Philip Morris Asia argued that Australia's tobacco plain packaging measure constituted an expropriation of its Australian investments in breach of the BIT.[10] Philip Morris Asia further argued that Australia's tobacco plain packaging measure was in breach of its commitment under Article 2(2) of the Hong Kong-Australia BIT, which required fair and equitable treatment to Philip Morris Asia's investments.[11] Finally, Philip Morris Asia asserted that tobacco plain packaging constitutes an unreasonable and discriminatory measure and that Philip Morris Asia's investments have been deprived of full protection and security in breach of Article 2(2) of the Hong Kong-Australia BIT.[12]

The arbitration was conducted under the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules 2010. The tribunal hearing the case was composed of three arbitrators: Australia appointed Professor Don McRae of the University of Ottawa as an arbitrator; Philip Morris Asia appointed Professor Gabrielle Kaufmann-Kohler as an arbitrator; and the Secretary-General of the Permanent Court of Arbitration appointed Professor Dr. Karl-Heinz Böckstiegel as the presiding arbitrator.[13] Over the course of four years, Australia and Philip Morris submitted full statements of claims and defense.[14] On December 17, 2015, the tribunal declined jurisdiction over Philip Morris's claims.[15] On May 16, 2016, the Permanent Court of Arbitration published a redacted version of the award in the Case Repository of the Permanent Court of Arbitration.[16]

Before its arbitral positions were vindicated in this first investor-state case against it, Australia had distanced itself from ISDS. In fact, Australia categorically rejected the inclusion of ISDS provisions in a bilateral investment treaty ("BIT").[17] In 2011, the Australian Government issued a

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Case No. 2012-12, Notice of Claim (June 27, 2011).

9. *See supra* note 6.

10. *Philip Morris Asia Ltd.*, PCA Case No. 2012-12, Notice of Claim, ¶ 10(a).

11. *See id.* ¶ 10(b); *see also* Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments art 2(2), H.K.-Aust., Sept. 15, 1993, 1784 U.N.T.S. 385 [hereinafter Hong Kong-Australia BIT].

12. *See Philip Morris Asia Ltd.*, PCA Case No. 2012-12, Notice of Claim, ¶ 10(c); *see also* Hong Kong-Australia BIT *supra* note 11; *supra* note 6.

13. *See supra* note 6.

14. *See* Perry, *supra* note 3.

15. *See* Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 588 (Dec. 17, 2015).

16. *See* Press Release, Permanent Court of Arbitration, Tribunal Publishes Redacted Version of Award on Jurisdiction and Admissibility (May 16, 2016) (on file at https://www.pcacases.com/web/sendAttach/1713).

17. *See The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), http://www.econo

Trade Policy Statement, which stated the country would not agree to ISDS in future treaties.[18] Since then, however, the Australian government has stated that it will consider ISDS provisions on a "case-by-case" basis—a policy which it appears to have carried out. Australia included ISDS in the 2014 Korea-Australia Free Trade Agreement but not in the 2014 Australia-Japan Free Trade Agreement.[19]

B. Criticism before Philip Morris Asia v. Australia

Criticism of ISDS began with some South American states in the late 2000s. In 2007, these states began withdrawing their membership in the International Centre for Settlement of Investment Disputes ("ICSID") as a result of a number of investor-state arbitrations filed against them. On May 2, 2007, Bolivia became the first to withdraw from ICSID by submitting a Notice under Article 71 of the Washington Convention.[20] Ecuador followed with its own withdrawal on July 5, 2009, and Venezuela withdrew on January 24, 2012.[21] Following their respective withdrawals from ICSID, Bolivia, Ecuador, and Venezuela have each terminated at least some of their existing BITs, and the three countries have not signed any new investment agreements.[22]

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mist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration. The Australia-New Zealand Investment Protocol and Malaysian Free Trade Agreement ("FTA") provide for resolution before local courts.

18. *See* Jürgen Kurtz, *The Australian Trade Policy Statement on Investor-State Dispute Settlement*, 15 AM. SOC'Y OF INT'L L. INSIGHTS (Aug 2, 2011), https://www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-state-dispute-settlement.

19. *See Investor-State Dispute Settlement*, AUST. GOV'T DEP'T OF FOREIGN AFFAIRS AND TRADE, http://dfat.gov.au/trade/topics/pages/isds.aspx (last visited Nov. 11, 2015). Note that some commentators disagree with the notion that Australia is abiding by the case-by-case policy, asserting that Australia has instead reverted to the inclusion of ISDS post-2013. *See generally* Luke Nottage, *Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?*, U. OF SYDNEY L. SCH. (2014), https://sydney.edu.au/law/anjel/documents/2014/ZJR_38_05_Nottage_8.pdf. This explanation concludes that the Japan FTA of 2014 excluding ISDS is merely an aberration. *See id.* at 39–42.

20. *See* Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 353, 354 (Claire Balchin, ET AL. eds., 2010); *see also* Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 71, 575 U.N.T.S. 159, 4 I.L.M. 524 (1965) [hereinafter ICSID Convention].

21. See Schreuer, *supra* note 20; *see also* Press Release, International Center for Settlement of Investment Disputes, Venezuela Submits a Notice under Article 71 of the ICSID Convention (Jan. 26, 2012), https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=57&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us.

22. *See Denunciation of the ICSID Convention and Bits: Impact on Investor-state Claims*, U.N CONFERENCE ON TRADE AND DEV. (Dec. 2, 2010),

At the time, withdrawal by Bolivia, Ecuador, and Venezuela seemed to be a regional reaction to the fairness of what was viewed as a foreign-imposed regime. When Bolivia withdrew, Bolivian President Evo Morales said, "Governments from Latin America[,] and I think all over the world[,] never win the cases. The transnationals always win."[23] Yet, this sentiment does not appear to be factually grounded; in an empirical study of investment treaty cases in 2008, Washington and Lee University Associate Professor of Law Susan Franck[24] recently found that governments won in 57.7% of cases whereas investors prevailed in only 38.5% of cases.[25]

C. *Criticism after* Philip Morris Asia v. Australia

Following the South American state repudiation of ISDS, the next wave of criticism was led by the public in reaction to high-profile cases, including Philip Morris' cases against Australia and Uruguay. Even in current debate about ISDS, commentators complain that Philip Morris is "trying to use ISDS to stop Uruguay from implementing new tobacco regulations intended to cut smoking rates."[26] Following *Philip Morris*, public commentators continued to criticize investor-state arbitration when *Vattenfall AB v. Germany* was initiated in 2012.[27] Vattenfall, a Swedish

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http://unctad.org/en/Docs/webdiaeia20106_en.pdf; *see also* Karsten Nowrot, *Termination and Renegotiation of International Investment Agreements*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW 233 (Steffen Hindelang & Markus Krajewski eds., 2016).

23. *See* Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration,* 86 N.C.L. Rev. 1, 49 (2008) (referring to newspaper article quoting President Morales).

24. *See generally Susan D. Franck*, WASH. & LEE U. L. SCH., https://law2.wlu.edu/faculty/profiledetail.asp?id=267 (last visited May 17, 2016).

25. *See id.*; *see also* Susan D. Franck, *Considering Recalibration of International Investment Agreements: Empirical Insights*, *in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 73 (Jose E. Alvarez et al. eds., 2011).

26. *See* Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

27. Vattenfall AB v. Germany, ICSID Case No. ARB/12/12, Notice of Arbitration (May 31, 2012). Note that Vattenfall had previously filed a case against Germany in 2009 after a change in Hamburg's environmental regulations caused Vattenfall to claim € 3.7 billion compensation based on increased expenses in a power plant that Vattenfall was building. *See generally* Vattenfall AB v. Germany, ICSID Case No. ARB/09/6, Award (Mar. 11, 2011). Interestingly, *Vattenfall* was the first case brought against a Western European country under the Energy Charter Treaty—the prior twenty cases were all brought by investors against the governments of Eastern Europe, the former Soviet Union, and Turkey. *See* Cesare Romano, *Vattenfall v. Germany: Anomaly or New Trend?*, KLUWER ARB. BLOG (May 6, 2009), http://kluwerarbitrationblog.com/2009/05/06/vattenfall-v-germany-anomaly-or-new-trend/.

power company, initiated the case against Germany after the German parliament amended the Atomic Energy Act in 2011 to speed up the phase-out of nuclear energy, which required the immediate shutdown of nuclear reactors operated by Vattenfall.[28] This amendment followed the nuclear disaster in Fukushima, Japan as public sentiment in Germany turned against the use of nuclear energy.[29] Critics of Vattenfall's claim have called it the "exploitation" of "woolly definition of expropriation to claim compensation for changes in government policy that happen to have harmed their business."[30] Similar to criticisms of the *Philip Morris* cases, commentators have painted *Vattenfall* as an attack on environmental and safety regulations.

Although Germany did not react against ISDS in response to *Vattenfall*, other states limited or withdrew their participation in ISDS around the time that the *Philip Morris* and *Vattenfall* cases were initiated. Like Australia's reaction to the *Philip Morris* case, South Africa followed suit in 2012 by stating that it would not provide for ISDS in future trade agreements.[31] Most recently, Pakistan rejected a U.S. draft BIT that contained ISDS provisions from the U.S. Model BIT.[32] Instead, Pakistan drafted its own Model BIT under which Pakistan could not be held liable for disputes involving private investors.[33]

South Africa and Indonesia have gone further than Pakistan; these two states have terminated existing BITs that include ISDS provisions. South Africa began terminating treaties in 2012 after a two-year review of its investment treaty obligations. The review followed ISCID arbitration by investors from Luxembourg and Italy in response to South Africa's 2002 Mineral and Petroleum Resources Development Act.[34] In 2015, South Africa went further by enacting legislation that does not permit investors to

28. *See* Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *The State of Play in* Vattenfall v. Germany II*: Leaving the German Public in the Dark*, IISD at 2 (Dec. 2014), http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf.

29. *See id.*

30. *See The Arbitration Game*, *supra* note 17.

31. *See SADC Model Bilateral Investment Treaty Template with Commentary*, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY at 55 (July 2012), http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.

32. *See* Mehtab Haider, *Pakistan refuses to accept US model on investment treaty*, THE NEWS INTERNATIONAL (Mar. 13, 2015), http://www.thenews.com.pk/print/28990-pakistan-refuses-to-accept-us-model-on-investment-treaty.

33. *See* Amin Ahmed, *New bilateral investment treaty model*, DAWN MEDIA GRP. (Mar. 2, 2015), http://www.dawn.com/news/1166720.

34. *See Bilateral investment treaties in South Africa*, NORTON ROSE FULBRIGHT (July 2014), http://www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa.

seek recourse through international arbitration.[35] Indonesia has also terminated the Netherlands-Indonesia BIT on its expiration date of July 1, 2015 with commentators proposing that recent investor-state arbitration cases motivated the Indonesian Government to review its treaty portfolio.[36] Indonesia has announced its intention to end all BITs so that those with automatic renewal will be terminated, and the remainder will expire.[37] But, Indonesia has yet to terminate any other existing agreements.[38]

D. Criticism in the United States: Trans-Pacific Partnership Negotiations

The public debate over ISDS reached the United States in 2015. The conversation has focused on the ISDS provision of the Trans-Pacific Partnership ("TPP"), a treaty negotiated by President Barack Obama with eleven Pacific Rim nations.[39] The text of the TPP was released fully to the public on November 5, 2015 and signed by United States Trade Representative Michael Froman on February 4, 2016.[40] United States Senator Elizabeth Warren, a Democrat from Massachusetts, led the conversation in early 2015 by accusing ISDS of being a "rigged, pseudo-court" that permits multinational corporations "potentially to pick up huge payouts from [U.S.] taxpayers."[41] Senator Warren gained the support of law and policy professors who explained how corporations use ISDS arbitration to "challenge[] environmental, health, and safety regulations,

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35. *See New Treatment of Foreign Investors in South Africa*, LEXOLOGY (Mar. 26, 2016), http://www.lexology.com/library/detail.aspx?g=d4b6fc79-d34a-4581-8e9a-6511bcb3b8ad.

36. *See* Leon E. Trakman & Kunal Sharma , *Why is Indonesia terminating its bilateral investment treaties?*, E. ASIA FORUM (Sept. 20, 2014), http://www.eastasiaforum.org/2014/09/20/why-is-indonesia-terminating-its-bilateral-investment-treaties/.

37. *See* Corrs Chambers Westgarth, *Farewell Indonesia's BITs: economic nationalism or sensible reform?*, LEXOLOGY (July 7, 2015), http://www.lexology.com/library/detail.aspx?g=cf024d43-350e-40c4-8d11-d235f86144fc.

38. *See id.* India has also announced its intention to review its BIT system to consider excluding IDSD from future agreements. *See* Kyla Tienhaara, *These TPP safeguards won't protect us from ISDS*, ABC (Mar. 26, 2015, 1:07AM), http://www.abc.net.au/news/2015-03-26/tianhaara-these-tpp-safeguards-wont-protect-us-from-isds/6350358.

39. *See generally The Trans-Pacific Partnership*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/tpp/ (last viewed May 11, 2016). The other participating nations are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. *Id.*

40. The White House released the full text of the TPP on a special website on November 5, 2015. *See The Trans-Pacific Partnership*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://medium.com/the-trans-pacific-partnership (last visited May 11, 2015).

41. Warren, *supra* note 26.

including decisions on plain packaging rules for cigarettes, toxics bans, natural resource policies, health and safety measures, and denials of permits for toxic waste dumps."[42] In addition to concerns for U.S. legislative measures, Senator Warren and others have bashed ISDS for its lack of independent judges and the absence of an appeal process.[43]

If ratified, the TPP will be one of fifty agreements to which the United States is a party that includes an ISDS provision.[44] According to the United States Trade Representative Froman, foreign investors rarely pursue arbitration against the United States, and more importantly, they have never been successful in arbitration against the United States.[45]

Still, Senator Warren and other critics not only fear that it is "a matter of time" before the United States loses, but they also cite the resources that states must expend on claim defense without the ability to sue affirmatively.[46] Senator Warren fears that the ISDS regime is only an opportunity for multinational corporations to win at the expense of American taxpayers and small businesses.[47]

E. Criticism in Europe: Transatlantic Trade and Investment Partnership Negotiations and Micula

Debate over ISDS is raging in Europe, mirroring the concerns raised in the United States. In Europe, the culmination of the public debate on investor-state arbitration could result in policymakers' decision to forego investor-state arbitration provisions in future treaties.

On July 8, 2015, the European Union Parliament adopted a series of recommendations on the Transatlantic Trade and Investment Partnership ("TTIP"), which included an amendment to the proposed ISDS provision.[48] The amendment calls to replace the ISDS with a new system "which is subject to democratic principles and scrutiny" that requires "publicly

42. Chermerinsky Letter, *supra* note 1.

43. *See id.*; Warren, supra note 26.

44. *See FACT SHEET: Investor-State Dispute Settlement (ISDS)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds (last visited May 11, 2015).

45. *Id.*

46. Warren, *supra* note 26; *see also* Prof. Chermerinsky Letter, *supra* note 1.

47. *See* Warren, *supra* note 26.

48. *See EU Parliament Adopts TTIP Resolution, ISDS Compromise Language,* ICSID (July 9, 2015), http://www.ictsd.org/bridges-news/bridges/news/eu-parliament-adopts-ttip-resolution-isds-compromise-language [hereinafter *"EU Parliament ISDS Compromise"*]. Note that the United States is also a participant in the TTIP negotiation. In the U.S. debate, some commentators focus their attention on TPP, *see* Warren, *supra* note 26, while others attack both TPP and TTIP, *see* Chermerinsky Letter, *supra* note 1.

appointed, independent professional judges in public hearings" with an appellate mechanism.[49] As a result of the amendment, some policymakers have concluded that "ISDS is dead."[50]

This new system is the European Commission's ("EC" or "Commission") Investment Court System, which would apply to TTIP and all other E.U. investment treaties.[51] The EC has described the EC Investment Court System as a permanent court with appointed judges that it will set up with the assistance of other states. The EC envisions that this system will replace the current ISDS arbitration system "over time" to "further increase the efficiency, consistency and legitimacy of the international investment dispute resolution system."[52]

But the EC's attacks on ISDS do not stop at treaty negotiations. It has challenged the appropriateness of BIT-based ISDS between European Union member states in an investor-state case. In an unprecedented move, the EC prohibited a member-state from enforcing the award issued by an ICSID tribunal in *Micula v. Romania*.[53] In 2005, brothers Ioan and Viorel Micula initiated a case against Romania under the Sweden-Romania BIT after Romania withdrew economic incentives that harmed the Miculas' food distribution business.[54] Romania, with the support of the EC as *amicus curiae*, argued in part that the ICSID tribunal should refuse jurisdiction because Romania changed its laws for the purpose of complying with European Union competition law when Romania acceded to the EU.[55] Nevertheless, in 2013, the ICSID tribunal issued an award in the Miculas' favor and ordered Romania to pay $250 million compensation.[56] An *ad hoc* ICSID committee refused to annul the award, which Viorel Micula has been seeking to enforce in the United States and Belgium.[57] In May 2014, the EC issued an injunction to prevent Romania

49. *EU Parliament ISDS Compromise*, *supra* note 48.

50. *Id.*

51. *See* Press Release, European Commission, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

52. *Id.*

53. *See generally* Micula v. Romania, ICSID Case No. ARB/05/20, Final Award, (Dec. 11, 2013).

54. *See* Douglas Thomson, *EU Comes Down Against* Micula *Award*, GLOBAL ARB. REV. (Apr. 1, 2015), http://globalarbitrationreview.com/news/article/33691/eu-comes-down-against-micula-awa.

55. *See generally* Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 40-41 (Sept. 24, 2008).

56. *See Micula*, ICSID Case No. ARB/05/20, Final Award, ¶ 1329.

57. *See* Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 339 (Feb. 26, 2016); *see also* Alison Ross, *Twin Brothers' Award Against Romania Upheld*, GLOBAL ARB. REV. (Feb. 29, 2016), http://globalarbitrationreview.com/news/

from honoring the award.[58] Following a six-month investigation, on March 30, 2015, the EC enjoined Romania from honoring the ICSID award on the basis that it infringes EU law, which prohibits subsidies and ordered Romania to recover any money already paid.[59]

The Miculas have brought a lawsuit against the Commission in the European Court of Justice ("ECJ") to overturn the injunction against Romania. Each of the European Union's twenty-eight member-states is a signatory to the ICSID Convention,[60] which affords ICSID awards the status of final judgments in the national courts of each signatory.[61] Therefore, in the ECJ proceeding, the Commission is arguing that intra-EU BITs are incompatible with EU law.[62] At least one commentator predicts that this argument will succeed. If the prediction is correct, the commentator believes it will be "a horrific outcome for investors and for legal certainty" with negative repercussions in the global investment arbitration system including "temptation for countries like Argentina not to pay out ICSID awards."[63]

F. Criticism from the Community of Arbitration Practitioners

The public debate regarding ISDS has identified inequities in the system, including the lack of independent judges and absence of an appeals process.[64] Politicians and academics are not the only commentators concerned about the practical problems of the ISDS arbitration system. The current TPP and TTIP public debates have been accompanied by unprecedented professional criticism of the ISDS system from arbitration "insiders." Insiders question opaque arbitrator appointment processes, the revolving door between advocates and neutrals, and time constraints faced by arbitrators. These criticisms pair with recent trends in arbitration practice, including a growing number of arbitrator challenges, growing number of dissents that appear to be based in ideology and challenges to arbitral awards based on of arbitrator work delegation.

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article/34779/twin-brothers-award-against-romania-upheld/.

58. *See Micula*, ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 50.

59. *See id.* ¶ 75.

60. *See generally* ICSID Convention, *supra* note 20.

61. *See id.*

62. *See id.*

63. *Id.* (citing opinion of Nikoas Lavranos, Secretary-General of investment law think-tank European Federation for Investment Law and Arbitration). Note that Argentina has ongoing obligations in spite of its withdrawal from ICSID. *See generally Argentina settles five investment treaty awards*, ALLEN AND OVERY (Nov. 7, 2013), http://www.allenovery.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx.

64. *See* Warren, *supra* note 26; Chermerinsky Letter, *supra* note 1.

Former deputy and acting Secretary-General of ICSID Nassib Ziadé and practitioner Hamid Gharavi both recently published concerns about the credibility of ICSID itself and its practices.[65] The President of the International Bar Association ("IBA"), David W. Rivkin, went beyond the system as a whole, chastising arbitrators for failing to dedicate sufficient time and attention to their cases in order to deliver fair and timely awards.[66]

Messrs. Ziadé and Gharavi explained concerns about the annulment committee appointment process, codes of conduct for ICSID, and code of conduct for arbitrators. First, Mr. Ziadé agreed with practitioner Mr. Gharavi that arbitrators who serve on ICSID tribunals should not be appointed to annulment committees.[67] He went further to say that ICSID arbitrators should not act as counsel in ICSID arbitrations. The current practice "creates at least a perception that annulment committee members may be tempted to develop case law that would benefit their pending or potential ICSID arbitration cases."

Second, the ICSID Secretary-General has enormous powers over the annulment committee appointment process and influence over cases. Mr. Ziadé explained that appointments are made in violation of the ICSID Convention because the chairman of the ICSID administrative council (president of the World Bank), who is charged with the appointment, "invariably" relied on the recommendation of the ICSID Secretary-General. The present ICSID Secretary-General "routinely" proposes a list of arbitrators from outside the ICSID panel of arbitrators even though Article 40(1) of the ICSID Convention requires the appointment from the panel.[68] As Mr. Gharavi also noted, in practice, it is the ICSID Secretary-General who makes all appointments, which is an extraordinary power.[69] In addition to appointment powers, ICSID secretaries-general have also expressed their views about the appropriate scope of the annulment mechanism, which can have an impact on proceedings when the ICSID Secretary-General essentially has the exclusive power to appoint annulment

65. *See* Hamid Gharavi, *ICSID Annulment Committees: the Elephant in the Room*, GLOBAL ARB. REV. (Mar. 13, 2015), http://globalarbitrationreview.com/news/article/33193/icsid-annulment-committees-elephant-room/; Nassib Ziadé, *Is ICSID Heading in the Wrong Direction?*, GLOBAL ARB. REV. (Feb. 24, 2015), http://globalarbitrationreview.com/news/article/33574/is-icsid-heading-wrong-direction/. Mr. Ziadé stated that he avoided criticizing ICSID's practices for four years after he left his role there. He published his recently article regretting "to say that [his] concerns have not abated in the past four years."

66. *See* Douglas Thomson, *Rivkin Calls for "New Contract" For Arbitrators and Parties*, GLOBAL ARB. REV. (Oct. 27, 2015), http://globalarbitrationreview.com/news/article/34255/rivkin-calls-new-contract-arbitrators.

67. *See* Ziadé, *supra* note 65.

68. *See* ICSID Convention, *supra* note 20, art. 40(1); Ziadé, *supra* note 65.

69. *See* Gharavi, *supra* note 65.

committees.[70] These recommendations echo those in the TIPP public debate about independent judges.

Third, Mr. Ziadé recommended that ICSID needs its own code of conduct because staff members tend to have close "personal (if not family) links" as well as professional connections to investment arbitration professionals. For example, there is no internal guideline that would prohibit *ex parte* communications about arbitration cases between party's counsel and ICSID staff. ICSID should create a code of conduct and guidelines for arbitrators and counsel as well. For example, unchallenged arbitrators should have standard guidelines to decide a challenge against their third arbitrator.

Finally, Mr. Ziadé expressed the ultimate concern that ICSID seems unwilling to improve the system: "I decided to speak out in the hope of spurring a debate that the present leadership of ICSID seems to wish to avoid."[71]

Turning to the arbitrators themselves, Mr. Rivkin recently called out arbitrators in a keynote address at an arbitration conference in Hong Kong.[72] Mr. Rivkin reprimanded arbitrators for failing to allow sufficient time to hear and decide cases, to familiarize themselves with the facts of disputes in advance, to exercise control over counsel, to schedule deliberations soon enough after the hearing, and to deliver timely awards that address the matters in issue.[73] Observers praised Mr. Rivkin for "telling it like it is."[74]

G. Criticism of Practical Issues

Public concerns about the lack of independent judges in the ISDS system find support in practical challenges that cast doubt on the neutrality of arbitrators. First, a growing number of high-profile challenges to the appointment of arbitrators creates an appearance of bias.[75] The perception

70. *See id.*

71. *See id.*

72. *See* Thomson, *supra* note 66.

73. *See id.*

74. *See id.*

75. Notable recent examples include challenges against (1) Yves Fortier in Fábrica de Vidrios Los Andes, C.A. v. Venezuela, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal for Disqualification of Arbitrator L. Yves Fortier (Mar. 28, 2016) and ConocoPhillips Petrozuata B.V. v. Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Dec. 16, 2015); (2) Brigitte Stern in Highbury International v. Venezuela, ICSID Case No. ARB/14/10, Disqualification of Professor Brigitte Stern (Jan. 9, 2015); (3) Vaughan Lowe QC in City-State N.V v. Ukraine, ICSID Case No. ARB/14/9 (Sept. 18, 2015); and (4) Teresa Cheng in Total S.A. v. Argentina, ICSID Case No. ARB/04/1, Decision on the Proposal to Disqualify Teresa Cheng (Aug. 26, 2015).

exists that ideology affects the appointment process. Challenges rarely succeed, which casts further doubt on the effectiveness of the appointment process and the viability of the investor-state arbitration system. On October 8, 2015, however, Alexis Mourre, President of the International Chamber of Commerce ("ICC") International Court of Arbitration, communicated that the ICC will start communicating the reasons for its decisions on challenges to arbitrators.[76] It remains to be seen whether such increased transparency will alleviate the concerns.

Next, after an arbitrator survives any challenges to appointment, he or she will ultimately be in a position to challenge the final award by writing a dissenting opinion. Dissenting opinions are expressly permitted in ICSID arbitrations pursuant to Article 48(4) of the ICSID Convention.[77] The recent proliferation of dissenting opinions, however, contributes to suspicions that arbitrators are not neutral, particularly when dissenters were almost always appointed by the losing party. In fact, nearly 100% of dissents favor the party that appointed the dissenting arbitrator which raises questions of arbitrator neutrality.[78]

Skepticism of arbitrators' neutrality as dissents increase is further fed by annulments of arbitral awards—at times based on the rationales given by dissenting arbitrators. A prime example is the very recent annulment in *Occidental Petroleum v. Ecuador* ("*Oxy*") for reduction in damages of $700 million, the largest amount ever annulled by ICSID, which partly endorsed a dissent from one arbitrator.[79] Reports indicate that arbitrator

76. *See ICC Court to Communicate Reasons as a New Service to Users*, INT'L CHAMBER OF COMMERCE (Oct. 8, 2015), http://www.iccwbo.org/News/Articles/2015/ICC-Court-to-communicate-reasons-as-a-new-service-to-users/.

77. *See* ICSID Convention, *supra* note 20, art. 48(4).

78. *See* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 823 (Mahnoush Arsanjani ET. AL eds., 2011).

79. *See* Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012) [hereinafter "*Oxy*"]. In *Oxy*, the arbitrators agreed that Ecuador inappropriately terminated its participation contract with Oxy for a 200,000-hectare oil block after Oxy breached by "farming out" a 40% interest in the project to another company without approval. *Id.* ¶ 363. The arbitrators disagreed about damages: the majority decided that Oxy right to the oil block's $2.5 billion value should be reduced by 25% for Oxy's failure to seek approval for the farmout. *Id.* ¶¶ 876–77. Arbitrator Stern stated in her dissent that the majority's findings on damages were based on "grossly incorrect legal bases," with its view on Oxy's farmout agreement with the third-party "egregious." *See* Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Dissenting Opinion, ¶ 5 (Sept. 20, 2012). Stern agreed with Ecuador that Oxy's right to the oil block's $2.5 billion worth should be reduced by forty percent, the amount that Oxy sought to farm out to the third party, which was void due to its failure to seek the required approval. See *Oxy*, supra note 73 ¶¶ 876–77. *See generally* Sebastian Perry, *Ecuador Wins Record Reduction of Oxy Award*, GLOBAL ARB. REV. (Nov. 3, 2015), http://globalarbitrationreview.com/news/article/34298/ecuador-wins-

Brigitte Stern's dissent "laid out a roadmap for Ecuador's annulment arguments."[80] The increasing number of annulments can rattle the confidence of investors who are the users of investor-state arbitration. When a string of awards were annulled by ICSID in 2010,[81] some predicted a "crisis of user confidence in the ICSID system." Concerns were then allayed by a 5-year period without any annulments—until *Oxy*.

Finally, confidence in investor-state arbitration is undermined with suspicions that arbitrators improperly delegate their duties to arbitral secretaries. In *Yukos v. Russia*, Russia recently moved to set aside the arbitral awards for the Tribunal's "impermissible delegation" of its mandate to decide the case.[82] Russia submitted a forensic linguist's conclusion that the arbitral secretary, Martin Valasek, wrote a large portion of the final award, including much of the substantive analysis on the case.[83] In a system in which "writing" the decision is equivalent to "making" the decision,[84] Russia argued that this delegation is grounds for annulment of the award. Although the award was set aside on other grounds,[85] Russia's challenge is likely to resonate with other international arbitration professionals, who have voiced strong concerns about the time and attention that arbitrators dedicate to their cases.[86]

III. ISDS WILL SURVIVE

In the face of criticism from politicians, academics, states, and professionals, the ISDS system will shake but not fall. The tide of criticism may encourage states to reform ISDS provisions in future treaties, but most state actions to date demonstrate that ISDS is here to stay.

First, the United States maintained ISDS provisions in the TPP.[87] The

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record-reduction-oxy.

80. *See* Perry, *supra* note 79.

81. *See, e.g.*, Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (June 29, 2010); Enron Corp. v. Argentina, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010); Fraport AG Frankfurt Airport Servs. Worldwide v. Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (Dec. 23, 2010).

82. *See* Alison Ross, *Valasek Wrote Yukos Awards, Says Linguistic Expert*, GLOBAL ARB. REV. (Oct. 20, 2015), http://globalarbitrationreview.com/news/article/34234/valasek-wrote-yukos-awards-says-li.

83. *See id.*

84. *Id.* (quoting Klaus Peter Berger).

85. Joined cases C/09/477160 / HA ZA 15-1 and C/09/477162 / HA ZA 15-2, Rb., the Hague, 20 April 2016, (Russian Federation/Yukos Universal Limited).

86. *See* Thomson, *supra* note 66 (quoting IBA President David W. Rivkin).

87. *See* Luke Eric Peterson, *A First Glance at the Investment Chapter of the TPP Agreement: A Familiar US-Style Structure with a Few Novel Twists*, INT. ARB. REP.

agreement contains baby steps toward addressing concerns over a state's power to legislate, including a footnote clarifying that expropriation "depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of *legitimate public welfare objectives*."[88] The agreement also considers that future actions might improve transparency or provide for appeals in ISDS arbitrations.[89] Nevertheless, the agreement does not include any revolutionary provisions on these issues.

Second, although Australia distanced itself from ISDS following Philip Morris's filing of action in 2011, it has cozied back up to ISDS in recent treaty negotiations. In all treaty agreements since 2013, Australia has included an ISDS provision with only one exception. In fact, Australia participated in the negotiations for TPP, which includes a relatively traditional ISDS provision, as described above. And, Australian officials are pushing the passage of TPP for the nation's economic future: the Prime Minister, Malcolm Turnbull, has lauded TPP as a "gigantic foundation stone for [Australia's] future prosperity."[90]

Australia's return to ISDS casts doubt on whether other states will continue to keep their distance from ISDS. Indonesia, for example, also appears to have stepped away from the system in 2015, but it has not completely withdrawn from ICSID. Another state to watch is South Africa, which has taken a unique approach to ISDS by permitting only state-state arbitration in lieu of investor-state arbitration as of December 2015.[91] Time will tell if Indonesia and South Africa, like Australia, will return when public debate quiets or when ISDS becomes useful in a treaty negotiation.

Finally, even the EC's actions do not put the final nail in the ISDS coffin. The EC's proposed investment court represents a reform rather than

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(Nov. 16, 2015), https://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familar-us-style-structure-with-a-few-novel-twists/.

88. *Id.*

89. *See id.*

90. Daniel Hurst, *Turnbull: Trans-Pacific Partnership 'a Foundation Stone for Future Prosperity'*, THE GUARDIAN (Oct. 5, 2015), https://www.theguardian.com/business/2015/oct/06/turnbull-trans-pacific-partnership-a-foundation-stone-for-future-prosperity.

91. *See* Jackwell Feris, *Amended Investment Bill is Still a Concern*, BDLIVE (Dec. 7, 2015). In December 2015, South Africa's Parliament passed The Protection of Investment Bill, which represents a compromise between its former ISDS regime and a no-arbitration regime. The first draft of the bill, released in 2013, caused an outcry by precluding international arbitration by foreign investors in disputes with the state, limiting recourse to domestic courts. The final bill provides that the government "may consent" to international state-to-state arbitration when domestic remedies have been exhausted. Rather than reject all international dispute resolution options, South Africa has crafted a new tailored approach.

a repudiation of ISDS.[92] Reforms include (1) requirements that arbitrators may not act as counsel or expert witnesses, (2) assignment of arbitrators at random from a set roster, and (3) development of an appeal process.[93] Yet, in spite of the "court" terminology, the proposed system is compatible with existing arbitration processes. The proposed system might be housed at either ICSID or the Permanent Court of Arbitration.[94] Further, awards issued will continue to be governed by the New York Convention and the ICSID Convention.[95]

CONCLUSION

In 2015 and 2016, ISDS suffered an unprecedented wave of criticism from public officials, academics, and arbitration professionals across the globe in highly publicized debate. [96] The criticism spans from questions of procedural fairness to concerns about the democratic power to legislate. In response to this criticism, states will reform ISDS, but the system will remain a crucial piece in international trade treaties. Critics hoping for the demise of ISDS due to democracy concerns can take comfort that *Philip Morris Asia v. Australia* continues a string of decisions upholding the state's power to make legitimate policy decisions on behalf of its citizens. While a government that clearly acts to protect its own industry through discriminatory legislation may be sanctioned by an arbitral tribunal,[97] tribunals have consistently upheld states' legitimate use of their police powers, such as with respect to California's gasoline additive regulation in

92. *See* Luke Eric Peterson, *Europe's Latest TTIP Investment Proposal Cloaks Arbitration in Judicial Robe, Tightens Ethical Screws (Further), and Thinks Seriously about Small Claims*, INT'L ARB. REP. (Nov. 17, 2015), https://www.iareporter.com/articles/analysis-europes-latest-ttip-investment-proposal-cloaks-arbitration-in-judicial-robe-tightens-ethical-screws-further-and-thinks-seriously-about-small-claims/.

93. *See id.*; *The Trans-Pacific Partnership*, *supra* note 40.

94. *The Trans-Pacific Partnership*, *supra* note 40.

95. *See id.*

96. That criticism of ISDS is not new. For example, there have been criticisms based on reasons related to a State's power to regulate, notably with respect to public health and environment (*see* e.g., Ethyl Corporation v. Canada, UNCITRAL, Award on Jurisdiction (June 24, 1998)) where the Canadian Parliament acted to ban the import and transport of a toxic gasoline additive). Other criticisms include the fact that arbitrators are, by and large, commercial lawyers who are less likely to be mindful of the public policy consequences of their awards for developing states than to the plain reading of treaties devised by dominantly developed countries. *See* Gus Van Harten, *Investment Treaty Arbitration and Public Law*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 122– 51 (Stephan W. Schill ed., Oxford University Press, 2010). The magnitude of the current criticisms and the fact that ISDS is not an obscure mechanism living outside the public eye is, however, novel.

97. S.D. Myers, Inc. v. Canada, UNCITRAL, Award (Dec. 30, 2002), http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/SDM.aspx?lang=eng.

Methanex[98] or Canada's agricultural pesticide regulation in *Chemtura*.[99] In these cases, like in *Philip Morris*, the arbitral tribunals dismissed investors' claims in favor of legitimate government acts.

98. Methanex Corp. v. United States, UNCITRAL, Final Award (Aug. 9, 2005), http://www.state.gov/s/l/c5818.htm.

99. Chemtura Corp. v. Canada, UNCITRAL, Award (Aug. 2, 2010), http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/crompton.aspx?lang=eng.

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SALIENT FEATURES OF INTERNATIONAL COMMERCIAL ARBITRATION IN EAST ASIA: A COMPARATIVE STUDY OF CHINA AND JAPAN

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INTRODUCTION

Driven by the trend of harmonization, arbitration in East Asia reflects an increasing uniformity of local legislation. Most East Asian countries have now ratified the New York Convention and a growing number of jurisdictions in the region have amended outdated laws, adopting the principles of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). Has this trend led to the harmonization of arbitration law and practice across the region? What are the salient features of international commercial arbitration in East Asia?

Despite the harmonization of law, legal systems do not exist independently of social and cultural contexts. Arbitration is generally seen as a meeting point for different legal cultures. Some suggest that there is an emergence of an "international arbitration culture," which fuses together elements of different legal traditions.[1] Others see arbitration as a locus of conflicts among legal cultures and traditions.[2]

This paper discusses the salient features of arbitration in East Asia through case studies from Japan and China. It illustrates the recent trends of arbitration development in East Asia. It then describes how the present state of the law and practice came to be in China and Japan by examining their historical developments and contemporary practices. This paper will draw comparisons between the countries' legislation, courts, and arbitration customs. This paper summarizes the country–specific features of arbitration in Japan and China and highlights some commonalities in the conduct of arbitration within these two countries and in East Asia generally. It analyzes the cultural reasons for both the divergences and convergences in arbitration in East Asia. This paper concludes with a prediction on the future trends of development.

II. RECENT TRENDS OF ARBITRATION DEVELOPMENT IN EAST ASIA

There is a strong movement towards the worldwide harmonization of international commercial arbitration law and practice. This is largely driven by globalization. East Asia is not immune to such forces. The development of trade and investment in the region has resulted in increased

1. Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. INT'L & COMP. L. 57, 57–75 (2002).

2. *See* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS (Stefan N. Frommel & Barry A.K. Rider eds., 1999); Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT'L 121, 121 (1997).

international commercial transactions.[3] Rapid development has increased caseloads for already overburdened courts, further leading to slow adjudication of commercial disputes.[4] As a result, Alternative Dispute Resolution ("ADR") mechanisms, including arbitration, have become crucial for businesses operating in East Asia.[5] Driven by the need to resolve the ever–increasing number of international commercial disputes, East Asia has been endeavoring to improve its legal infrastructure and develop a sound environment for efficient international dispute resolution.

The broad international consensus surrounding the Model Law also drives the relevant authorities in East Asia to modernize and harmonize arbitration laws. All East Asian jurisdictions, except Taiwan, have ratified the New York Convention[6] and a growing number of East Asian jurisdictions have amended outdated laws, instead adopting the Model Law principles.[7] For example, Japan, Hong Kong, and Singapore have all adopted the Model Law with only some minor amendments.[8] South Korea and India have adopted legislation that is closely patterned after the Model Law. The relevant legislation in China and Taiwan includes important principles of the Model Law.

3. Kun Fan, *International Dispute Resolution Trends in Asia*, 10 TRANSNAT'L DISP. MGMT. 1, 2 (2013), www.transnational-dispute-management.com/article.asp?key=1970 [hereinafter Fan, *International Dispute Resolution*].

4. *Id.*

5. *Id.*

6. *See infra* Chart 1.

7. *See infra* Chart 2.

8. *See id.*

Chart 1: Signatures of East Asian Jurisdictions to the New York Convention[9]

State	Notes[10]	Signature	Ratification, accession, approval, acceptance or succession	Entry into force
China (including Hong Kong)	(a), (c), (h)		22/01/1987	22/04/1987
Indonesia	(a), (c)		07/10/1981	05/01/1982
Japan	(a)		20/06/1961	18/09/1961
Malaysia	(a), (c)		05/11/1985	03/02/1986
Philippines	(a), (c)	10/06/1958	06/07/1967	04/10/1967
Republic of Korea	(a), (c)		08/02/1973	09/05/1973
Singapore	(a)		21/08/1986	19/11/1986
Thailand			21/12/1959	20/03/1960

9. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited May 11, 2016) [hereinafter *New York Convention*].

10. *New York Convention*, *supra* note 9 ("Declarations or other notifications pursuant to article I(3) and article X(1)[:] (a) This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State; (b) With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment; (c) This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law; (h) Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. Reservations or other notifications (i) This State formulated a reservation with regards to retroactive application of the Convention. (j) This State formulated a reservation with regards to the application of the Convention in cases concerning immovable property.")

Chart 2: Legislation based on the Model Law enacted in East Asia[11]

State	Enactment	Notes[12]
Hong Kong	2010	(a), (c)
Japan	2003	
Malaysia	2005	
Philippines	2004	
Republic of Korea	1999	
Singapore	1994	(d)
Thailand	2002	

East Asia's improvements on its legal infrastructure have facilitated the region's arbitral development and as a result, regional arbitration institutions have blossomed. The most active arbitration institutions in East Asia include the Hong Kong International Arbitration Center ("HKIAC"), the Singapore International Arbitration Centre ("SIAC"), the China International Economic and Trade Arbitration Commission ("CIETAC"), the Japan Commercial Arbitration Association ("JCAA"), the Korean Commercial Arbitration Board ("KCAB"), and the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"). Many have modernized their arbitration rules with references to transnational standards such as the UNCITRAL Arbitration Rules. Some recent developments include the JCAA's amendment of its arbitration rules in 2014,[13] KCAB's amendment in 2011,[14] SIAC's amendments in 2010 and 2013,[15] and CIETAC in 2012

11. *UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited May 11, 2016) [hereinafter *UNCITRAL Model Law*].

12. *Id.* (including the following notes: "(a) [i]ndicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006[;] (b) [o]verseas territory of the United Kingdom of Great Britain and Northern Ireland[;] (c) [t]he legislation amends previous legislation based on the Model Law[;] (d) [t]his legislation has been further amended in 2001, 2003, 2005, 2009 and 2012.")

13. *See generally Commercial Arbitration Rules*, THE JAPAN COM. ARB. ASS'N, (Feb. 1, 2014), http://www.jcaa.or.jp/e/arbitration/docs/Arbitration_Rules_2014e.pdf.

14. *See generally KCAB International Rules 2011*, KOR. COM. ARB. BOARD (2011), thttp://www.kcab.or.kr/jsp/kcab_eng/law/law_02_ex.jsp (last visited May 11, 2016).

15. *See SIAC Announces Establishment of Users Council*, SIAC (Sept. 8, 2015), http://www.siac.org.sg/images/stories/press_release/SIAC-Announces-Establishment-of-Users-Council-8-Sept-2015.pdf (stating that the SIAC is currently reviewing its Arbitration Rules and that a revised version is scheduled to be released in mid-2016). *See generally SIAC Rules 2010,* SIAC, http://www.siac.org.sg/our-rules/rules/siac-

and then 2015.[16] KLRCA amended its arbitration rules in 2013.[17] The HKIAC published the revised HKIAC Administered Arbitration Rules, effective since November 1, 2013.[18]

At the same time, we can observe an impressive increase of caseloads in East Asian arbitration institutions. For instance, the CIETAC handled only thirty–seven cases in 1985, but this number increased to 850 in 2004, and has exceeded 1,000 since 2007.[19] Despite being entangled in post–split problems,[20] the CIETAC remained on top of the list of arbitration institutions in terms of the number of new cases accepted since 2001, ahead of the ICC International Court of Arbitration ("ICC"), the American Arbitration Association ("AAA"), and the London Court of International Arbitration ("LCIA"). In 2014, CIETAC handled a total of 1,610 cases, including 387 international cases.[21] The HKIAC had only nine cases in 1985, and this number increased to 280 cases in 2004, reaching its peak of

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rules-2010 (last visited May 11, 2016); *SIAC Rules 2013*, SIAC, http://www.siac.org.sg/our-rules/rules/siac-rules-2013 (last visited May 11, 2016).

16. *See generally Arbitration Rules*, CHINA INT'L ECON. & TRADE ARB. COMM'N (Jan. 1, 2015), http://cn.cietac.org/rules/rule_E.pdf.

17. *See generally Arbitration Rules*, KUALA LAMPUR REGIONAL CTR. FOR ARB., http://klrca.org/downloads/rules/english/klrca_arbitration_en.pdf (2014).

18. *See generally Administered Arbitration Rules*, H.K. INT'L ARB. CTR, http://www.hkiac.net/images/stories/arbitration/2013_hkiac_rules.pdf (2013).

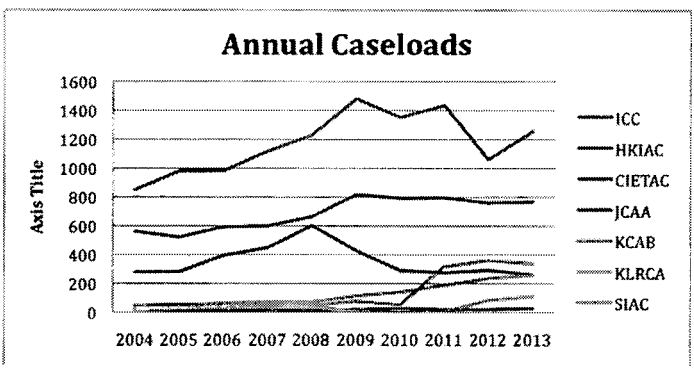
19. CIETAC's increase of caseload is partly due to the economic growth of China in recent years.

20. *China International Economic and Trade Arbitration Commission An Open Letter to All Arbitrators*, CHINA INT'L ECON. & TRADE ARB. COMM'N, http://www.cietac.org/index.php?m=Download&a=show&id=45&l=en (last visited May 11, 2016). On May 1, 2012, CIETAC Beijing announced that the Shanghai sub-commission of CIETAC had split from the Beijing headquarters. The Shanghai sub-commission of CIETAC had, without approval from CIETAC Beijing, declared itself to be an independent arbitral institution, published its own arbitral rules and adopted its own panel of arbitrators. CIETAC Beijing considered the Shanghai sub-commission's declaration of independence to be unlawful under the applicable Chinese arbitration laws and tribunals, as well as to be a violation of CIETAC's Articles of Association. Three months later, on August 1, 2012, CIETAC Beijing announced that both the Shanghai and Shenzhen sub-commissions had decided to split from the Beijing headquarters. As a result, CIETAC Beijing revoked the authorisation it had granted to the Shanghai and South China sub-commissions to accept and administer arbitration cases under the authority of CIETAC. Press Release, China International Economic and Trade Arbitration Commission, China International Economic and Trade Arbitration Commission Announcement On Issues Concerning CIETAC Shanghai Sub-Commission and CIETAC South China Sub-Commission (December 31, 2012) (on file at http://www.cietac.org/index.php?m=Download&a=show&id=42&l=en); *see also* Kun Fan, *CIETAC's Internal Conflicts: A Chronology of Events and Practical Implications*, ADR THOUGHTS (Apr. 27, 2013), https://adrthoughts.wordpress.com/2013/04/27/cietacs-internal-conflicts-a-chronology-of-events-and-practical-implications/, for a discussion of this topic.

21. Ning Fei & Shengchang Wang, *China*, ASIA-PAC. ARB. REV. (2016), http://globalarbitrationreview.com/reviews/71/sections/238/chapters/2879/china/.

602 cases in 2008.[22] Despite a decreased caseload after the financial crisis, the HKIAC's caseload remains significant.[23] In 2014, HKIAC handled a total of 252 arbitration cases, 110 of which it fully administered.[24] The SIAC, another important regional arbitration center, saw an increased caseload from twenty in 1993 to 222 in 2014.[25] According to a recent international arbitration survey, the five most preferred arbitration institutions include the HKIAC and SIAC.[26] The HKIAC is also viewed as the most improved arbitration institutions in the past five years, followed by the SIAC.[27] Chart 3 demonstrates the annual caseloads of arbitration institutions in the region compared to the ICC.

Chart 3: Annual Caseloads of Arbitration Institutions in East Asia (compared to the ICC)[28]



Furthermore, East Asian parties are beginning to play a more active role in international arbitration institutions beyond the region, as demonstrated by the ICC's statistics.[29] In 2014, there were a total of 123 East Asian parties in the newly filed ICC arbitration cases, 26.2% of which represented the Asia–Pacific Region, and 5.5% of those were ICC arbitrations that year.[30] Within East Asia, the leading parties include China

22. Fan, *International Dispute Resolution*, *supra* note 3, at 6.

23. *Id.*

24. *Case Statistics—2014*, H.K. INT'L ARB. CTR., http://www.hkiac.net/en/hkiac/statistics/39-hkiac/statistics (last visited May 11, 2016).

25. Fan, *International Dispute Resolution*, *supra* note 3, at 6.

26. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, QUEEN MARY UNIV. OF LONDON & WHITE & CASE 1, 2 (2015), http://www.arbitration.qmul.ac.uk/docs/164761.pdf [hereinafter *2015 International Arbitration Survey*].

27. *Id.*

28. Data extracted from the official websites of the CIETAC, HKIAC, ICC annual Statistical Report, KCAB annual reports and information provided by the JCAA.

29. Fan, *International Dispute Resolution*, *supra* note 3, at 7. The statistics calculation is based on the parties' nationality.

30. *See 2014 ICC Dispute Resolution Statistics*, ICC, http://store.iccwbo.org/2014-

and Hong Kong, followed by Singapore, South Korea, and Japan.[31] Even though the choice of ICC seats and the appointment of arbitrators continues to be Europe–dominated (e.g., in 2014, 65% of ICC seats were in Europe; 60.5% of the arbitrators appointed or confirmed in ICC arbitrations came from Europe), East Asian countries are beginning to gain popularity in the parties' choice of arbitration seats, as a result of their improved legal framework and court support.[32] In 1980, no ICC arbitrations were seated in East Asia; however, in 2014 this figure increased to fifty.[33] Singapore and Hong Kong have become among the top ten most popular cities for ICC arbitration seats.[34] According to the 2015 International Arbitration Study, the five most preferred and widely used seats are London, Paris, Hong Kong, Singapore, and Geneva.[35] Singapore is the most improved arbitral seat, followed by Hong Kong.[36]

As expertise in arbitration is growing in the region, East Asian arbitrators have also become much more active in international arbitrations. In 2014, forty–nine East Asian arbitrators were appointed to ICC arbitration.[37]

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icc-dispute-resolution-statistics (2015).

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *2015 International Arbitration Study*, *supra* note 26, at 2.
36. *Id.*
37. *2014 ICC Dispute Resolution Statistics*, *supra* note 30.

Chart 4: Parties, Arbitrators, and Places of Arbitration from East Asia in ICC Arbitrations in 2014 (A Country–by–country Breakdown)[38]

	Parties	Arbitrators	Places of Arbitration
Mainland China	62	10	0
Hong Kong	11		16
Indonesia	2	N/A	N/A
Japan	11	1	2
Malaysia	3	7	1
Philippines	4	2	3
South Korea	13	2	3
Singapore	15	23	24
Taiwan	N/A	N/A	N/A
Thailand	2	4	1

III. COMPARISON OF THE CONTEMPORARY ARBITRATION REGIME BETWEEN CHINA AND JAPAN

The above analysis and data show that global economic integration has led to considerable convergence of law and legal institution designs across the region, which has been driven by the wide adoption of the New York Convention and Model Law, as well as the spread of commercial arbitration facilities in East Asia. Has this trend led to the unification of arbitral practice across the region? What are the salient features of international commercial arbitration in East Asia? Is there an East Asian culture of dispute resolution?

One should bear in mind that the classification of East Asia is, to a great extent, an externally imposed category. It combines many different cultural backgrounds, languages, and regional ethnic groups. However, the combined factors of former colonial influence, voluntary borrowing, and contemporary religious or ideological influences have contributed to the divergent legal systems in East Asia. Several former British colonies follow a common law tradition;[39] others inherited civil law traditions;[40] some

38. *Id.*

39. *See* H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD 346-47 (5th ed. 2014) (stating that the common law is most visible in Hong Kong, Malaysia, and Singapore).

40. *See* Michael Pryles & Michael J. Moser, *Introduction*, *in* ASIAN LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 2 (Michael Pryles & Michael

inherited both.[41] Some countries developed a socialist legal system,[42] while others follow Islamic law.[43] Each country is at its own particular stage of development, influenced by various religious, political, and/or economic factors. Furthermore, cultural attitudes towards the law by individuals, corporations, and political elites also vary significantly within the region. The perception of what constitutes a dispute and how one reacts to it will be entirely different in Singapore than in Thailand, and different again from that in Indonesia, Japan, or China. The cultural diversity of East Asia permeates every aspect of the relationships of humans and businesses. It is therefore very difficult to identify common cultural and legal norms that are uniformly shared within East Asia.

Instead of attempting to make generalizations of culture in the region, this paper will take a microscopic approach to illustrate salient features of the current arbitration law and practice in China and Japan. As the second and third largest economies in the world, the two countries will play important roles in the development of arbitration in the region. Both China and Japan are deeply influenced by Confucian philosophy.[44] As a result, the dispute resolution mechanisms in the two countries are viewed as conciliatory, as opposed to the adversary mode utilized in the United States. The modern arbitration regimes of both jurisdictions, based on the Western model, are at a relatively early stage of development. In recent years, authorities in both jurisdictions have undertaken significant reforms to improve their arbitration legal framework. At the same time, the two countries diverge in their cultures, legal traditions, legal transplants, and contemporary political, social, and economic statuses. China and Japan can

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J. Moser eds., 2007) (citing Indonesia, Japan, South Korea, Taiwan, and Thailand as countries that inherited civil law traditions).

41. *See generally The World Factbook*, CIA, https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html (last visited May 11, 2016) (listing the Philippines as a mixture of common and civil law).

42. *See Socialist Legal Systems*, WORLD ENCYCLOPEDIA OF L., http://lawin.org/socialist-legal-systems/ (last visited May 11, 2016) (explaining that China developed a socialist legal system).

43. *See* DISPUTE RESOLUTION IN ASIA (Michael Pryles ed., 3d ed. 2006). For the classification of Asian legal systems by their predominant source of law, *see also* Yeni Salma Barlinti, *Harmonization of Islamic Law in National Legal System a Comparative Study between Indonesian Law and Malaysian Law*, 1 INDONESIA L. REV. 35, 35 (2011) (stating that Indonesia and Malaysia follow Islamic law).

44. *See* Kun Fan, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China*, 18 HARV. NEGOT. L. REV. 175, 184 (2013) [hereinafter Fan, *Glocalization*] (stating that the Chinese approach to dispute resolution was strongly influenced by Confucian philosophy); *see also* Hoken S. Seki, *Effective Dispute Resolution in United States-Japan Commercial Transactions Perspectives*, NW. J. OF INT'L L. & BUS. 979, 986 (1985) (stating that Confucian ethics have "shaped the Japanese view toward law").

thus be used as case studies of how Western principles are adopted and adjusted with their traditional dispute processing. Comparisons in this section will examine legislation, court practices, and institutional arbitration practices.

A. Japan

i. History

Historically, Japan is one of several civilizations that grew independent of, but still under the influence of, classical Chinese imperialism.[45] Thus, the Japanese civilization of the Heian period (roughly 500–1100 AD) centered on the Imperial Court, which administered the country under a Confucian ideology and methodology, emphasizing harmony and conflict avoidance.

These concepts were later radically reshaped by a purely Japanese warrior, Ethos. By 1905, Japan had defeated Imperial Russia, one of the traditional European Great Powers, earning itself respect as a Great Power in its own right.[46] In the nineteenth century, Japanese law was remade almost entirely, drawing upon Western — primarily French and German — concepts and institutions, with a characteristic Japanese twist.[47] After World War II, Americans imposed a new Japanese constitution, which once again merged purely Japanese attitudes and characteristics with foreign input.[48] Throughout this extraordinary history of change and development, Japanese law has become a 'hybrid' or 'mixed' creature, much like the Japanese lunch box (Bento). Modern Japanese law is the product of a struggle to adapt foreign ideas to Japanese values, and Japanese values to ever–changing circumstances.

ii. Legislation

Japan has recognized arbitration as a technique of dispute resolution for at least a century.[49] In 1890, the part of the Japanese legal system

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45. *See* Seki, *supra* note 44, at 985–86 (explaining that while Japan developed differently, the ancient Chinese influence still carried over into the Japanese legal tradition).

46. *See Russo-Japanese War*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/event/Russo-Japanese-War (last updated Mar. 30, 2016) (describing the Russo-Japanese War).

47. *See* Seki, *supra* note 44, at 986 ("Despite its Western European civil law roots, in the application of the laws Japanese courts and lawyers have developed institutions and procedures which are peculiarly Japanese.").

48. *See generally* Justin Williams, *Making the Japanese Constitution: A Further Look*, 59 AM. POL. SCI. REV. 665 (1965).

49. Tony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on*

pertaining to arbitration, the "Law Concerning Procedure for General Pressing Notice and Arbitration Procedure" ("Notice"), was enacted as Book VIII of the Code of Civil Procedure. The Code of Civil Procedure itself (Law No. 29 of 1890) was substantially modeled after the German Code of Civil Procedure of 1877.[50]

The Code of Civil Procedure is silent on international arbitration and the enforcement of foreign arbitration awards. After passage of the Trade Association Law of 1948 (Law No. 191), private trade associations primarily arbitrated international commercial disputes.[51] However, domestic disputes, under this 1948 law, could only be arbitrated under the Law of Arbitration in the Code of Civil Procedure.[52] Despite the Code's silence on international arbitration, Japan has entered into a number of multilateral and bilateral arbitration treaties, including the 1923 Geneva Protocol on Arbitration Clauses,[53] the 1927 Geneva Convention on the Enforcement of Foreign Arbitral Awards, the New York Convention,[54] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"). At home, no domestic legislation was passed at the time to demonstrate firm national support and provide implementing mechanisms for these conventions.

In recent years, many strongly advocated the necessity of amending the Notice due to (i) the increasingly active efforts to promote the use of ADR, and (ii) the Notice's inadequacies in resolving the large variety of disputes that exist in this modern age. Simultaneously in 1985, the United Nations Commission on International Trade Law adopted the UNCITRAL Model Law. Under such circumstances, the Ministry of Justice began a preliminary study into reforming arbitration law in 1997. The official preparation work for law reform did not start until December 2001, when the Consultation Group on Arbitration was established under the auspices of the office for Promotion of Justice System Reform of the Cabinet Office (Shiho–Seido Kaikaku Suishin Honbu, hereinafter referred to as "Reform Office").[55] The Reform Office started a study group of arbitration experts

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"Japanese Non- Litigiousness", 40 INT'L L. & POL. 29, 38–39 (2007).

50. *See* T. Doi, *Japan*, 2 INT'L HANDBOOK ON COM. ARB. 1 (1986).

51. New York Convention on the Enforcement of Foreign Arbitral Awards, Sep. 26, 1927, U.S.T. 2517.

52. Toshio Sawada, *Practice of Arbitral Institutions in Japan*, 4 ARB. INT'L 2, 120–21 (1988); *see also* Charles Ragan, *Arbitration in Japan: Caveat Foreign Drafter and Other Lessons*, 7 ARB. INT'L 2, 93–113 (1991).

53. Protocol on Arbitration Clauses, *ratified* June 24, 1928, L.N.T.S. (Sep. 24, 1923).

54. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 4739.

55. Shunichiro Nakano, *International Commercial Arbitration Under the New Arbitration Law of Japan*, 47 JAPANESE ANN. INT'L L. 96, 97 (2004).

that considered the new law and reformed it based upon the Model Law. On March 14, 2003, the Reform Office submitted a bill for the New Law to the Japanese National Diet (Japan's legislature), and the Arbitration Law of Japan, promulgated on August 1, 2003 (Law No. 138 of 2003), which came into effect on March 1, 2004.[56] The New Law, promulgated as Law No. 138 of 2003, is applicable to both national and international arbitration. The New Law has adopted the majority of the Model Law with some slight modifications.[57]

The Arbitration Law of Japan was enacted as a part of the Japanese government's efforts to enhance and promote ADR, such as methods for resolving disputes without litigation, with the purpose of making it easier for people to utilize arbitration. Provisions of the Law concerning the arbitration system are organized on the basis of the Model Law in the following major respects:

(1) Concerning the validity of arbitration agreement, writing is required as to its form, but no specific substantive requirements are set out in the statutes. An action which is brought before a court in respect to a civil dispute which is the subject of an arbitration agreement shall, if the defendant so requests, dismiss the action; unless (i) the arbitration agreement is null and void, cancelled, or for other reasons invalid; (ii) the arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement; or (iii) the request is made by the defendant subsequent to the presentation of its statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute.[58]

(2) The parties are free to agree on a procedure of appointing the arbitrators and the qualifications of arbitrators. No special qualifications are required in the statutes, apart from arbitrators' independence and impartiality.[59]

(3) In arbitral proceedings, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, provided that it does not violate the provisions of the Arbitration Law relating to public policy. Failing parties' agreement, the arbitral tribunal may, subject to the provisions of the Arbitration Law, conduct the arbitral proceedings in such manner as

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56. *See* Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?*, 7 INT'L ARB. L. REV. 54, 56 (2004); *see also* Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model Law on International Commercial Arbitration*, 17 JCAA NEWSLETTER (2004).

57. *See* Nottage, *supra* note 56, at 64; *see also* Nakamura, *supra* note 56, at 2, for a commentary on the New Law.

58. Minji soshōhō [Minsohō] [C. Civ. Pro.] 2003, art. 14, para. 1 (Japan).

59. *Id.* art. 17, ¶¶ 1, 6.

it considers appropriate.[60] Further, the arbitral tribunal or a party may apply to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary.[61]

(4) The grounds for setting aside an arbitral award are similar to the Model Law.[62] Japan acceded to the New York Convention on June 20, 1961 and it came into effect on September 18, 1961.[63] According to the Japanese Constitution, international conventions and treaties are directly treated as law without any implementing legislation and prevail over national law.[64] In addition, "if international conventions and treaties are of a self–executing nature, they are directly applicable by the Japanese courts."[65] Accordingly, the New York Convention will directly apply to the recognition and enforcement of a foreign arbitral award in Japan, as long as it falls under the New York Convention.[66]

(5) Enforcement records: Given the relatively small numbers of arbitrations in Japan, there have been only a few cases in Japan in which the court has applied the New York Convention to the enforcement of foreign arbitral awards.[67] There have not been any reported court decisions that have refused the enforcement of a foreign arbitral award under any of these conventions and treaties.[68] Indeed, the Japanese courts have consistently demonstrated a pro–arbitration approach, and have liberally granted enforcement of foreign arbitral awards.[69]

iii. Arbitration Institutions

With the exception of numerous "arbitration centers" of local bar associations, there are only a limited number of arbitral institutions in Japan: The Japan Commercial Arbitration Association (JCAA) and the Japan Shipping Exchange, Inc. (JSE). These two institutions are the only

60. *Id.* art. 26.

61. *Id.* art. 35.

62. *See id.* art. 44.

63. *Contracting States*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/countries (last visited May 11, 2016); *see also* Yasuhei Taniguchi & Tatsuya Nakamura, *Japanese Court Decisisons on Article V of the New York Convention*, 25 J. INT'L ARB. 857 (2008) [hereinafter Taniguchi, *Japanese Court Decisions*].

64. Taniguchi, *supra* note 63.

65. *Id.*

66. Nakamura, *supra* note 56.

67. *See* Hiroyuki Tezuka & Yutaro Kawabata, *Japan*, INT'L ARB. REV. 296, 302–03 (2012) (explaining Japanese trends relating to arbitration).

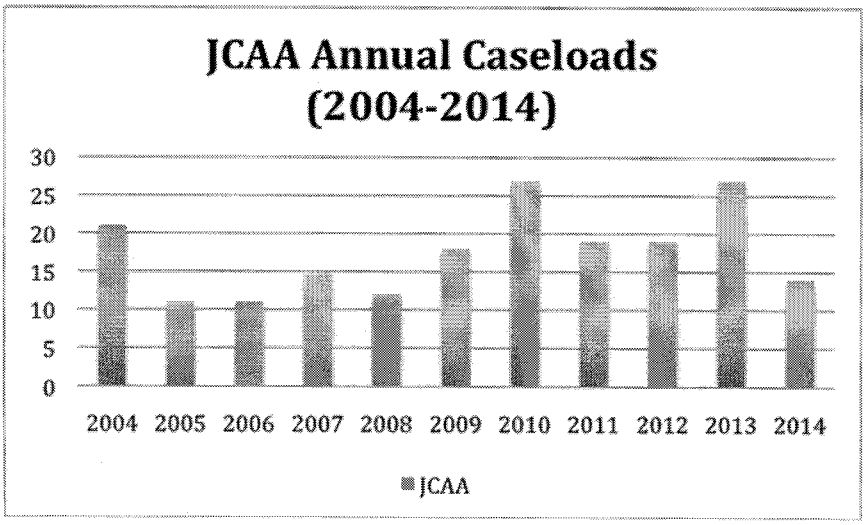
68. YASUHEI TANIGUCHI & TATSUYA NAKAMURA, NATIONAL REPORT FOR JAPAN, ICCA INT'L HANDBOOK COM. ARB. (Jan Paulsson & Lise Bosman ed. 2010) [hereinafter TANIGUCHI, NATIONAL REPORT]; *see also*, Nakamura, *supra* note 56.

69. Tezuka, *supra* note 68 at 302; *see also* Nakamura, *supra* note 56, for a record of enforcement cases in Japanese courts.

ones that handle international arbitration in Japan.[70]

The Japan Chamber of Commerce and Industry established the JCAA in 1950, in co–operation with major trade and industrial organizations.[71] The JCAA has dealt almost exclusively with international commercial disputes.[72] JCAA "[a]rbitrations are administered in accordance with the JCAA's Commercial Arbitration Rules" and the JCAA has an average of ten to twenty cases annually.[73]

Chart 5: JCAA Annual Caseloads (2004–2014)



In terms of personnel, there is one general manager and one deputy general manager, plus two staff members in the Tokyo office, as well as one general manager and one staff member in the Osaka office. On average, they handle about twenty cases in Tokyo and about five cases on average. The JCAA maintains a panel list of arbitrators. In the current JCAA Panel list, there are about 150 arbitrators from twenty–five countries (some with dual nationality).[74]

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70. Nakamura, *supra* note 56.
71. *Id.*
72. Yasuhei Taniguchi & Tatsuys Nakamura, *Japan*, *in* ARBITRATION IN ASIA 3, 30 (Michael J. Moser ed., 2d ed. 2012).
73. *Id.*; *see also* Joongi Kim, *International Arbitration in East Asia: From Emulation to Innovation*, 4 ARB. BRIEF, 1, 6 (2014).
74. Telephone Interview with Tatsuya Nakamura, JCAA (Aug. 24, 2015); email from Tatsuya Nakamura, JCAA, to author (Aug. 31, 2015) (on file with author).

In light of recent trends in the amendments of arbitration rules by other arbitration institutions, the JCAA has decided to review its institution's rules, which were last amended in 2004, and established the Rules Amendment Committee in July 2012.[75] The Committee reviewed each provision of the Rules and considered necessary improvements and new provisions.[76] After the public consultantion of the proposed amendments to the Rules, the final Rules were approved by the Board of Directors of the JCAA in December 2013, and came into effect on February 1, 2014.[77]

Some highlights of the 2014 amendments of the JCAA Rules are summarized below:[78]

- Allowing a third party to join the arbitration if certain requirements are satisfied;[79]
- Incorporating improved provisions for consolidation of the parties' various claims;[80]
- Containing new mediation rules enabling parties, by agreement, to refer their dispute to mediation any time during the arbitration;[81]
- Providing for emergency arbitrator provisions enabling a party, prior to the arbitral tribunal being constituted or when an arbitrator ceases to perform his or her duties, to seek appointment of an emergency arbitrator to grant interim measures;[82] and
- Enabling parties, within two weeks of the request for arbitration, to jointly submit their dispute to expedite procedures, regardless of the amount of relief sought.[83]

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75. *The Key Points of the 2014 Amendment to the Commercial Arbitration Rules*, JCAA (Mar. 2014), http://www.jcaa.or.jp/e/arbitration/docs/news31.pdf.

76. *Id.*

77. *Id.*

78. *See id.*

79. *Id.*; *see also* JCAA Commercial Arbitration Rules, Chapter IV Rule 52 (2014).

80. *The Key Points of the 2014* Amendment, *supra* note 75; *see also* JCAA Commercial Arbitration Rules, Chapter IV Rule 53.

81. *The Key Points of the 2014* Amendment, *supra* note 75; *see also* JCAA Commercial Arbitration Rules, Chapter IV Rule 54.

82. *The Key Points of the 2014* Amendment, *supra* note 75; *see also* JCAA Commercial Arbitration Rules Chapter V Rule 71.

83. *The Key Points of the 2014* Amendment, *supra* note 75; *see also* JCAA Commercial Arbitration Rules Chapter VI Rule 75.

B. China

i. History

Since the 11th Century BC, the Chinese legal tradition has undergone continuous development.[84] This legal tradition is distinct from the common law and civil law traditions of the West and incorporates elements of both Legalist and Confucian traditions of social order and governance.[85] Three traditional Chinese terms approximate "law" in the modern sense — Fa, xing, and lü.[86] From a chronological perspective, what we today refer to as ancient law was, during the Three Dynasties (Xia, Shang and Zhou Dynasties) referred to as "xing," during the Spring and Autumn Period and Warring States Period referred to as "fa," and during Qin, Han, and later dynasties referred to mainly as "lü."[87] The law was considered in ancient China merely as the instrument for the emperors to govern the country – which related to a compulsive and punitive imposition of order.[88] The ultimate rule of nature and human society is expressed in Chinese as li or dao ("理" or "道"), the standard of human behaviour is evaluated by li or li jiao ("礼," "礼教"), and the national system is expressed as "zhi" ("制").

During the 18th and 19th centuries, Western civilization was introduced into China, which "resulted in significant changes within the political, economic, and cultural structures of [Chinese] society."[89] During this period, "[t]he pre–existing social order was destroyed by several major political upheavals, and the legal tradition that was part of that social order was" greatly challenged by the new values, ideologies, and norms imported from the West.[90] However, traditional Chinese values will not disappear in such a short period of time.[91]

After the Qing dynasty was overthrown in 1911, China experienced trade–centered Western colonialism, which led to the "systematic

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84. *Judicial Reform in China*, EMBASSY OF CHINA IN THE UNITED STATES (2012), http://www.china-embassy.org/eng/zt/bps/t978034.htm.

85. *See* Anne Judith Farina, "*Talking Disputes into Harmony*" *China Approaches International Commercial Arbitration*, 4 AM. U.J. INT'T L. & POL'Y 137, 142 (1989).

86. Xinzhong Yao, *Fa and Law – Critical Examination of the Confucian and Legalist Approaches to Law*, http://tkugloba.tku.edu.tw/english/doc-e/AFa%20and%20Law.htm (last visited May 13, 2016).

87. *See id.*

88. *See* Farina, *supra* note 85, at 141 ("Traditional Chinese society equated 'law' or *fa* with coercion.").

89. Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, J. OF CHINESE L. 29, 32 (1989); *see also* Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State, and Social Control in China* 1, 7 (1992) (Ph.D. dissertation, University of Pennsylvania) (on file with proquest.com).

90. Xingzhong, *supra* note 89, at 32; Ren, *supra* note 89, at 3.

91. Xingzhong, *supra* note 89, at 32 (stating that traditional notions still remain influential today).

replication of Western law."[92] During this period, Western contacts pressured China to adopt economic laws that would govern trade. As a result, "the ruling Nationalists abrogated traditional Chinese law remaining from imperial times, and enacted a new body of law based largely on European–style civil law."[93]

Soon after its inception in February of 1949, "the government of the People's Republic of China (PRC) abolished the old Nationalist laws" pursuant to the "instructions" issued by the Chinese Communist Party (the "CCP"), "and began building a socialist legal system."[94] The PRC "rejected Nationalist legal theory, along with its laws, and sought to develop a new socialist legality to serve the needs of a socialist country."[95] This process entailed a campaign of criticism against Western legal theory and large–scale borrowing from the Soviet model.[96]

Pragmatists within the CCP, which had been led by Den Xiaoping since 1978, carried out an economic reform in an attempt "to generate sufficient surplus value to finance the modernization of the mainland Chinese economy."[97] Since the far–changing economic reforms, "[t]he growth has fueled a remarkable increase in per capita income and a decline in the poverty rate from 64% at the beginning of reform to 10% in 2004," indicating that about 500 million people climbed out of poverty during this period.[98] In this economic and political renewal process, many of the capitalist legal structures and concepts that early reformers sought to

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92. *Id.*

93. *Id.* at 32–33.

94. *Id.* at 29. The Instructions stated: "The judicial organs should educate and transform the judicial cadres with a spirit that holds in contempt and criticizes the Six Laws of the Nationalists and all reactionary laws and regulations, and holds in contempt and criticizes all the anti-people laws and regulations of bourgeois countries in Europe, America and Japan. To accomplish this aim, they should study and master the concepts of state and law of Marxism-Leninism and Mao Zedong Thought, and new democratic policies, programmatic principles, laws, orders, regulations and decisions." *Id.* at 33 (quoting Zhongguo Zhongyang Guanyu Feichu Guomindang de Liufa Quanshu yu Queding Jiefangqu Sifa Yuanze de Zhishi (Instructions of the Chinese Communist Party Central Committee Relating to Abolishing the Complete Six Laws of the Guomindang and Establishing Judicial Principles for the Liberated Areas) (1949), *reprinted in* 2 FAXE LILUN XUE-XI CHANKAO ZILIAO (Referencing Materials for the Study of Jurisprudential Legal Theory) 1 (1983) [hereinafter Instructions]).

95. *Id.* at 29.

96. *Id.*

97. Xu Ying, *Economic Reform in the People's Republic of China (1)*, ETEACHER CHINESE OFFICIAL BLOG, http://blog.eteacherchinese.com/history-of-china/economic-reform-in-the-peoples-republic-of-china (last visited May 13, 2016).

98. David Dollar, *Poverty, Inequality and Social Disparities During China's Economic Reform* (2007), http://china.usc.edu/sites/default/files/legacy/AppImages/Dollar.pdf; Ravallion Martin & Chen Shaohua, *China's (Uneven) Progress Against Poverty*, 82 J. DEV. ECON. 1, 8–9 (2007).

eradicate were re–introduced.[99] As a result, China's new legal system was shaped by the often "divergent pulls of models drawn from China's historical experience on the one hand, and models based on the experience of Western countries and the newly industrialized nations of Asia on the other hand."[100]

Early in the history of PRC, an arbitral organ was established to handle international commercial disputes based on the model of the Soviet Union. Arbitration otherwise received little serious consideration before the economic reforms. In 1962, a notice of the State Council "provided that disputes among state enterprises should be 'arbitrated' by local branches of the State Economic Commissions that was charged . . . with executing the five–year and yearly plans" of the Chinese government.[101] However, even though "the term 'arbitration' appeared, in reality this was not arbitration, but rather administrative handling."[102] Thereafter, the Culture Revolution intervened, preventing further experimentation with legal institutions and arbitration mechanisms did not reappear until twenty years later.[103]

As legislation defined new commercial transactions in the early 1980s, arbitration bodies were created to deal with a growing number of disputes.[104] These arbitral bodies were created on an ad hoc basis and lacked a formal legal infrastructures or unifying principles to support them. According to statistics, by the end of June 1994, there were fourteen laws, eighty–two administrative regulations, and 192 local regulations applicable to arbitration.[105] In this legislative welter, the arbitration was developed as an un–systematized assortment of institutions. Approximately twenty different types of arbitration organizations existed, all varying on fundamental issues such as the requirement of an agreement between the parties as a prerequisite to arbitration and the relationship of arbitration to mediation. Moreover, in some cases the parties could go directly to the courts.[106]

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99. Yu Xingzhong, *Legal Pragmatism in the People's Republic of China,* 3 J. CHINESE L. 29, 30 (1989).

100. Kun Fan, ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS (2013) [hereinafter Fan, ARBITRATION IN CHINA].

101. Stanley B. Lubman, *Dispute Resolution in China after Deng Xiaoping : Mao and Mediation Revisited,* 11 COLUM. J. OF ASIAN L. 229, 304 n.218 (1997).

102. *Id.*

103. Stanley Lubman, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 242 (1999) [hereinafter LUBMAN, BIRD IN A CAGE].

104. Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law & Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 421-22 (2006).

105. 谭兵：《中国仲裁制度研究》，法律出版社(1995), p17. (Research on Chinese Arbitration System)

106. Lubman, BIRD IN A CAGE, *supra* note 107, at 242.

ii. Legislation

In 1995, the Arbitration Law was implemented in China to create a new nationwide arbitration system and to diminish administrative interference in the old domestic arbitration system.[107] Many internationally recognized principles were recognized in the Arbitration Law, such as: party autonomy, independence of arbitration, and finality of arbitral awards.[108] However, the notion of control can still be found throughout the arbitration proceedings, which restricts party autonomy.[109] Administrative powers interfere with the key players of the arbitration proceedings, that is, the parties and the arbitral tribunal.[110] The salient features in the Chinese practice that differ from the Model Law approach are highlighted as follows:[111]

(1) Concerning the validity of arbitration agreement, the Arbitration Law sets out substantive requirements, namely, (a) the expression of the parties' wish to submit to arbitration; (b) the matters to be arbitrated; and (c) the designated arbitration institution.[112] An arbitration agreement failing to designate an arbitration institution will be considered invalid under the Arbitration Law. This specific requirement excludes the possibility of ad hoc arbitration in China and puts the possibility of foreign arbitration institutions administering arbitration in China in doubts.[113]

(2) The generally accepted principle of competence–competence is not recognized under the Arbitration Law of China.[114] The power to determine the validity of an arbitration agreement is vested in the Court and Arbitration Institution, instead of the individual Arbitral Tribunal.[115]

(3) The qualifications of arbitrators are specifically set out in the Arbitration Law, particularly: (a) to have been engaged in arbitration work for at least eight years, (b) to have worked as a lawyer for at

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107. Fan, ARBITRATION IN CHINA, *supra* note 100 ("The Arbitration Law of China was adopted by the 9th Session of the Standing Committee of the eighth NPC of the PRC on 31 August 1994 and came into force on 1 September 1995.").

108. *Id.*

109. *Id.*

110. *Id.*

111. *See* Kun Fan & Clarisse Von Wunschheim, *Arbitrating in China: The Rules of the Game – Practical Recommendations concerning Arbitration in China*, 26 ASA BULL. 35 (2008), for further details; Kun Fan, *Arbitration in China_Practice, Legal Obstacles, and Reforms*,19 ICC INT'L CT. OF ARB. BULL. 25 (2008).

112. ICC Rules of Arbitration, Article 16 (2009).

113. *See* Jingzhou Tao and Clarisse Von Wunschheim, *Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*, 23 ARB. INT'L 309, 309–25 (2007).

114. Fan & Wunschheim, *supra* note 111, at 37.

115. ICC Rules of Arbitration art. 20 (2009).

least eight years, (c) to have been a judge for at least eight years, (d) to have engaged in legal research or legal teaching in senior positions, or (e) to have legal knowledge and be engaged in professional work relating to economics and trade, and to possess a senior professional title or to have an equivalent professional level.[116] The legislative control went further to set the procedural rules of appointment. Article 13 of the Arbitration Law requires each arbitration institution to draw up its own panel of arbitrators according to different professions.[117] This stipulation is generally interpreted as creating a compulsory panel system in China.[118]

(4) The procedure for enforcement of arbitral awards in China depends on the type of award: "domestic," "foreign–related," or "foreign."[119] Foreign arbitral awards are enforced in China in accordance with the New York Convention. Grounds for setting aside and refusing to enforce foreign–related awards are similar to the Model Law and limited to procedural grounds.[120] When it comes to enforcing domestic awards, on the other hand, Chinese courts are allowed to review both procedural and substantive issues, on the following grounds: (1) evidence on which the forged award was based, and (2) the other party withheld sufficient evidence to affect the impartiality of the arbitration.[121]

To reduce the risk of decisions being invalidated because of local protectionism and lower court corruption, a so–called Report System[122] was established by the Supreme People's Court in 1995,

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116. *Id.* article 13.

117. Fan & Wunschheim, *supra* note 111, at 40.

118. *Id.*

119. Foreign awards are those rendered outside China (including in Hong Kong, Macao and Taiwan). Awards rendered within China will be considered either domestic awards or foreign-related awards, depending on whether a foreign element presents.

120. 1995 Arbitration Law of the People's Republic of China (promulgated by Decree No.31 of the President of the People's Republic of China, Oct. 31, 1994), art. 70-71, [hereinafter Arbitration Law]; (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1992, amended by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 274, [hereinafter Civil Procedure Law].

121. 1995 Arbitration Law of the People's Republic of China (promulgated by Decree No.31 of the President of the People's Republic of China, Oct. 31, 1994), art. 58(1), [hereinafter Arbitration Law]; (中华人民共和国民事诉讼法)[Civil Procedure Law of the People's Republic of China] art. 258 (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1992, amended by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 237, [hereinafter Civil Procedure Law].

122. *See* Press Release, Notice from the Supreme People's Court on Several Issues Regarding the Handling by the People's Courts of Certain Issues Pertaining to International Arbitration and Foreign Arbitration (Aug. 28, 1995) (on file with author); Press Release, Notice from the Supreme People's Court on Relevant Issues Relating to

under which a lower court cannot refuse to enforce a foreign–related or foreign arbitral award or deny the validity of an arbitration agreement in foreign–related or foreign arbitration proceedings without the prior examination and confirmation of the Supreme People's Court.

(5) Thanks to the Report System, some negative rulings by local courts have become accessible. In September of 2001, the Fourth Division of Civil Trials of the SPC started to publish its replies to its subordinate courts' reports on whether to refuse applications for enforcement of foreign–related and foreign arbitral awards, in a series of books named Guide on Foreign–related Commercial and Maritime Trials (from 2004 onwards) or Guide and Study on China's Foreign–related Commercial and Maritime Trials (from 2001–2003).[123] A review of such enforcement records shows that the Report System has had a positive effect in protecting foreign investors and limiting the influence of local protectionism. However, there are still inconsistent decisions by courts of different levels and regions due to the unbalanced development of the economy, legal consciousness, and the quality of judges in different regions of China.[124]

Because of the lack of a centralized registry for statistics dealing with the enforcement of arbitral awards in China, no definite conclusions can be reached as to the extent to which enforcement actions have been brought to the Mainland Courts and how successful such actions have been. In 2007, the Fourth Civil Division of the SPC conducted a sample survey on the judicial review of foreign–related and foreign arbitration by the people's courts,[125] involving courts of seventeen regions.[126] According to the survey, of the seventy–four cases for the recognition and enforcement of

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the Setting Aside of International Awards by the People's Courts (Apr. 23, 1998) (on file with author).

123. EXIANG WAN, GUIDE AND STUDY ON CHINA'S FOREIGN-RELATED COMMERCIAL AND MARITIME TRIALS 1–6, 7–18 (2003); Judge Gao Xiaoli, Fourth Division of Civil Trials, Speech at the Annual Conference of International Economic Law at the Northwest University of Politics and Law at Xi'an, Shanxi, China (Nov. 2006).

124. *See* FAN, ARBITRATION IN CHINA, *supra* note 100, at 101–13.

125. *See* Honglei Yang, *Report on the Judicial Review of International Arbitration by Chinese Courts,* 9 WU DA INT'L L. REV. (2009). The sample survey covers the following types of cases: (i) application for the confirmation of the validity of arbitration agreement; (ii) application for setting aside foreign-related arbitral awards; (iii) application for the recognition and enforcement of foreign-related awards from one party and the application for refusal of enforcement from the other; and (iv) application for the recognition and enforcement of foreign awards. Hong Kong, Macao and Taiwan awards are not included in the survey. The survey collected a total of 610 cases heard by the investigated courts between 2002 and 2006.

126. The 17 regions include: Beijing, Shanghai, Tianjin, Jiangsu, Guangdong, Liaoning, Fujian and Shandong, Hubei, Zhejiang, Hei Longjiang, Hunan, Guangxi, Hainan, Shanxi, Sichuan and Chongqing.

foreign arbitral awards heard by the Chinese courts, rulings to reject recognition and enforcement of such awards were made in only five of these cases (6.76% of the total cases).[127] The courts have made affirmative conclusions in the majority of these cases and ruled to enforce foreign awards in fifty–eight cases (78.38% of the total applications).[128] Furthermore, the survey also reflects the importance of the Report System in current judicial practice.[129] In the applications for recognition and enforcement of foreign awards, nine were rejected by the lower level courts.[130] Thanks to the Report System, four of these rejected cases were overruled by the SPC, accounting for forty–four percent of the total reported cases.[131]

According to the SPC judges, from 2000 to September 2011, a total of fifty–six cases had been reported to the SPC, in which lower courts refused to recognize and enforce foreign awards.[132] The SPC confirmed the refusal of recognition and enforcement of foreign awards in twenty–one of those reported cases: eight cases due to the lack of a valid arbitration agreement; nine cases were refused on the ground of no proper notice of the appointment of arbitrator or of the proceedings or violation of due process; two cases of partial refusal of recognition and enforcement due to partial ultra vires; and one case due to the in–arbitrability under the Chinese law.[133] In three cases the claimant's request was dismissed due to the expiration of the time limit for enforcement.[134]

iii. Arbitration Institutions

CIETAC is considered to be the leading arbitral institution for international arbitration in China, although it faces mounting competition from other domestic institutions, such as Beijing Arbitration Commission ("BAC"). Established in 1956 under the auspices of the Chinese Council for the Promotion of International Trade, CIETAC's administration was initially confined to disputes with a "foreign element."[135] However,

127. *Id.* at 306–08.

128. *Id.* at 309 (Among the 74 applications, 6 cases were withdraw upon the parties' settlement agreement, and 5 cases were pending or under other circumstances).

129. *Id.*

130. *Id.*

131. *Id.*

132. Fan, ARBITRATION IN CHINA, *supra* note 100.

133. *Id.*

134. Guixiang Liu & Hongyu Shen, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CHINA: A REFLECTION ON A DECADE OF COURT PRACTICES 10, 22–23 (2011).

135. *See* Andrea Sturini & Lorrain Hui, *Commentary on the Arbitration Rules of the China International Economic and Trade Arbitration Commission* 268, 269 (2011), http://www.maa.net/uploads/VJ/5._Sturuni_and_Hui.pdf.

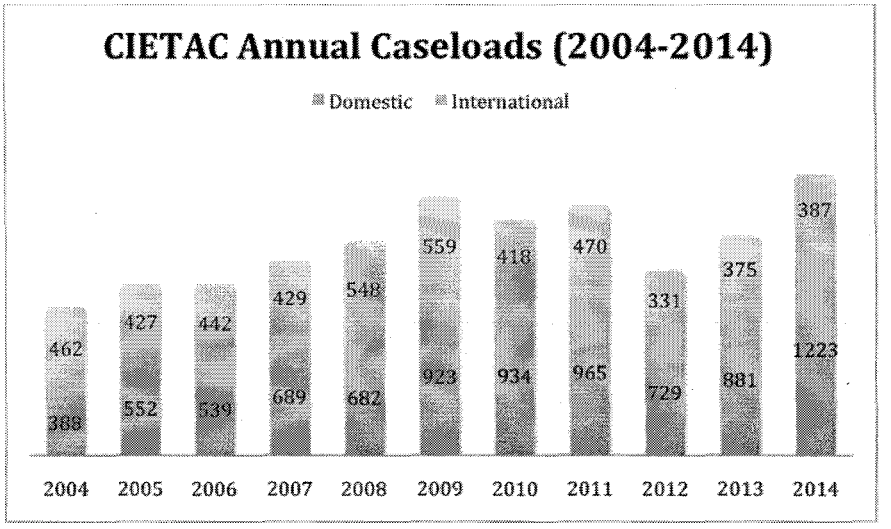
amendments to CIETAC's arbitration rules in 2000 expanded its jurisdiction to allow administration of both domestic and foreign–related disputes, as well as disputes involving no Chinese parties.[136]

CIETAC accepted a total of 1,610 cases in 2014 alone, with 1,223 domestic cases and 387 international cases, which has made CIETAC one of the most important permanent arbitration institutions in the world.[137] The 2014 caseload represents a twenty–eight percent increase (by 354 cases) from 2013.[138] In 2014, "[t]he total amount of claims of all cases accepted by CIETAC . . . reached 37.8 billion renminbi, which represents an increase of fifty–five percent or 13.4 billion renminbi from 2013."[139] These cases involved parties from forty–eight countries and regions.[140] CIETAC amended its list of arbitrators in 2014 to include 1,212 arbitrators from forty–one countries.[141]

In 2014, "CIETAC published its new Arbitration . . . which became effective as from 1 January 2015" (the "CIETAC Rules 2015").[142] The CIETAC Rules 2015 "are designed to improve the efficiency of CIETAC arbitral proceedings and bring CIETAC rules further in line with international best practice."[143] "Key amendments include provisions dealing with problems after CIETAC's split, multiparty arbitration, joinder of additional parties, consolidation of arbitration, arbitrator's power to order interim protection, emergency arbitrators, and special provisions in relation to arbitration administered by CIETAC Hong Kong Arbitration Center."[144]

136. *Id.*
137. *See* CIETAC, www.cietac.org (last visited Oct. 30, 2015).
138. Fei & Wang, *supra* note 21.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

Chart 6: CIETAC Annual Caseloads (2004–2014)



Meanwhile, the BAC is handling an increasing number of international arbitration cases.[145] On December 4, 2014, "BAC officially released its new Arbitration Rules, which took effect on 1 April 2015" (the BAC Rules 2015).[146] The eighth revision of its arbitration rules since 1995 reflect "BAC's fast growing experience in arbitration, as well as its close attention to the developments in international arbitration practice."[147] These amendments increase the flexibility of the arbitral tribunal to run arbitration hearings;[148] provide for arbitration proceedings to continue pending BAC's determination of a jurisdictional objection in the same proceedings;[149] and enlarge the scope of an arbitration agreement "in writing" so that a party's intention to arbitrate is not thwarted by a failure to comply with strict

145. *Id.*

146. *Id.*

147. *Id.*; *see also Beijing Arbitration Commission Arbitration Rules: Revision Draft Description*, BEIJING ARBITRATION COMM'M, 1 (Oct. 31, 2013) www.bjac.org.cn/images/20131211/Revision%20Draft%20Description.doc at 1.

148. BEIJING ARBITRATION COMM'N, Arbitration Rules art. 34 (2015), http://www.bjac.org.cn/page/data_dl/bjac_guize_en.pdf. ("The Arbitral Tribunal shall have the power to, depending on the circumstances of the case, determined the agenda of cases and take such various hearing measures as issuing question lists, holding pre-hearing conferences or producing terms of referenceFalse").

149. *Id.* art. 6, § 3 (The arbitration shall proceed notwithstanding any jurisdictional objection raised by any party to the BAC).

written form requirements.[150]

Other Chinese arbitration commissions were established by local provincial or city governments at various times after the first PRC Arbitration Law came into effect in 1995. There are currently over 200 such commissions. However, these arbitration commissions generally have less experience in handling international arbitration cases.

IV. SALIENT FEATURES OF ARBITRATION IN EAST ASIA

The above comparison finds that the recent reforms, in terms of legislation and institutional infrastructure in both Japan and China, have produced positive effects for the development of arbitration. It also illustrates the divergences in the conduct of arbitration in Japan and China. This section will summarize the country–specific features of arbitration in Japan and China and will highlight some commonalities in the countries' conduct of arbitration and in East Asia more generally. It also attempts to analyze the cultural reasons that contributed to divergences and convergences in the practice of arbitration in East Asia.

A. The Inactiveness of Arbitration in Japan

A curious phenomenon in cotemporary arbitration development is the sharp contrast between the drastic growth of arbitration in China[151] and the continued inactiveness of arbitration in Japan.[152]

Japan adopted a Model Law type of arbitration legislation in 2003 and has since developed strong institutional support for arbitration, including Japanese courts generally taking a pro–arbitration approach.[153] Nonetheless, arbitration has not taken off in Japan as one would expect. Although the JCAA increased its caseload slowly over the years, it has

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150. *Id.* art. 4, §§ 2–3. (stating (2) An arbitration agreement shall be in written form, including but not limited to contractual instruments, letters and electronic data messages (including telegrams, telexes, facsimiles, EDIs and e-mails) and any forms of communication where the contents are visible. (3) Where, in the exchange of the Application for Arbitration and the Statement of Defence, one party claims the existence of the Arbitration Agreement whereas the other party does not deny such existence, it shall be deemed that there exists a written Arbitration Agreement).

151. Kanishk Verghese, *Arbitration in Asia: The Next Generation?*, ASIAN LEGAL BUS. (July 1, 2014), http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation (explaining that CIETAC has attracted more than 1,000 new arbitration cases per year since 2007).

152. Lars Markert, *The JCAA Arbitration Rules 2014- One Step Forward in the Modernization of Japanese Arbitration*, JAPAN COM. ARB. ASSOC. (Oct. 2014), http://www.jcaa.or.jp/e/arbitration/docs/news32.pdf (explaining that the JCAA accepts less than twenty cases per year); *see also supra* Charts 5 & 6.

153. Herbert Smith Freehills et. al., *Japan – Law & Practice*, CHAMBERS & PARTNERS (2016), http://www.chambersandpartners.com/guide/practice-guides/location/265/7770/2188-200.

done so at a slower rate than other arbitration institutions in the region. Furthermore, international arbitration institutions administer only a few arbitrations in Japan. For instance, from 1997 to 2014 only a total of forty–six ICC arbitrations, an average of three per year, took place in Japan.[154] In contrast, in 2014 alone, ninety–four ICC arbitrations took place in France, eighty–two in Switzerland, and twenty–four in Singapore.[155]

For decades, scholars have heavily debated the reasons for Japanese non–litigiousness.[156] "Culturalists" argue that Japan is reluctant to litigate because of the Japanese culture's emphasis on the need for harmony in social relations.[157] "Institutionalists," on the other hand, insist that Japan's low litigation rates are due to the structural impediments to litigation built into the Japanese legal system, such as the high costs of litigation, the lack of lawyers and judges, the relative absence of discovery procedures, and the incredible amount of time required to obtain a judicial resolution.[158] The institutionalists' theory presents a more comprehensive picture of the Japanese legal system and may explain why Japan avoids litigation. However, the question remains: why is there a similarly low use of arbitration, which does not have such structural barriers in the court system? Some scholars argue that Japan's continuing low rate of arbitration and litigation is best explained by the "disjunction" between Japanese law and social rules, rather than institutional barriers.[159] According to this theory, "no formal dispute resolution system will be widely used where it does not conform to the social relations it is allegedly resolving."[160] One such disjunction exists between arbitration as a formalistic mechanism and the deeply rooted informal relational traditions in Japan.

However, reducing Japan's relative slow growth in arbitration to single point issues is too simplistic. The slow growth rate may be attributable to a combination of various factors, such as Japanese local culture, economic structure, and persistent organizational norms and practices within Japanese

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154. ICC Statistical Report 1997-2014.

155. ICC Statistical Report 2014.

156. *See* John Owen Haley, *The Myth of the Rluctant Litigant*, 4 J. JAPANESE STUD. 359, 366-71 (1978) (raising serious doubts to the notion of the 'non-litigiousness of the Japanese); *see also* K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 327–28 (2d ed. 1988).

157. *See e.g.*, Chin Kim & Craig M. Lawson, *The Law Of The Subtle Mind: The Traditional Japanese Conception of Law* 28 INT'L & COMP. L.Q. 491, 501–02 (1979).

158. *See* John Owen Haley, *The Myth of the Rluctant Litigant* 4 J. JAPANESE STUD. 359, 385 (1978); Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111, 116–17 (1988).

159. Tony Cole, *Commercial Arbitration In Japan: Contribution to the Debate on Japanese Non-Litigiousness* 40 N.Y.U. J. INT'L L. & POL. 29, 79–80 (2007).

160. *Id.*

corporations.

For domestic disputes, the high quality and efficiency of its domestic civil court system has made arbitration an unpopular alternative. For example, "[t]he Japanese hold their judges in extremely high esteem and regard them as sacred in the proper social order. On the other hand, arbitrators are mere private persons who are not State officials."[161] As a result, court decisions are preferred over arbitral awards, "because they are made by fair and reliable judges, whereas decisions of arbitrators do not carry the same weight."[162] For instance, in 2014, only fourteen arbitration cases were filed at the JCAA, while a total of 1,524,018 cases (civil and administrative) were filed with Japanese courts.[163] Furthermore, Japanese courts have made significant efforts to expedite civil trials and increase their capacity to deal with complex disputes.[164] With the trust for the Japanese judiciary, there seems to be less need to search for an alternative forum to resolve domestic disputes.

Where international business is concerned, the Japanese are prepared to use arbitration to resolve conflict because of its perceived neutrality.[165] Empirical evidence suggests that the majority of Japanese companies surveyed (sixty–six percent) typically include arbitration clauses in their international contracts, one or more times more so than any other dispute resolution mechanism (only twenty–seven percent include provisions subjecting a prospective dispute to international litigation).[166] However, Japanese companies have been prone to agree to arbitration with an arbiter outside Japan. The growing investments of Japanese companies overseas may also undermine the incentives to press for the use of Japanese substantive law and Japan as the seat of arbitration for resolving cross–border disputes involving Japanese interests.[167] Another reason might be that at the time of contract, Japanese companies do not pay enough

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161. Russell Thirgood, *A Critique of Foreign Arbitration in Japan* 18 J. INT'L ARB. 177, 178–79 (2001).

162. *Id.*

163. Statistics are provided by the JCAA.

164. Yasuhei Taniguchi, *The Development of the Adversary System in Japanese Civil Procedure*, *in* LAW IN JAPAN: A TURNING POINT 80–98 (Daniel H. Foote, ed., 2007); Tatsuya Nakamura & Luke Nottage, *Arbitration In Japan* 1, SYDNEY L. SCH. (2012), http://ssrn.com/abstract=2070447.

165. Thirgood, *supra* note 161 at 178–79.

166. In order to investigate the Japanese corporations' attitudes and practices towards international arbitration, two surveys were conducted by the JCAA in 2007: one based on a total of 296 responses of Japanese companies in Japan, another based on a total of 57 responses from Japanese subsidiaries in Europe. For an analysis of the surveys. *See* Michael Allan Richter, *Attitudes and Practices of Japanese Companies with Respect to International Commercial Arbitration: Testing Perceptions with Empirical Evidence*, 8 TRANSNAT'L DISP. MGMT. (2011).

167. *See generally* Nottage, *supra* note 56.

attention to the dispute settlement clauses.[168]

It is important to note that incorporation of an arbitration clause into the contract does not necessarily mean that arbitration will be used to ultimately resolve the disputes. Empirical survey data shows that Japanese companies typically resolve approximately eighty–three percent of all their international commercial disputes through negotiated settlements. Furthermore, a significant number of Japanese companies (37.5%) have filed for arbitration in order to further settlement negotiations.[169] Such behavior may be explained by the "persistent organizational norms and practices within Japanese corporations."[170] When disputes arise, Japanese corporate executives' first choice would still be to settle it amicably through negotiation. As top corporate executives are often ignorant about arbitration, the responsibility rests upon the legal department staff, who is hesitant and wants to avoid the risk of losing arbitration by settling the dispute amicably, sometimes with large concessions. According to Professor Taniguchi, "this is a part of the Japanese corporate culture which has been basically unchanged for decades or for a century despite a radically changed business environments in which they operate."[171] In this way, he describes "the Japanese corporate dispute resolution culture has affinity with the conciliation culture, but, in a peculiar way, also with the litigation culture. Arbitration culture is not yet well accepted in the Japanese business society."[172]

Such corporate behavior—the reluctance of Japanese companies to initiate arbitration— is arguably related to cultural factors such as Japan's reputation for being traditionally dispute–averse and its preference for amiable settlements. Traditionally, the Japanese prefer extra–judicial and informal means of settling disputes. A face–saving, mutually agreeable compromise is much more acceptable than confrontational forms of dispute resolution.[173]

As a result, even though the structural barrier is lifted with Japan's modernization of arbitration law and strong institutional support, arbitration is still not widely used today. Even when the Japanese parties agree to incorporate an arbitration clause into their contract, they will first seek a negotiated settlement when a dispute actually arises.

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168. Yasuhei Taniguchi, *Arbitration Cultural Revisited 18 years later*, Workshop on "Towards A Theory of Arbitration", co-hosted by the Faculty of Law, Chinese University of Hong Kong and Harvard Yenching Institute (June 27–28 2014).

169. Richter, *supra* note 166.

170. Nottage, *supra* note 56.

171. Taniguhi, *supra* note 168.

172. *Id.*

173. Thirgood, *supra* note 161, at 178–79.

B. Top–Down Approach of Arbitration in China

Another noticeable feature is the unique practice of arbitration in China, which differs from transnational standards. "While China considered, but ultimately decided against, adopting the Model Law, a number of its key principles are nonetheless reflected in the 1995 legislation."[174] China's Arbitration Law has "made an important contribution by unifying the previously scattered legislative enactments governing arbitrations in China."[175] Nevertheless, restrictions on party autonomy and elements of state control can also be found in various aspects of arbitration in China. For example, ad hoc arbitration is not allowed, the appointment of arbitrators is restricted by statutory qualifications and a compulsory panel system, and enforcement of arbitral awards are sometimes influenced by local protectionism. Traces of extensive state control can be found along the whole process of arbitration, from the arbitration agreement, to the constitution of the tribunal, and the court review of arbitral awards.

Furthermore, strong administrative features exist in institutional practice in China. The starting point of institutional arbitration in China is the role of the institution, which acts as the guardian of rights and the quality control of the arbitration.[176] This practice is not entrusted to individuals in the role of the arbitrators. As a result, government control and administrative influence can be gleaned in the following aspects of institutional arbitration in China:

- Unilateral institutional arbitration makes it impossible for parties to escape institutional control through ad hoc arbitration;
- Chinese arbitration institutions are generally more "institutional" than any other international arbitration institutions; and
- Chinese arbitration institutions are still subject to administrative influence and government control in terms of their establishment, financial resources and personnel.

State control over institutional practice can be explained through the metaphor of a "bird in a cage," in which the state functions as a cage and captures all business activities (the birds) within the cage.[177] In other words, the freedom to contract only extends to the boundaries of the cage established by the state.[178]

Given that the notion of "individual rights" is not emphasized in the Chinese tradition, the law in China comes from above. The Chinese

174. Pryles & Moser , *supra* note 40, at 11.

175. *Id.* at xxiii.

176. *See* Fan, ARBITRATION IN CHINA, *supra* note 100.

177. Lubman, BIRD IN A CAGE, *supra* note 103.

178. Fan, ARBITRATION IN CHINA, *supra* note 100.

system begins with the state as a guardian of rights and the quality control of arbitration as a "public" means of dispute resolution.[179] This top–down notion casts a long shadow on the way arbitration is conducted in China.[180]

C. *The Wide Use of Mediation in Arbitration Proceedings*

In the context of arbitration, the combination of mediation and arbitration are widely adopted and viewed favorably in both Japan and China. Such attitude is indeed shared in many other East Asian jurisdictions.

In Japan, Article 38 of the Japanese Arbitration Act provides that "an arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subject to the arbitral proceedings, if consented to by the parties."[181] Article 54 of the latest JCAA Rules 2014 contains detailed provisions concerning mediation: "the Parties, at any time during the course of the arbitral proceedings, may agree in writing to refer the dispute to mediation proceedings under the International Commercial Mediation Rules of the JCAA (the "ICMR")"; however, "no arbitrator assigned to the dispute shall be appointed as mediator, except if appointed under Rule 55.1."[182] If an Arbitrator serves as a Mediator, Article 55.1 provides Special Rules for the ICMR, which allows the parties to agree in writing to appoint an arbitrator, assigned to the same dispute as a mediator, and refer the dispute to mediation proceedings.[183] Further, Article 55.1 provides that, "the Parties shall not challenge the arbitrator based on the fact that the arbitrator is serving, or has served, as a mediator," since the amendment of the JCAA Rules.[184] There has not been any case where a different person carried out mediation. In roughly twenty to twenty–five percent of the JCAA Arbitration proceedings, arbitrators have acted as mediators in order to facilitate settlements.[185]

In terms of parties' attitudes, Japanese parties easily accept the same person acting as both a mediator and an arbitrator. Empirical research shows that most Japanese practitioners (seventy–six percent) felt that arbitrators' suggestions of settlements were generally appropriate. This figure is higher with domestic practitioners (ninety–five percent) than with international practitioners (sixty–five percent). Similarly, a total of seventy–four percent of Japanese practitioners (eighty–five percent of

179. *Id.*

180. *Id.*

181. JCAA Commercial Arbitration Rules art. 38.

182. *Id.* art. 54.

183. *Id.* art. 55.1.

184. Interview with Tatsuya Nakamura, Secretary General of the JCAA, & Toshiyuki Nishimura, case manager JCAA (Aug. 24 2015).

185. *Id.*

domestic practitioners, sixty-five percent international practitioners) consider it appropriate for the arbitrators to conduct conciliation with the parties' consent.[186] According to the JCAA, because Japanese judges frequently act as mediators in court proceedings, Japanese parties are accustomed to having the same person act as both the settlement facilitator and decision maker.[187] When arbitrators do facilitate settlement, Article 55.2 of the JCAA Rules 2014 provides that "an arbitrator who serves as mediator in regard to the same dispute shall not consult separately with any of the Parties orally or in writing, without the agreement of the Parties in writing." In actual practice, arbitrators still frequently use caucus. [188]

In China, judges customarily promote settlement to relieve heavy caseloads and reduce costs.[189] The legal basis for judges to mediate disputes can be found in Civil Procedure Law, which provides that "when adjudicating civil cases, the people's courts may mediate the disputes according to the principles of voluntariness and lawfulness."[190] Following court practice, promotion of settlement by arbitrators is admissible and actively encouraged under Arbitration Law. Article 49 of Arbitration Law allows parties to settle disputes on their own, notwithstanding the commencement of arbitration proceedings. Article 51 of Arbitration Law provides that "[t]he arbitration tribunal may carry out conciliation prior to giving an award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly." Most institutional rules in China expressly allow a combination of mediation and arbitration.[191] The CIETAC Arbitration Rules 2015, for instance, allow the arbitral tribunal to commence mediation in the process of arbitration proceedings upon the parties' agreement.[192] Article 42 of the BAC Arbitration Rules 2015 gives parties the option to choose conciliation by the Tribunal, which allows the arbitration tribunal to conciliate the case in such a manner as it considers

186. A survey on the linkage of arbitration and mediation, conducted in June–July 1999 with members of JCAA and the Japan Shipping Exchange (JSE), in-house counsel for companies, scholars and *bengoshi* (lawyers). *Id.*, 319-21. Due to the limitation of samples, quality of the method and the lapse of time, the survey could not provide conclusive evidence. However, as the population of arbitration practitioners is still small in Japan, and almost all the leading figures replied, the survey may still illustrate some general attitude for the purpose of this work, qualified by a future comprehensive survey.

187. *Id.*

188. Interview with Nakamur & Nishimura, *supra* note 184.

189. Fan, ARBITRATION IN CHINA, *supra* note 100.

190. Code of Civil Procedure (民事诉讼法) (promulgated by National People's Congress, 1991, effective 2012) art. 9 (China).

191. Fan, ARBITRATION IN CHINA, *supra* note 100.

192. China Int'l Econ. & Trade Arb. Comm'n Arb. Rules, art. 47(1) (2015).

appropriate.[193] Article 43 allows for Independent Conciliation, which is conducted by mediators at the Mediation Center of the BAC (the "Mediation Center") in accordance with the Rules of the Mediation Center.

In actual practice, according to a series of interviews with Chinese practitioners conducted by Professor Gabrielle Kaufmann–Kohler and the author during a research trip, Chinese arbitrators systematically offer the parties mediation as an alternative.[194] If the parties agree, the arbitrator will act as a mediator. If mediation fails, the arbitrator will then shift back into the role of an arbitrator and render a binding decision. A subsequent online survey conducted by the author in November of 2011 and April of 2012 confirms this finding.[195] 88.9% of the respondents considered that it is appropriate for arbitrators to facilitate settlement.[196] In actual practice, a majority of arbitrators have attempted mediation during arbitration proceedings.[197] Fifty percent of respondents have proposed mediation to parties in over ninety percent of the cases in which they act as arbitrators.[198] The survey also shows that Chinese arbitrators consider the combination of

193. BEIJING ARBITRATION COMM'N, art. 42 (2015).

194. *See* Gabrielle Kaufman-Kohler & Kun Fan, *Integrating Mediation into Arbitration: Why it Works in China*, 25 J. INT'L ARB. 479 (2008) (The research trip was conducted while the author worked at the Geneva University Law School on a research project on international arbitration in China. The research project was directed by Prof. Gabrielle Kaufmann-Kohler and funded by the Swiss National Science Foundation. The arbitrators interviewed were among the most frequently appointed at the CIETAC, Beijing Arbitration Commission (BAC) and Wuhan Arbitration Commission (WAC), who have extensive experience in international arbitration in China).

195. See Kun Fan, *An Empirical Study on Arbitrators Facilitating Settlement in China*, 15 CARDOZO J. CONFLICT RESOL. 777 (2014) (Between November 2011 and April 2012, the questionnaires were distributed to more than 100 Chinese arbitrators sitting on the panel of the CIETAC and the BAC with the kind assistance of the CIETAC and the BAC and by the author's direct distribution to arbitrators by email. A total of thirty-eight responses were received. After filtering out two incomplete responses, the analysis was based on thirty-six complete responses. From a statistical point of view, thirty-six responses was not a very large sample. It should be emphasized that the target of our survey was limited to 'active' arbitrators, who have actual arbitration experience. Counsels without the experience of acting as arbitrators were excluded from the survey. Those who are on the panel list but have never acted as arbitrators were also excluded. To put this number into perspective, despite the large number of arbitrators on the panel lists of arbitrators from numerous arbitration institutions, only a small portion are frequently nominated by the parties or appointed by the arbitration institutions. The reason is obvious: the arbitration is as good as the arbitrators. Parties, advised by their lawyers, generally have their own list of active arbitrators who they trust to have extensive experience and a good reputation. The same concern applies when arbitration institutions are called upon to appoint arbitrators on the parties' behalf).

196. *Id.* at 805.

197. *Id.* at 791.

198. *Id.*

mediation and arbitration as being reflective of traditional culture.[199] When arbitrators propose the use of mediation, both the surveyor and the interviewer show a wide range of variation in the percentage of positive responses from both parties.[200] Generally, the percentage is higher when both parties are Chinese than when a foreign party is involved.[201] When both parties are Chinese, the mean response is 54.65%, and the median is 59.50%.[202] When a foreign party is involved, the mean response is 37.50%, and the median is 19.50%.[203]

The general public's cultural attitude towards dispute resolution may explain such behavioural patterns in China and Japan's conduct of arbitration. The concept of conciliation and arbitration were not clearly distinguished in Japanese and Chinese minds. Even though the term "arbitration" did appear in traditional Japanese society, it appears as "arbitrary conciliation" or "conciliatory arbitration," and is used as a kind of reconcilement. Kijien, one of the most popular Japanese dictionaries, states that "conciliation means arbitration" in daily use.[204] Arbitration is understood to be closer to conciliation than litigation in Japanese culture.[205] Similarly, in traditional Chinese society, the function of the dispute resolver (family heads, clan heads, village leaders, guild leaders, or other elders) was neither equivalent to the role of a mediator nor that of an arbitrator defined in the Western context.[206] Sometimes their role resembled that of an arbitrator, who heard the arguments of the parties, looked into the evidence, and handed down a decision.[207] Although not directly enforceable as a judgment, such decisions were often respected by the disputing parties, as it was considered dishonorable to disobey the elders.[208] However, before the dispute reached the stage of decision–making, the dispute resolver often first adopted a conciliatory role and suggested ways in which the disputants could come to a compromise or

199. *Id.* at 811.

200. *Id.* at 792.

201. *Id.*

202. *Id.*

203. *Id.*; *see also* Kaufman-Kohler & Fan, *Integrating Mediation into Arbitration: Why it Works in China*, *supra* note 194.

204. Niiimura (ed.), Kijien (Tokyo, *Iwanami Shoten*, 5th ed.1998), referred to in SATO (2001), 236.

205. Yasunobu Sato, COMMERCIAL DISPUTE PROCESSING AND JAPAN 316 (2001).

206. Kun Fan, *Cultural Dimensions, Psychological Expectations and Behavioral Patterns in Arbitration* (last visited May 15, 2016), http://www.brunel.ac.uk/__data/assets/pdf_file/0008/299528/Cultural-Dimensions,-Psychological-Expectations-and-Behavioral-Patterns-in-Arbitration_Fan-Kun.pdf [hereinafter Fan, *Cultural Dimensions*].

207. *Id.*

208. *Id.*

suggested possible solutions satisfactory to both disputing parties.[209] In that sense, their role may be comparable to that of a mediator, who assists the parties to arrive at a satisfactory settlement.[210] With that blurring in notion, the same person assuming the role of a mediator and later the role of an arbitrator, is also culturally acceptable by the arbitrators and parties in both Japan and China.

Many other institutional rules in East Asian jurisdictions also allow the arbitrators to assume the role of mediators. The International Arbitration Act of Singapore expressly provides that the arbitrator may act as a conciliator if all the parties consent in writing and for so long as no party withdraws its consent in writing.[211] In Hong Kong, the Arbitration Ordinance (Cap 609)[212] also contains express provisions on the power of an arbitrator to act as a mediator, if this is stipulated in an arbitration agreement.[213] In Korea, the KCAB Arbitration Rules allow mediation to be conducted by a mediator listed on the KCAB's panel of arbitrators before arbitration proceedings start.[214] In India, the Arbitration and Conciliation (Amendment) Ordinance 2015[215] provides that "it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the

209. *Id.*

210. *See* Fan, *Glocalization*, *supra* note 44, for a detailed discussion on the conceptual difference between arbitration and mediation in China and in the West.

211. Int'l Arbitration Act, art. 17(1) (2005).

212. The Hong Kong Arbitration Ordinance (Cap 609) was approved by the Hong Kong Legislative Council on 10 November 2010. It came into effect on 1 June 2011, replacing the existing Arbitration Ordinance (ch 341). The Ordinance draws heavily on the Model Law, with certain modifications (and additions) which reflect the specific features of arbitration in the region. The current Arbitration Ordinance (Cap 609) has unified the domestic and international arbitration regimes and provides for an opt-in mechanism to retain the rights formerly granted to parties to domestic arbitration for seeking the assistance of the Court of First Instance on certain matters. The opt-in mechanism gives rise to doubts as to whether parties to a domestic arbitration agreement which specifies the number of arbitrators would still be able to seek the Court's assistance. On 23 January 2015, the Arbitration (Amendment) Bill 2015 was introduced into the Legislative Council, in order to remove such legal uncertainties and to update the list of parties to the New York Convention. The Arbitration (Amendment) Ordinance 2015 (Ordinance No. 11 of 2015), was enacted by the legislative council on 17 July 2015.

213. Arbitration Ordinance, sec. 32(3)(a) (2014).

214. KOREAN COMMERCIAL ARBITRATION BD., Int'l Arbitration Rules of KCAB, art. 18 (2011).

215. The Indian Government has taken steps to implement long awaited arbitration reforms by promulgating an ordinance, the Arbitration and Conciliation (Amendment) Ordinance 2015, amending the Arbitration and Conciliation Act 1996. Although the Ordinance is effective immediately, it will need Parliamentary approval in the upcoming session.

arbitral proceedings to encourage settlement."[216] The Bangladesh Arbitration Act contains a similar provision.[217]

Empirical research has also illustrated a regional variation in the role of arbitrators in settlement facilitations, showing East Asian arbitrators' tendency to play a more active role in settlement interventions in arbitration proceedings.[218] The survey revealed that a significantly higher number of respondents working in East Asia (eighty–two percent) saw the facilitation of voluntary settlement as one of the goals of arbitration, in comparison to sixty–two percent of practitioners working in the West.[219] More than forty percent of practitioners working in East Asia report regularly suggesting settlement negotiations to the parties, in comparison to sixteen percent of their counterparts working in the West.[220] Similarly, over thirty percent of practitioners working in East Asia reported that arbitrators regularly participate in settlement negotiations, in comparison to sixteen percent of those surveyed working in the West.[221]

This common attitude in East Asia may be explained by the deeply rooted "conciliation culture,"[222] comprising a variety of forms, which has flourished in the region for centuries. The "conciliation culture . . . stems from a deep mistrust in any pre–set rules of law and the concept of right as an absolute entitlement."[223] The belief is that no such general rules can deal with every aspect of complicated human relations.[224] A just solution must take into account the particularities of each case.[225] A conciliatory process offers a socially and individually satisfactory result and is thus a

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216. Arbitration and Conciliation Act, art. 30(1) (1996).

217. Arbitration Act, art. 22(1) (2001).

218. *See* Christian Buhring-Uhle ET AL., ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS (2d ed. 2006) (Shahla Ali's 2006–2007 survey covers practitioners across the region, with a focus on practitioners from East Asia (77 respondents, 75 %) and a small portion from the United States and Europe (26 respondents, 25 %). Close to 250 surveys were distributed to arbitrators, academics, attorneys and in-house counsel, and a total of 115 individuals responded. Ali's survey was essentially based on the questionnaires developed by Bühring-Uhle) ; Shahla F. Ali, *The Morality of Conciliation: An Empirical Examination of Arbitor "Role Moralities" in East Asia and the West*, 16 HARV. NEGOT. L. REV. 1 (2011) (providing information on the attitudes of practitioners working in East Asia regarding the role of arbitrators in the settlement process).

219. Ali, *supra* note 219.

220. *Id.*

221. *Id.*

222. This symbolic dichotomy is used for the sake of illustration of cultural trends. The reality is more complex.

223. Grant L. Kim, *East Asian Cultural Influences*, *in* ASIAN LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 17, 27 (Michael Pryles & Michael J. Moser, eds., 2007).

224. *Id.*

225. *Id.*

preferred way to reach a just solution.[226] Under such an ideology, it is not socially acceptable to sue in order to win one's right without first giving the other party the opportunity to find a reasonable solution.[227] Influenced by the local culture emphasizing conciliation to maintain harmony, arbitrators are generally viewed as individuals, familiar with the parties and their dispute, who will not only end their dispute, but also assist them in reaching a mutually agreeable solution and restore harmony. Thus, the role of a settlement facilitator and that of a decision–maker is not clearly distinguished and can be combined in Asian minds. As a result, the combination of mediation and arbitration is generally recognized and widely practiced in East Asia, in both common law and civil law jurisdiction.[228]

CONCLUSION

Many jurisdictions in the region have made continuous efforts to introduce the best innovations in policing and enhancing global arbitration standards. Through these innovations, coupled with East Asia's growing economic power and industry expertise, the arbitration community in the region is on track to build East Asia as an arbitration hub, providing relevant practices and expertise that are unmatched in any other region in the world.

The comparison between arbitration in Japan and China illustrates the country specific features of arbitration practice, despite the general trend of harmonization. Still, local culture continues to play an important role in the contemporary development of arbitration.

In order to further promote international commercial arbitration in Japan, China, and across the region, it is important to consolidate the efforts of all stakeholders (in different sectors, public and private, domestic and international), to enhance the legal and institutional infrastructure, to understand the cultural differences, and to enhance collaborations in terms of professional training and arbitration of arbitrators.

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226. Fan, *Cultural Dimensions, supra* note 206.

227. Yasuhei Taniguchi, IS THERE A GROWING INTERNATIONAL ARBITRATION CULTURE? - AN OBSERVATION FROM ASIA 36 (Albert Jan Van Den Berg ed. 1996).

228. *See* Fan, ARBITRATION IN CHINA, *supra* note 100., for a comparative study on the law and practice of arbitrators facilitating settlement.

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THE INTERFACE BETWEEN ARBITRATION AND THE BRUSSELS REGULATION

DR. FILIP DE LY*

INTRODUCTION

On January 10, 2015, a revised version of the Brussels I Regulation on international jurisdiction and recognition and enforcement of judgments entered into force[1] replacing the original regulation of 2000 (old Brussels Regulation).[2] The new regulation is also referred to as the Brussels Regulation Recast, EEX Ibis or Ibis Brussels. By virtue of article 66, it applies only prospectively *i.e.,* in respect of legal proceedings instituted on or after 10 January 2015. The Brussels I Regulation applies to all Member

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1. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2012 O.J. (L 351) (recast) 1-32 (Eur.) [hereinafter Brussels Regulation].

2. Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2001 O.J. (L 12) of January 16, 2001, 1-23 (Eur.) [hereinafter Old Brussels Regulation].

States of the European Union including Denmark.[3]

The amendment to the old Brussels Regulation has not yet led to an adjustment of the Lugano Convention of 2007[4] (also called the Parallel Convention) so that in relations with Norway, Switzerland and Iceland different rules and solutions than those under the Brussels Regulation may apply.

In this article, the Brussels Regulation is discussed and analyzed in its relation to arbitration in view of some relevant amendments and the questions and problems that they raise. During the negotiations on the new regulation, it was precisely this relationship that caused many controversies and heated debate in the arbitration community. For a better understanding of these questions and problems, some fundamental questions also need to be addressed as they are relevant for the discussion on the amendments brought about by the new regulation and the identification of remaining issues.

The basic question is, in this respect, how the exclusion of arbitration in article 1, second paragraph under (d) of the Brussels Regulation is to be interpreted and applied. This contribution, thus, in essence concerns the interpretation of a single word of the Brussels Regulation. This provision reads as follows:

> "This Regulation shall not apply to:
>
> . . .
>
> d) arbitration
>
> . . ."[5]

The legislative history of this provision is discussed first in relation to the earlier versions of the Brussels system as of its original manifestation in 1968. This article then discusses the case law of the Court of Justice (now the Court of Justice of the European Union) concerning this provision. In a

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3. Brussels Regulation, *supra* note 1, at 5. Denmark is not formally bound by the old Brussels Regulation and the Brussels I Regulation. Denmark and the European Union, however, concluded on October 19, 2005 an Agreement in Brussels to the effect that the Brussels I Regulation will also apply for Denmark (O.J. L 299, November 16, 2005, 62-67). By letter dated December 20, 2012, Denmark has indicated its commitment to be bound by the Brussels I Regulation (O.J. L 79 of March 21, 2013, 4).

4. Brussels Regulation, *supra* note 1, at 19; Lugano Convention of September 16, 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of November 25, 1988, O.J. (L 319), 9-48 (Providing that pursuant to entry into force of the old Brussels Regulation, this treaty was revised to align it with the text of the old Brussels Regulation. This led to a new Lugano Convention of October 30, 2007 O.J. (L 146) of June 10, 2009) which, as of May 1, 2011, applies to all Member States of the European Union (including Denmark), Norway, Switzerland and Iceland. For the explanatory report on the revised Lugano Convention of professor Pocar, *see* O.J. C 319, December 23, 2009, 1 ff).

5. Brussels Regulation, *supra* note 1, at art.1(2)(d).

third section, the negotiations on the arbitration exception at the occasion of the recasting of the Brussels Regulation will be summarized as well as the various proposals presented leading to the final solution of the new regulation. Finally, this solution is analyzed and a number of problems raised by the Regulation or unsettled by it will be discussed.

II. FROM THE 1968 BRUSSELS CONVENTION TO THE 2000 BRUSSELS REGULATION

Article 1, second paragraph of subsection (4) of the original 1968 Brussels Convention[6] provided already simply that it did not apply with respect to "arbitration." From this, one could infer that both the jurisdiction and the recognition and enforcement rules of the 1968 Convention were separate from any rules applicable in or in relation to arbitration. The explanatory report to the 1968 Convention of an official of the Belgian Ministry of Foreign Affairs, *Jenard*, in this respect made reference to international conventions on arbitration and to the Uniform Law of the Council of Europe on arbitration.[7] On that basis, the *Jenard* report drew the conclusion that the 1968 Convention did not apply to (1) the recognition and enforcement of arbitral awards; (2) the determination of international jurisdiction of national courts in disputes concerning arbitration such as setting aside procedures; and (3) the recognition of judgments of national courts concerning disputes in relation to arbitration.[8] Outside the arbitration context, the *Jenard* report stated in general terms that the exclusions as to the application of the 1968 Convention were to be determined on the basis of the primary object of the proceedings and the exclusions were, thus, inapplicable if they only related to subsidiary points in the main proceedings or were raised only in preliminary proceedings.

Following the accession of Denmark, Ireland and the United Kingdom to the European Economic Community (EEC), the new Member States also joined the 1968 Convention which was renegotiated and amended.[9]

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6. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 Sept. 1968, 1968, O.J. (L 299) Title I 32-45 (Eur.) [hereinafter Brussels Convention] (signed at Brussels on September 27, 1968).

7. Council Report of the Convention on Jurisdiction and the Enforcement of Judgments on Civil and Commercial Matters of 27 Sept. 1968, O.J. (L 59), 13 (Eur.) [hereinafter Brussels Convention Report]; Convention of January 20, 1966, signed in Strasbourg, ETS 1966, 56 (providing the uniform law was only introduced by Belgium in 1972 and substantially modified by the recent 2013 Belgian Arbitration Act (Statute of June 24, 2013, Official Gazette, June 28, 2013)).

8. Brussels Convention Report, *supra* note 7, at 13; P. Jenard, Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, O.J. (C 59), March 5, 1979, 13.

9. Peter Schlosser, Report on the Convention of October 9, 1978, signed in Luxembourg, on the accession of the Kingdom of Denmark, Ireland and the United

However, the arbitration exception was unchanged. The explanatory report to the 1978 Accession Agreement by Professor Schlosser mentions in this respect that in the accession negotiations, a disagreement arose between the original 1968 Convention States and especially the United Kingdom in connection with the interpretation of the arbitration exception: the United Kingdom interpreted the arbitration exclusion as a complete exclusion of whatever dispute concerning arbitration while the original 1968 Convention States read the arbitration exclusion as being limited to disputes concerning pending or closed arbitrations or arbitrations which were to be instituted. Notwithstanding this disagreement, it was decided not to amend the text of the 1968 Convention because, at that time, all States (except Ireland and Luxembourg) had become parties to the New York Convention of June 10, 1958 on the Recognition and Enforcement of arbitral awards ("New York Convention") and Ireland also was considering ratification. On the other hand, the *Schlosser* report considered that the disagreement above essentially only applied to judgments on the merits of national courts rendered in spite of an arbitration agreement. If the British position were accepted, such a judgment would not fall within the ambit of the recognition and enforcement provisions of the 1968 Brussels Convention and the court seized of a request for recognition or enforcement of a foreign judgment would have to assess on the basis of other treaties or its domestic law whether such a judgment might be recognized or enforced and could have account of any arbitral award rendered in relation to the same dispute. If, on the other hand, the continental position were followed and the arbitration exception interpreted more restrictively and applicable only to arbitration proceedings, this would not preclude the jurisdiction of a court in a Brussels Convention State to rule on the validity of an arbitration agreement as a preliminary question with respect to its international jurisdiction as arbitration is then not the object of the main proceedings. From that perspective, a judgment of a national court on the merits also dismissing a jurisdictional challenge based on an arbitration agreement would be susceptible to recognition and enforcement on the basis of the 1968 Convention which, under the system of the 1968 Convention, would imply that full faith and credit is to be given to that judgment (*i.e.*, without the courts in another Contracting State where recognition or enforcement of the judgment is sought being able to review the jurisdiction of the courts of the country of origin of the judgment (including the judgment's decisions as to the arbitration agreement).[10] To this, the *Schlosser* report adds that in

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Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters of Oct. 30, 1978, O.J. 1 (L 304).

10. *See* Peter Schlosser, Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern

any event – apart from the aforementioned controversy – judgments as to jurisdiction only of the courts concerning the validity of an arbitration agreement or judgments where the parties are ordered to terminate the arbitration proceedings because the arbitration agreement – in its opinion – is void, do not fall under the 1968 Convention[11] as their main object is arbitration.

In any case, under the *Schlosser* report, incidental proceedings before national courts concerning arbitration such as the appointment or dismissal of arbitrators, the determination of the place of arbitration or the extension of deadlines for rendering an arbitral award, fall under the arbitration exception. Similarly, the 1968 Convention does not apply to setting aside, revocation or recognition and enforcement proceedings relating to arbitral awards and to the English practice of an arbitration award converted into a judgment of national courts. On the other hand, the 1968 Convention applies to a judgment of a court in which – after setting aside or revocation – it rules on the merits of the case.[12]

Finally, the *Schlosser* report also indicates that the 1968 Convention does not apply to subject matters which cannot be submitted to arbitration ("arbitrability" in the sense used in most countries but not in the United States). Such questions shall be governed by the applicable national law and this law can also permit arbitration regarding disputes where the 1968 Convention provides for an exclusive ground of international jurisdiction (such as certain disputes about real estate or certain corporate disputes under Article 24 of the Brussels Regulation).[13]

The question of the specific position of arbitration under the 1968 Convention arose again following the accession of Greece to the EEC and to the 1968 Convention.[14] Again, the wording of the arbitration exception was not changed. The explanatory report of *Evrigenis* and *Kerameus* to the Greek Accession Convention endorses – without much explanation – the continental conception that the preliminary question as to the validity of an arbitration agreement in proceedings on the merits in national court falls

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Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its interpretation by the Court of Justice of Mar. 5, 1979, O.J. (C 59), 92-93 [hereinafter Schlosser Report]; Report on the Convention of Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 5 March 1979, O.J. (L 59) 92-93 (Eur.).

11. Schlosser Report, *supra* note 10, at 93.

12. *Id.* at, 93.

13. Schlosser Report, *supra* note 9, at 93.

14. Luxembourg Convention of October 25, 1982 on the Accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 31 Dec. 1982, 1982 O.J. (L 388), 1-6 (Eur.) [hereinafter Luxembourg Convention].

under the 1968 Convention and that the arbitration exception does not apply to a defendant raising a jurisdictional challenge based on the existence of an arbitration agreement.[15]

Also following the Spanish and Portuguese,[16] respectively, the Finnish, Austrian and Swedish[17] accessions to the 1968 Convention, article 1, paragraph 2, sub (4) of the 1968 Convention was not amended either. The explanatory report to the Accession Convention of Spain and Portugal does not even mention the arbitration exception or its interpretation.[18]

Pursuant to the Treaty of Amsterdam of October 2, 1997,[19] authorizing federalization of private international law within the European Union, the 1968 Convention – as amended on four occasions in relation to accession of new Member States – was transformed into a regulation *i.e.* the old Brussels Regulation mentioned above. For the arbitration exception, this had no effect except that the second paragraph of article 1 of the 1968 Convention was converted into a second section of article 1. Also, the preamble to the old Brussels Regulation provides no clues regarding the interpretation of the arbitration exception; recital (7) merely states in general terms that the Regulation has a wide substantive scope of application combined with well–defined exceptions. As indicated above, there was already since at least 1978 controversy over the interpretation of the arbitration exception so one might challenge whether in relation to arbitration there was a well–defined exception.

By way of conclusion, one can say that the interpretation of the arbitration exception – except in the *Schlosser* report – has received little attention in the period between the original 1968 Convention up to and including the implementation of its system in the old Brussels Regulation in 2000.

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15. Demetrios Evrigenis, K. D. Kerameus, Report on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 24 Nov. 1986, 1986 O.J. (C 298), 10 (Eur.) [hereinafter Kerameus Report].

16. Treaty of Donostia-San Sebastian of May 26, 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, May 26, 1989, O.J. (L 285), 1-23. This also applies to the original Lugano Convention, which was concluded one year earlier than the Spanish-Portuguese Accession Convention.

17. Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, Jan. 15, 1997, O.J. C 15/10, 1-9.

18. *See generally* Almeida Cruz, Desantes Real and Paul Jenard, Almeida-Desantes Report 1990, Report on the 1968 Brussels Convention, O.J. C 189/35, 35-56 (1990).

19. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts; with Protocols and Declarations Annex; Amsterdam, Oct. 2, 1997, 1998 I.L.M. 11 [hereinafter Treaty of Amsterdam].

III. EUROPEAN COURT OF JUSTICE REGARDING THE ARBITRATION EXCEPTION

Also in the case law of the European Court of Justice there have been scant decisions as to the interpretation of the arbitration exception of the 1968 Convention. Although the Court of Justice is the highest court for European Union matters, its jurisdiction under the 1968 Convention was not automatic in view of the fact that the 1968 Convention was not a EU instrument and a Protocol had to be concluded to convey powers to the Court of Justice to give interpretative rulings on the 1968 Convention at the request of national courts in the EU Member States. This Protocol was concluded in 1971 and entered into force in 1975.[20] From 1975 until the entry into force of the old Brussels Regulation in 2002, only two relevant judgments were rendered.[21]

In *Marc Rich*,[22] a judgment of 1991, there was a dispute on the merits regarding the sale of a shipment of oil which the buyer claimed was seriously polluted whereupon the seller brought proceedings in Italy seeking a declaration of non–liability. After the sales contract was closed, the buyer had yet sent a telex with additional contract terms including an arbitration clause providing for arbitration in London.[23] The buyer invoked the arbitration exception before the Italian court to challenge its jurisdiction but also immediately after summons instituted arbitration proceedings in London where it quickly – given the refusal of the Italian seller to appoint an arbitrator – requested an English court to proceed to the appointment of an arbitrator.[24] The seller considered that the English court, on the basis of the 1968 Convention, lacked jurisdiction because it had started earlier proceedings on the merits in Italy.[25] The *High Court* rejected the jurisdictional defense and ruled that the 1968 Convention – having regard

20. *See* Luxembourg Protocol Concerning the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments, June 3, 1971, 4 U.S.T. 1971 [hereinafter Luxembourg Protocol] (concerning the interpretation of the Brussels Convention by the Court of Justice).

21. *See generally* Information Pursuant to Protocol 2 Annexed to the Lugano Convention, Court of Justice of the European Communities, (1992-2011), www.curia.europa.eu/common/recdoc/convention/en/index.htm?63,15 (citing "[r]ecent case-law relating to the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters," however, none of the listed case law is relevant to the topic at hand under the conventions or protocols section regarding the original Lugano Convention.).

22. Case C-190/89, Marc Rich & Co. AG v. Società Italiana Impianti PA, 1991 E.C.R. I-3854. (noting conclusions of Advocate General Darmon.

23. *Id.* at I-3856.

24. *Id.* at I-3856-57.

25. *Id.* at I-3857.

to the arbitration exception – was not applicable.[26] On appeal, the Court of Appeal referred some preliminary questions to the Court of Justice in Luxembourg about the interpretation of the arbitration exception and some other provisions of the 1968 Convention including the provisions concerning *lis pendens*.[27] The Court of Justice – taking into account the comments of the British, German and French governments, but contrary to the conclusions of the European Commission – concluded that the arbitration exception could be interpreted broadly and that the 1968 Convention in any case could not be applied in respect of proceedings before a court to appoint an arbitrator, even if a preliminary issue concerning the existence or validity of an agreement to arbitrate was raised.[28] The Court quoted the *Jenard* and *Schlosser* reports mentioned above[29] as well as the New York Convention but also considered that – as arbitration is already regulated in international treaties – the Contracting Parties to the 1968 Convention intended to exclude arbitration in its entirety from the scope of the 1968 Convention, including proceedings before national courts even if these are not regulated by the New York Convention, such as a procedure for the appointment of an arbitrator.[30]

In *Marc Rich,* the Court did not explicitly address the reverse question *i.e.* whether the arbitration exception applies in a dispute on the merits before a judge in a State where the defendant pursues an arbitration defense to contest the jurisdiction of the court on the merits and the plaintiff relies on the absence or invalidity of an arbitration agreement.[31] This was exactly at stake in the Italian proceedings but the Court had to rule in relation to the English proceedings to appoint an arbitrator. Advocate General Darmon in

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26. *Id.*

27. *Id.*

28. Case C-190/89, Marc Rich & Co. AG v. Società Italiana Impianti PA, 1991 E.C.R. I-3854, I-3859-61.

29. Almeida-Desantes Report 1990, *supra* note 18; Schlosser Report, *supra* note 9, at 92-93. It is also striking that both Jenard and Schlosser submitted legal opinions in the proceedings and both came to conclusions opposite to those of the Court of Justice. The contents of these legal opinions are apparent from the abovementioned conclusion of Advocate General Darmon. Schlosser argued in this context – contrary to what he wrote in the Schlosser report – that the arbitration exception was to be reinterpreted to the effect that it was limited to recognition and enforcement of arbitral awards, and that not only disputes concerning the existence or invalidity of the arbitration agreement but also any other decision of a state court regarding arbitration was to fall within the scope of the 1968 Convention. Jenard, on the other hand, argued that parallel proceedings before judges in signatory states were to be avoided and that the court seized first of a dispute concerning the existence or validity of the arbitration agreement, had jurisdiction to assess such dispute.

30. Case C-190/89, Marc Rich & Co. AG v. Società Italiana Impianti PA, 1991 E.C.R. I-3854, I-3858-64.

31. *Id.* at I-3858-64.

his opinion to the Court, however, takes on this issue and concludes that also in such a hypothetical the arbitration exception of the 1968 Convention applies.[32] He concedes that this may lead to contradictory decisions if arbitrators accept the existence or validity of the arbitration agreement and any such award on jurisdiction is not reversed in setting aside proceedings while a judge in another Member State might conclude to the non–existence or the invalidity of the arbitration agreement. He considers that this risk is just to be taken as applying a strict interpretation of the arbitration exception is at odds with the arbitration laws of the Member States which accept the authority of arbitrators to rule on their own jurisdiction as well as the system of the New York Convention which is based on the exclusive jurisdiction of the courts of the country of the place of arbitration in the context of setting aside proceedings to pass a final judgment on the existence or validity of the arbitration agreement.

A second case in which the arbitration exception is briefly mentioned is *Van Uden / Deco–Line*[33] in which Dutch law on summary interim relief proceedings regarding the collection of receivables and its compatibility with the 1968 Convention was raised and only accepted by the Court of Justice provided strict conditions are met. Pending arbitration in The Netherlands, Van Uden brought collection interim relief proceedings before the President of the Rotterdam District Court requesting an order against Deco–Line for an amount of 837,919.13 German marks corresponding to receivables under four agreements. The application was granted for an amount of 377,625.35 German marks in view of article 1022, paragraph 2 of the Dutch Code of Civil Procedure which provided that an arbitration agreement does not prevent a party from applying for interim relief to the court. The Court of Appeal reversed and, upon an appeal to the Dutch Supreme Court, the latter referred some preliminary questions to the Court of Justice, including the question of the relevance of an arbitration agreement in the contract between the parties, of the place of arbitration designated in the agreement and of the relevance of the pending arbitration proceedings on the merits. The Court answered that question as meaning that provisional measures normally do not relate to the conduct of arbitral proceedings but to the substantive interests of the parties and, therefore, are not covered by the arbitration exception. The preliminary questions received a negative answer to the effect that the arbitration agreement, the place of arbitration and the fact that arbitration proceedings were pending

32. *Id.* at I-3858.

33. *See* Case C-391/95, Van Uden Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another, 1998 E.C.R. I-7122 (mentioning the arbitration exception briefly and including conclusions of Advocate General G Léger).

were irrelevant factors to the determination of the scope of the 1968 Convention and, thus, that collection interim relief proceedings in court fell within the 1968 Convention and were not covered by the arbitration exception.

Although the arbitration exception was extensively discussed in *Mark Rich,* but could be decided on narrow grounds, it did not lead to a revision of the text of the arbitration exception in the negotiations leading to and the adoption of the old Brussels Regulation in 2000 despite the controversy over its interpretation had existed since the nineteen seventies. Also *Van Uden* did not have an impact on the old Brussels Regulation because it decided only a limited point and questions about existence and validity of the arbitration agreement did not play a role.

After a forty year period of calm, the arbitration exception regarding its relationship to the arbitration agreement was raised to its full extent in the *West Tankers* judgment of the Court of Justice of February 10, 2009[34] as to whether English courts were authorized to issue an anti–suit injunction to protect arbitration proceedings in England. Such an injunction is an order restraining a party to bring or continue court proceedings. The legal question was whether the old Brussels Regulation banned anti–suit injunctions and whether the arbitration exception applied to such injunctions.

West Tankers concerned a dispute about the collision in Syracuse, Italy of West Tankers' ship, the *Front Comor* with a jetty owned by Erg Petroli SpA, its charterer.[35] The charter party contained a choice of English law and an arbitration clause providing for arbitration in London. Allianz and Generali who under insurance policies had paid Erg part of its damages, then brought proceedings against West Tankers in Syracuse seeking repayment of any sums disbursed. West Tankers then asked the High Court in London for a declaration that the dispute with the insurers had to be submitted to arbitration and an anti–suit injunction prohibiting insurers to institute whatever further proceedings other than arbitration and to continue the pending proceedings in Italy. The High Court granted the anti–suit injunction and the House of Lords was also inclined to follow this view but nonetheless decided to request a preliminary ruling from the Court of Justice.

The Court of Justice first held that the object of an anti–suit injunction or the rights such an injunction intended to protect related to arbitration and,

34. Case C-185/07, Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc., 2009, E.C.R. I-663 (citing a case decided by the Grand Chamber and including conclusions of Advocate General Kokott).

35. *Id.*

thus, were excluded from the scope of the old Brussels Regulation.[36] On the other hand, the Court stated that the effectiveness of the regulation implied that the attainment of the objectives pursued by the regulation prevented a court in one Member State to curtail or affect the powers of a court in another Member State to exercise its powers under the regulation. As the Italian court could rule on its jurisdiction under the alleged tort of West Tankers and the arbitration clause of the charter agreement was a preliminary question to be addressed in the Italian court's determination of its jurisdiction under the regulation, the Court held that the Italian court could also answer this preliminary question and that the English courts were prohibited to interfere in that determination directly but also indirectly by means of anti–suit injunction to litigants. The Court in this respect made an explicit reference to the aforementioned *Evrigenis/Kerameus* report. Finally, the Court observed that it considered that this solution was in accordance with article II, paragraph 3 of the New York Convention authorizing a domestic court to assess its jurisdiction if an arbitration agreement is invoked before it.[37]

West Tankers basically is the convergence of two earlier judgments of the Court of Justice about the interpretation of the Brussels system which were rendered outside an arbitration context. In *Gasser*, the Court held that a (disputed) choice of forum for an Austrian court under the *lis pendens* first in time rule of the 1968 Convention had to lead to a stay of the Austrian proceedings and the continuation of parallel Italian proceedings as the Italian court was seized first and there was no exception in the 1968 Convention to the effect that a forum selection clause had to prevail over the general first in time rule.[38] Thus, the Court refused to create an exception to the *lis pendens* rule in favor of forum selection clauses feeling bound by the text of the Convention.[39] Moreover, the Court noted that the 1968 Convention is based on the mutual trust of the Contracting States in

36. *Id.*

37. Case C-185/07, Allianz SpA. and Generali Assicurazioni Generali SpA v. West Tankers Inc., 2009 E.C.R. (noting the ban on *anti-suit injunctions* to protect arbitration raises the question whether a claimant in arbitration can institute a breach of contract claim against the defendant or request the arbitral tribunal give declaratory relief establishing that the defendant's action in a domestic court is a breach of the arbitration agreement. The latter was successfully tried in the rest of the *West Tankers* saga in England where the Court of Appeal converted a declaratory arbitral award into a judgment of the court. This enabled West Tankers, on the basis of article 34, paragraph 3 of the old Brussels Regulation, to resist the enforcement of any Italian judgment in England *West Tankers Inc./Allianz SpA and Generali Assicurazioni Generali SpA [2012] WLR (D) 9 [2012] EWCA Civ 27*).

38. *See* Case C-116/02, Erich Gasser GmbH v. MISAT Srl, 2003 E.C.R., I-14721, ¶¶ 17, 39.

39. Brussels Regulation, *supra* note 1, at art. 31 (Having regard to the undesirable outcome of *Gasser*, article 31 of the new Brussels Regulation has overruled *Gasser*).

each other's legal systems and judicial institutions as reflected in a system of mandatory rules on jurisdiction and limited review in the course of proceedings for recognition and enforcement of judgments. Thus, *Gasser* stands for the principle of *full faith and credit* in relation to the jurisdictional determination of the court first seized.

In its judgment in *Turner*, the Court held that, under the 1968 Convention, the English court could not issue an anti–suit injunction to prohibit Turner's former employer to continue Spanish proceedings against Turner notwithstanding that the English court had already accepted jurisdiction in respect of Turner's prayers for relief and had ruled that the Spanish proceedings had been initiated to pressure Turner to withdraw his suit in England.[40] To ensure the effectiveness of the 1968 Convention, the Court did not permit English anti–suit injunctions to interfere with jurisdictional determinations by courts in another State.

West Tankers combines both *Gasser* and *Turner*. Respect for a contractual arrangement (forum selection in *Gasser,* an arbitration clause in *West Tankers)* must give way to the grounds of jurisdiction of the Brussels system and an *anti–suit injunction* is not consistent with full faith in jurisdictional determinations by courts of other Member States. However, the Court seems to have become the prisoner of its own recent case law. *Gasser* is a case that falls completely within the Brussels system while *West Tankers* raises the very issue whether it falls within the scope of the Brussels system given the presence of an arbitration agreement and where the Court pays scant attention to *Mark Rich.* For the same reason, *West Tankers* is clearly distinguishable from *Turner* because also in *West Tankers* the question is first to be answered whether the Brussels system applies after all to an *anti–suit injunction* which aims to protect the arbitration agreement against infringement by one party creating parallel proceedings before a domestic court in a Member State other than the State of the place of arbitration.

From the above, it turns out that there are three competing conceptions regarding the relationship between arbitration and the Brussels system. The first idea which may be called the *sui generis* conception and is mainly followed in England, wishes both contractual and procedural aspects of arbitration to be immunized from Brussels influences and, thus, to be governed by a separate regime of national arbitration law and international conventions. The main disadvantage of this view is that a small risk exists of an enforcement conflict between an arbitral award, when not set aside at the place of arbitration in a EU Member State, and a judgment of a domestic court in another Member State which dismissed a jurisdictional

40. *See generally* Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA, 2004 E.C.R., I-3570, I-3574.

challenge based on an alleged agreement to arbitrate and comes to a different conclusion than the arbitration award as to the merits of the dispute. The second view which may be referred to as the procedural conception restricts the interpretation of the arbitration exception to procedural aspects. Under this second view, the enforcement conflict also arises as it does not affect the power of arbitrators to rule on their jurisdiction or the setting aside powers of courts in Member States at the place of arbitration while the second view also accepts the power of courts in Member States other than at the place of arbitration to rule on jurisdiction and on the merits even in the presence of an alleged arbitration agreement which can lead to a jurisdictional determination regarding this agreement as it is only a preliminary question as to the jurisdiction of these courts. A third view seems to be that of the recent case law of the European Court of Justice which may be characterized as the institutional view and where – in order to ensure the effectiveness of the Brussels system and starting from the premise of mutual trust and non–interference in jurisdictional determination of courts of Member States, parallel proceedings subsist and also do not solve potential enforcement conflicts.

These three concepts, thus, do not provide an answer to the coordination problem between parallel proceedings between arbitrators and courts at the place of arbitration on the one hand and courts in other Member States on the other hand as to the existence and validity of the arbitration agreement. Moreover, the problem of such parallel proceedings is not confined to questions of existence and validity of arbitration agreements, but they also relate to questions as to subject–matter arbitrability (*e.g.*, arbitration of consumer or employment disputes) where there are different positions in Member States and which have yet been untouched by the case law of the Court of Justice. The question arising at this juncture is whether and how these problems have been tackled under the new Brussels Regulation.

IV. FROM THE OLD TO THE NEW BRUSSELS REGULATION

The text of the arbitration exception remained unchanged in the Brussels Regulation except for the fact that the article "the" in the Dutch text of the Regulation has been dropped. This minor change in one the various languages of the regulation does not seem to have intended any substantive change at all: the English text of the Regulation speaks only of "arbitration" whereas the German and French texts continue to use the article referring respectively to "die Schiedsgerichtsbarkeit" and "l'arbitrage".[41]

The genesis of the new regulation can be divided into three stages. In a

41. Brussels Regulation, *supra* note 1.

first phase, the revision of the Regulation was prepared by a report of the German Professors Hess, Pfeiffer and Schlosser ("Heidelberg Report"), which was partly based on national reports from the Member States.[42] Despite the fact that the national reports did not support this, the Heidelberg Report proposed the deletion of the arbitration exception which would imply that all decisions of national courts relating to arbitration would fall under the regulation.[43] This proposal was in line with the legal opinion of Schlosser mentioned above which was submitted in the *Marc Rich* case.[44] This deletion would be mitigated by an exclusive jurisdiction to be added to the regulation in favor of the courts of the place of arbitration regarding ancillary procedures concerning arbitration proceedings (such as an appointment of an arbitrator by the court of the place of arbitration). Moreover, it was proposed to introduce a *lis pendens* rule in favor of an action seeking a declaration on the validity of the arbitration agreement from a court at the place of arbitration which would suspend parallel proceedings before courts in other Member States and have torpedo actions instituted at the latter place stayed. This last proposal would require a claimant in arbitration to seize a court at the place of arbitration to have parallel proceedings in another Member State stayed.

In a second phase, the EU Commission published its own report and Green Paper.[45] The Commission suggested – in line with the Heidelberg Report – to adapt the arbitration exception and grant exclusive jurisdiction to the courts of the place of arbitration. The consultation process that ensued was particularly controversial with many critical comments being made about the whole exercise to change the *status quo*, and many concerns being expressed about how such changes should look like. The Commission was concerned that the controversies regarding arbitration would provide a deal breaker for the whole revision of the Regulation and sought support within the arbitration community by appointing a group of experts to review the matter and to reconsider its proposals.[46] This led to a

42. Hess, B., Pfeiffer, T., and Schlosser, P., The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States at ¶¶ 105-35 (Study JLS / C4 / 2005/03), final Sept. 2007, http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. [hereinafter The Heidelberg Report].

43. *See generally* The Heidelberg Report, *supra* note 42.

44. Case C-190/89, Marc Rich & Co. AG v. Società Italiana Impianti PA, 1991 E.C.R. I-3854, I-3858-64.

45. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee (2009); European Commission, Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (COM April, 21 2009).

46. European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 9 (COM

new proposal providing that the institution of an arbitration or an arbitration related procedure before a court of the place of arbitration was sufficient to block parallel proceedings before a court in any other Member State provided the international jurisdiction of the court of that other Member State was challenged on the basis of an arbitration agreement.[47]

In a final stage, the European Parliament which had already earlier on voiced its critical views,[48] seized the initiative. Also the most recent Commission proposal continued in a number of Member States, particularly in France and Great Britain, to face significant opposition. The Parliament – therein followed by the Council of Ministers – took over the lead of the revision project and reintroduced the general arbitration exception, with no further amendments or qualifications, which found its way into the new Regulation. However, four paragraphs were inserted in the twelfth recital of the preamble of Brussels Regulation to address the arbitration exception. Given its importance, it deserves to quote these in full:

> This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.
>
> A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

July 26, 2013).

47. *See generally* European Commission, Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commerical matters (SEC Dec. 14, 2010); European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 9 (COM July 26, 2013)..

48. *See generally* Brussels Regulation, *supra* note 1; European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Eur. Par. Doc. (2009/2104(INA)); *see also* European Parliament Legislative resolution of 20 November 2012 on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (P7_TA (2012) 0412).

> On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.
>
> This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.[49]

From the unamended retainer of the arbitration exception in article 1, paragraph 2, sub (d) Brussels Regulation and the reasons cited in the preamble to the regulation, one can deduce the following principles:

1. The Brussels Regulation does not apply to arbitration. This relates to procedural aspects and ancillary claims before national courts in relation to arbitration such as those concerning the composition of the tribunal, the competence of arbitrators, the course of the arbitral proceedings or any other aspect of the arbitration proceedings or decisions on any means of recourse against arbitration awards or recognition and enforcement of arbitral awards.
2. National law and international instruments – and not the Brussels Regulation – apply to the questions of the existence, the validity and the effectiveness of an arbitration agreement and the procedural consequences a court in a Member State may draw therefrom.
3. National law and international instruments – and not the Brussels Regulation – apply to the recognition and enforcement of judgments of courts in Member States concerning the point 2. above in other Member States.
4. The Brussels Regulation is applicable to the recognition and enforcement of judgments of courts of a Member State in proceedings in which such court has ruled that there is no arbitration agreement, that it is void or voidable or that it has expired, is unenforceable or cannot be applied. Such recognition or enforcement is without prejudice to the jurisdiction of a court in another Member State to recognize or enforce an arbitration award

49. Brussels Regulation, *supra* note 1, at 2.

under the New York Convention.[50]

These four principles are further discussed and analyzed in the next section of this paper. From a legislative technique, it may be regretted that the interpretation of the arbitration exception essentially is to be derived from four paragraphs of the Regulation's preamble which confirms the complexity of the matter and the fact that a compromise crystallized only at a very late stage of the European legislative process.

V. ANALYSIS OF THE ARBITRATION EXCEPTION IN THE BRUSSELS REGULATION

The first principle (the first sentence of the first paragraph and the last paragraph of recital 12) requires scant comment and is largely codifying the *Mark Rich* case law and what was stated in the *Jenard* and *Schlosser* reports regarding procedural aspects of arbitration. The principle can essentially be broken down into two components.

The first component refers to the supportive, complementary and supervisory functions of the courts in relation to arbitration and reaffirms that these fall outside the scope of the Brussels Regulation. But this does not solve all interpretation problems. One may wonder for instance whether the outcome of the *Van Uden* case is still good law because in that case an interim collection order was sought while arbitration was pending. The relief requested before a domestic court was complementary to an arbitration procedure where that same relief could have been requested in arbitration and which often is also governed by specific rules of national arbitration law regarding arbitral interim relief. The Regulation's preamble has not identified this problem and did not refer to interim relief or did not include it in the list of ancillary proceedings or otherwise does not make clear whether *Van Uden* after the arbitration friendly revision of the regulation is still good law. Similarly, there is the question whether *West Tankers* is not overruled by this first principle. At first sight, this is arguable but in doing so, one should take into account that – in the absence of an explicit position in the Brussels Regulation in respect of anti–suit injunctions to protect arbitration or an arbitration agreement – the Court of Justice based *West Tankers* on the effectiveness of the old Brussels Regulation and not on the fact that such a ban fell under the arbitration exception. This does not seem to have changed which implies that, in my opinion, *West Tankers* is still good law.[51]

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50. Brussels Regulation, *supra* note 1, at 6.

51. Case C-536/13, 'Gazprom' OAO, 2014 Respublika, ECLI:EU:C:2015:316. To the contrary, Advocate General Wathelet, conclusions in the *Gazprom* judgment discussed below, nos 132-141; Margaret Moses, Arbitration/Litigation Interface: The European Debate, 35 NW. J. INT'L L. & BUS. 1, 6, 16 (2014) (available at

To this first component, there is a major exception which is covered by the other three principles discussed below. This exception applies as soon as a domestic court is seized of a question relating to the existence, validity and effectiveness of an arbitration agreement. This exception is discussed further below.

The second component of the first principle concerns the arbitral proceedings. The Brussels Regulation deals with problems of distribution of international jurisdiction between courts in different EU Member States as well as with questions of recognition and enforcement in one Member State of judicial decisions from other Member States. It, therefore, in no way regulates the arbitration proceedings before the arbitrators which are governed by national arbitration law, arbitration rules and procedural rules agreed upon by the arbitrating parties. Despite the obviousness of this second component, it must be mentioned here because – with regard to the arbitration agreement – most Member States recognize the *compétence–compétence* principle under which a tribunal has its own prerogative to assess its own jurisdiction and may decide whether there is an arbitration agreement, whether the agreement is valid and effective and whether the dispute submitted to it falls within the scope of the arbitration agreement. This implies that the problems listed below relating to the existence, validity and scope of the arbitration agreement which may lead to parallel proceedings before national courts in different Member States get a third dimension *i.e.*, that relating to the arbitral award of the tribunal. This dimension is important because a positive assessment on jurisdiction by arbitrators which is not or unsuccessfully challenged in the Member State of the place of arbitration is recognizable under the New York Convention in other Member States, including the Member State where a domestic court is asked to accept jurisdiction based on an allegation that there is no arbitration agreement, provided that such court – depending on the applicable law – had not yet been seized of the case or had not ruled on the jurisdictional challenge when the arbitral award was rendered. If that is not the case, the risk of conflicting decisions arises if the outcomes concerning the arbitration agreement are different.

It was well settled law that the Brussels Regulation did not address the arbitral proceedings before an arbitral tribunal which was recently confirmed by the Court of Justice in the *Gazprom* judgment of May 13, 2015.[52] In a dispute under a shareholders' agreement in which an

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http://ssrn.com/abstract=2433652). For a further discussion, see also below.

52. Case C-536/13, 'Gazprom' OAO, 2014 Respublika, ECLI:EU:C:2015:316 (citing a case decided by the Grand Chamber and including conclusions of Advocate General Wathelet. The Advocate General approached the preliminary question differently than the Court. According to the Advocate General, the new regulation has an interpretive nature so that it can be applied retroactively. In this respect, it must be

arbitration clause provided for arbitration under the Arbitration Rules of the Stockholm Chamber of Commerce, where Gazprom held 37.1% of the shares in a Lithuanian company and the Republic of Lithuania had 17.7% of the shares, Gazprom requested the arbitral tribunal to order the Republic of Lithuania to withdraw an earlier action brought before the Lithuanian courts seeking an investigation regarding the affairs of the Lithuanian company. The arbitral tribunal ruled that the action before the Lithuanian judge partially constituted a breach of the arbitration agreement and ordered Lithuania to withdraw or reduce certain requests in the Lithuanian proceedings. The arbitral award was a kind of arbitral anti–suit injunction against a party to the arbitration in Stockholm. The court in Lithuania, however, took no notice of the award and ordered an investigation into the affaires of the Lithuanian company which was confirmed on appeal. Gazprom then sought the recognition of the arbitral award in Lithuania, which was initially rejected by the court because the dispute about the investigation into the affairs of the local company was not arbitrable, the arbitral tribunal's award had restricted the power of the Republic of Lithuania to take legal action and had interfered with the jurisdiction of the Lithuanian courts to decide on their own jurisdiction and had, thus, breached international public policy. Gazprom filed recourse against these decisions with the Lithuanian Supreme Court whereupon the Supreme Court asked a preliminary ruling from the Court of Justice as to whether the arbitral award could interfere with the jurisdiction of the Lithuanian courts under the old Brussels Regulation. The Court of Justice reasoned that the preliminary questions essentially concerned the exercise of powers by the arbitral tribunal (*i.e.*, to issue an arbitral anti–suit injunction) and the recognition of such an injunction in a Member State other than that of the place of arbitration and thus – unlike *West Tankers* – implied no inference by a domestic court in the jurisdiction of a court of another Member State. The arbitral anti–suit injunction and its recognition in Lithuania were, thus, not only covered by the arbitration exception and excluded from the scope of the old Brussels Regulation but also did not involve interference by the arbitral tribunal in the jurisdiction of the Lithuanian courts affecting the mutual trust of national courts of Member States in each other's legal systems and judicial institutions and the effectiveness of the Brussels Regulation as mutual trust only applies to the courts of Member States and not to arbitral tribunals sitting within the Union. Sanctions for failure to comply with an arbitral anti–suit injunction would therefore not be imposed by a court of another Member State but only by the arbitral tribunal. The recognition of the award in Lithuania is therefore for the Court not a matter governed by the old Brussels Regulation but only by Lithuanian law and

noted that *Gazprom* was rendered under the old Brussels Regulation).

the New York Convention.[53]

Under the new regulation, *Gazprom* would not have been decided otherwise as no change as regards recognition and enforcement of arbitral awards was intended; this matter remains excluded under the arbitration exception of the Brussels Regulation. The effectiveness of the Brussels Regulation is also not affected because an arbitral anti–suit injunction is not rendered by a court of a Member State. In this case, the institutional view overlaps with the sui *generis* conception which were referred to above. *Gazprom*, thus, confirms the widely accepted view that the Brussels system is not relevant for the proceedings before arbitrators as long as no court in a Member State is involved.

The second principle (the first paragraph of recital 12 with the exception of the first sentence) states that the arbitration exception does not affect the other jurisdiction rules of the Brussels Regulation so that a court in a Member State other than that of the place of arbitration may be seized of a dispute wherein an arbitration agreement is invoked by a respondent to challenge the jurisdiction of the court. One may think of the courts of the domicile of the defendant, the alternative ground for jurisdiction to that of the defendant's domicile for contracts under article 7, section 1 of the Brussels Regulation or, as in *West Tankers*, the alternative jurisdiction in torts under Article 7, section 2 of the Brussels Regulation. These disputes may relate to a positive or negative declaratory request regarding jurisdiction of a domestic court and non–applicability of an arbitration agreement or to obtain a final judgment on the merits in proceedings despite an arbitration agreement. These proceedings remain possible under the Brussels Regulation notwithstanding attempts in the Heidelberg Report and the successive Commission proposals to limit these opportunities. They are not contrary to the case law of the Court of Justice and are aligned to the *West Tankers* case which is a second reason to assume that *West Tankers* is still good law and has not been implicitly overruled by the Brussels Regulation.[54] They are the expression of the aforementioned *sui generis* theory advocating that arbitration is to be untouched by the Brussels Regulation and accepting that a court in one Member State cannot or should not interfere with the jurisdiction of a court in another Member State.

The result of the application of the second principle is that a court in a

53. Pursuant to the decision of the Court of Justice, the Lithuanian Supreme Court, on October 23, 2015, recognized the arbitral award by virtue of the New York Convention (Case 3K-7-458-701/2015, available at www.transnational-dispute-management.com).

54. *See also* Simon P. Camilleri, *Recital 12 of the Recast Regulation: a New Hope,* ICLQ 899, 906 2013.

Member State other than that of the place of arbitration can render a judgment regarding the basis of the jurisdiction of arbitrators in another Member State and may, thus, threaten the very foundation of such arbitration. The question is then as to the legal effects of such a judgment for arbitration being conducted elsewhere. The answer to this question is governed by the third and fourth principles which form the counterpart to the second principle.

The third principle (the second paragraph of recital 12) states that the judicial determination of a court of a Member State other than that of the place of arbitration concerning the arbitration agreement falls outside the scope of the recognition and enforcement section of the Brussels Regulation. That is a remarkable principle for a mere recital in a preamble as it means that the substantive scope of the jurisdiction title of the Brussels Regulation (the arbitration exception does not preclude the jurisdiction of a court in a Member State other than that of the place of arbitration) is defined differently than the substantive scope of the enforcement title (the arbitration exception precludes application to the enforcement of judgments from Member States other than that of the place of arbitration concerning the arbitration agreement).[55] Nevertheless, the principle is clear: judges in other Member States are not bound by a jurisdictional determination of a judge in a Member State other than the State of the place of arbitration, about the arbitration agreement. Moreover, this applies both to a judgment on the merits or to a judgment on an incidental question such as jurisdiction. The English text of the preamble is in this respect clear (*"regardless of whether the court decided on this as a principal issue or as an incidental* question.").[56] If, for example, negative declaratory relief is sought and obtained that there is no arbitration agreement, any such judgment will not be recognized under the Brussels Regulation. If positive declaratory relief is requested and obtained that the court has jurisdiction and a challenge to the court's jurisdiction based on an arbitration agreement is rejected, then the ruling on the arbitration defense is equally not to be recognized. In my opinion, the third principle does not address the substantive proceedings on the merits in which an arbitration defense is rejected as to jurisdiction since then the fourth principle applies. The third principle primarily looks at negative declaratory judgments about the arbitration agreement (*i.e.*, where the outcome is that there is no arbitration agreement, that it is void or unenforceable, that it is not effective or that the dispute is outside the scope of the agreement arbitration) but logic seems to indicate that this should also apply to judgments on jurisdiction where the

55. *Id.* at 905.

56. *See also* the French text: *"à titre principal ou incident"* or the German text: *"in der Hauptsache oder als Vorfrage"*.

court declares that it has no jurisdiction considering the existence of an arbitration agreement.[57] Negative judgments, however, are more common and threatening to the arbitration process while a positive verdict also might result in a conflict with an arbitral award if the arbitral tribunal were to rule that it does not have jurisdiction regarding all or part of the dispute. If all these judgments fall outside the scope of the Brussels Regulation with respect to their recognition in other Member States, there is still the question whether they are still recognizable under other treaties or arrangements or based on domestic law. The answer to this question is beyond the scope of this article except to observe that the non–application of the Brussels Regulation renders application of other recognition rules not easier. In any event, the Brussels Regulation has in this respect not achieved decisional harmony with respect to the interface between arbitration and judgments in Member States other than that of the place of arbitration.

Finally, the fourth principle (the third paragraph of recital 12) envisages a court decision on the merits in a Member State other than that of the place of arbitration encompassing a jurisdictional determination that there is no arbitration agreement so that the court passes judgment on the merits. Full faith and credit implying respect for jurisdictional determinations in sister states at first glance seems to indicate that any judgment on the merits is to be recognized and enforced in other Member States including incidental decisions to the effect that there is no arbitration agreement.[58] The fourth principle solves this problem. On the one hand, judgments on the merits

57. *See* Court of Arnhem-Leeuwarden, November 26, 2013, ECLI:NL:GHARL:2013:9004 where the Court recognized a positive response from the Luxembourg court regarding an arbitration agreement under the old Brussels Regulation and rejected setting aside of arbitral awards rendered in The Netherlands because the Court considered itself bound by the judgment on jurisdiction by the Luxembourg court.

58. National Navigation Co., v. Endesa Generacion SA 2009 EWCA Civ. 1397 (2010) (England and Wales); Gothaer Allegemeine Verischerung AG v. Samskip GmbH, ECLI:EU:C:2012:719. A difficult question is whether an interlocutory judgment on jurisdiction that accepts jurisdiction in defiance of an arbitration agreement is recognizable under the Brussels Regulation in the Member State of the place of arbitration with possible implications for the arbitral proceedings and for any disputes before the domestic court at such place. It seems to follow from the decision of the Court of Justice of November 15, 2012 (Case C-456/11, *Gothaer Allgemeine Versicherung AG and Others / Samskip GmbH*, ECLI:EU:C:2012:719) that this is the case in respect of disputes before the court. The scope of Preamble 12 of the Brussels Regulation seems, however, to point in the opposite direction. If a judgment on the merits must yield to the New York Convention in a third Member State and an arbitral award on the merits prevails over a contradicting judgment on the merits (as analyzed below), it seems to me that this must be applied by analogy to the State of the place of arbitration (for a similar case under the old Brussels Regulation where – because of *West Tankers* – the court came to the opposite conclusion, see *National Navigation Co / Endesa Generacion* SA, [2010] 1 Lloyd's Rep 193, [2009] EWCA Civ 1397 (Court of Appeal, December 17, 2009).

from other Member States are subject to recognition and enforcement under the Brussels Regulation as the major requirement is that they emanate from a court of another Member State, even if jurisdiction of the court of origin is not based on the Brussels Regulation. However, this provides for the aforementioned risk that the judgment conflicts with an arbitral award which is not solved by the ground for refusal of recognition or enforcement of article 45, paragraph 1c. and d. of the Brussels Regulation regarding conflicting judgments as this does not apply to an arbitral award as this is not a judgment for the purposes of this article. The fourth principle solves this by stating that the court before which the recognition or enforcement of the judgment from another Member State is invoked, should solve this conflict by giving priority to the New York Convention[59] and, thus, recognize and enforce the arbitral award and refuse the recognition and enforcement of the sister state judgment. It is remarkable to read such a provision in a preamble but the intention and effect are clear. Enforcement in a third Member State (not the State of the place of arbitration or the Member State where the judgment was rendered) will be governed by the New York Convention. Under article V, paragraph 1, sub a of the New York Convention, the court in a third Member State can test whether there is an arbitration agreement. Regardless of the jurisdictional determinations by the arbitral tribunal or the court of another Member States in merits proceedings, this provision authorizes the enforcement court in a third Member States to independently test whether there was an arbitration agreement and to permit enforcement if it comes to the conclusion that there is an arbitration agreement, even if a court in another Member State in proceedings on the merits came to the opposite conclusion. Any such enforcement decision may entail a negative assessment of the incidental jurisdictional decision of the court of another Member State in its proceedings on the merits. This implies that the fourth principle in fact provides an additional ground for refusal in article 45 Brussels Regulation under which a judgment from another Member State may be refused recognition and enforcement if it is incompatible with an arbitral award which can be recognized and enforced under the New York Convention. Thus, the Brussels Regulation provides an answer to the main problem of parallel procedures *i.e.*, the question of how to deal with potentially contradictory decisions arising from an arbitral award which is not set aside at the place of arbitration on the one hand and a judgment on the merits rendered in another Member State in which the judge comes to

59. Brussels Regulation, *supra* note 1, at art. 73(2). (confirming that the Brussels Regulation does not affect the application of the New York Convention. Such an explicit reference to the New York Convention was absent from article 71 the old Brussels Regulation).

the conclusion that there is no arbitration agreement.[60]

Apart from the lack of elegance in addressing the interface between arbitration and the Brussels Regulation in a preamble, the solution put forward by the European Parliament and adopted by the Regulation is to be endorsed for a number of reasons. First, the problem of possible conflicting judgments regarding an arbitration agreement between an arbitral award and a judgment of a court in another Member State does not frequently arise and there is the legislative political question whether it should have been regulated at all. Ultimately, the Brussels Regulation comes to a lite solution which is preferable to the complicated arrangements of the Heidelberg Report and the Commission proposals. Unlike the Heidelberg Report, the claimant in arbitration should seek no protection to a court at the place of arbitration to defend itself against a torpedo action in another Member State; it is sufficient to defend himself in that other Member State and a judgment that there is no arbitration agreement may then not block the enforcement of an arbitral award in another Member State under the New York Convention. The arrangements of the preamble to the Regulation also sufficiently protect the respondent in the arbitration who can have a legitimate interest in challenging the jurisdiction of the arbitral tribunal. If there are grounds for reasonable doubt regarding the arbitral tribunal's jurisdiction, the Brussels Regulation still enables the respondent in the arbitration to submit the dispute to an otherwise competent court, although a judgment on jurisdiction does not automatically prevail in other Member States and ultimately the setting aside judge in the State of the place of arbitration and the enforcement court in a third State may have the last word. The Heidelberg Report and the Commission proposals also had another problem. They tried to find a procedural solution through a *lis pendens* rule for what is essentially a contractual problem *i.e.*, whether there is an arbitration agreement and whether the dispute falls under this agreement.[61] In the absence of harmonization of substantive and conflict rules governing the arbitration agreement, a procedural solution is insufficient because it unduly restricts the powers of an otherwise competent court in a Member State to assess under its substantive and

60. New York Convention on the Recognition and Enforcement of Arbitral Awards, art. 5, ¶ 1. Two other situations must be distinguished from the one discussed in the main text. The first is the effects in the Member State of the place of arbitration. The New York Convention, then, does not apply but it can be argued that the solution of the preamble is applicable by analogy (*i.e.*, the priority of the arbitral award). The second situation is the effects in the Member State where the court has already ruled that there was no arbitration agreement. In that case, the arbitral award is likely to be refused recognition and enforcement under article V, paragraph 1, sub (1) of the New York Convention for the same reasons as retained by the court deciding on the merits (compare Moses, M., l.c., 14).

61. The Heidelberg Report, *supra* note 42.

conflict rules whether there is an arbitration agreement. For that reason, I have argued in a previous publication that the proposals of the Heidelberg Report and the Commission did not go far enough and had to deal with these substantive and conflict rules, provided one is in favor of a federalization of arbitration law within the European Union at all.[62] The Brussels Regulation does not raise these problems as it readily accepts that conflicting decisions might arise, provides a pragmatic answer to this problem and does not purport to achieve decisional harmony at all costs.

Notwithstanding the positive appreciation of the solution to the interface between arbitration and court judgments in the Brussels Regulation, still two interpretation questions catch the eye. First, the preamble speaks constantly about the arbitration agreement being null and void, inoperative or incapable of being performed. The equally authentic French and Spanish texts refer to *"la convention est caduque, inopérante ou non susceptible d' être appliquée"* and *"el convenio de arbitraj es nulo de pleno derecho, ineficaz o inaplicable"*. In particular the English and French texts indicate that the Regulation regarding the arbitration agreement and the question whether a dispute under such an agreement may be subject to arbitration intended to be aligned with the identical wording of article II, paragraph 3 of the New York Convention[63] so that in the interpretation of the Regulation the New York Convention may serve as persuasive authority.[64]

A second question concerns subject–matter arbitrability which is nowhere mentioned in the Regulation and where conflicting decisions within the European Union can occur if arbitrators and setting aside judges in the State of the place of arbitration accept that a dispute is in full or partially subject to arbitration (*e.g.*, a dispute concerning an employment contract that is subject to arbitration under Dutch law) but a court in another Member State accepts jurisdiction under the Brussels Regulation because the arbitration agreement covers a dispute which is not capable of arbitration. Unfortunately, the Brussels Regulation does not settle this question explicitly. Analogous application of the Regulation might be considered but is not obvious because the problem has not been a topic of

62. De Ly, F., Conflict of Laws in International Arbitration - an Overview, in Conflict of laws in international commercial arbitration, Verona Conference March 18-20, 2010, Ferrari, F. and Kroll, S. (ed.), Munich, Sellier, 2010, 14-16, with further references.

63. Brussels Regulation, *supra* note 1, The Spanish text of the preamble added the words *"de pleno derecho"* which do not appear in the Spanish version of the New York Convention.

64. *See* Albert Jan van den Berg, The New York Arbitration Convention of 1958, (1981) (thesis), Rotterdam, The Hague, TMC Asser Instituut, 1981, 154-161; UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), A/CN./814 (Jan. 13, 2014)

debate in the drafting of the Regulation and the issue relating to subject–matter arbitrability – much more than regarding the arbitration agreement – raises important policy questions with respect to the protection of private and public interests. Thus, it seems advisable to keep these issues entirely outside the Regulation and leave it to the enforcement court in a third Member State to deal with possible conflicting judgments.[65]

CONCLUSION

In a clear and concise way, the Brussels Regulation has dealt with the interface between arbitration and court judgments in Member States and solved a problem that does not frequently arise in practice. However, this does not apply to issues of subject–matter arbitrability. With this solution, it allows free rein for arbitral tribunals sitting inside the European Union to assess their jurisdiction without interference from judgments of national courts of Member States other than that of the place of arbitration. Moreover torpedo actions are curtailed since the New York Convention takes precedence over the Brussels Regulation if they were to lead to jurisdictional judgments or judgments on the merits. It seems that English style *anti–suit injunctions* continue to be prohibited if they are intended to interfere with a jurisdictional determination regarding an arbitration agreement by a court in another Member State. The new scheme of the Brussels Regulation is still limited to the European Union as long as the Lugano Convention is not again aligned with the Brussels Regulation which implies that in particular Swiss arbitrations and proceedings before the Swiss courts are still governed by rules other than those of the Brussels Regulation.

65. New York Convention, *supra* note 64. Enforcement of the arbitral award in the State of the place of arbitration does not raise substantial arbitrability issues as the arbitral tribunal will settle these under the control of the setting aside judge and the Brussels Regulation is then not applicable by virtue of the arbitration exception. Enforcement of the arbitral award in the Member State where the courts proceeded to the merits because the dispute was not capable of being referred to arbitration may be refused on the basis of article V, paragraph 2 sub (a) of the New York Convention.

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