

# The Role of US Courts in International Commercial Arbitration (ICA)

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THE SUPREME COURT *of* OHIO **2020**  
Dispute Resolution  
Conference

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# Actors and Steps in ICA

Actors	Parties	Arbitral Tribunal	Arb. Institutions	Federal and State courts	Federal and State Legislatures	Federal and State Executive	International Treaties and Agreements
Steps in Arbitration Procedure							
Arbitration Clause	xx			Xx			Xx
Constitution of the Arbitral Tribunal	xx	xx	xx	X			
Arbitral Procedure	xx	xx	xx				
Arbitral Award		xx	xx				
Enforcement of the Arbitral Award	xx			Xx	xx	Xx	Xx

# Four Interacting Levels

- a) **Party Autonomy as expressed in the arbitration clause or party agreement to arbitrate**
- b) **Arbitral Institutional rules or rules of other than state origin (ICC, AAA, CIETAC, ad hoc rules etc.)**
- c) **National Arbitration Laws (FAA Chapter 2 (and 3), UNCITRAL Model Law on International Commercial Arbitration as legislated in countries, other national arbitration laws such as the English Arbitration Act of 1996, or the Indian Arbitration and Conciliation Act)**
- d) **International agreements (1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, the Washington Convention, the European Convention, etc.)**

# Place of Arbitration/Place of Enforcement

Place of Arbitration (in say Country A)	Place of Enforcement (in say Country B)
Arbitration Clause	Arbitration Clause
Arbitral Institution Rules	Arbitral Institution Rules
National Law	National Law
Treaty	Treaty

# Hello Complexity! Frydman v. Cosmair, Inc. (1995)

Types of arbitration	French General Arbitration	French Price Arbitration (Article 1592 French Civil Code)	US General Arbitration	US Price arbitration Appraisal
<b>Legal nature of the decision</b>	Arbitral award has status as a judgment	Price appraisal does not have the status of a judgment	Means of resolving disputes – a judgment	Means of fixing the price term for contracting parties – never a judgment
<b>Nature of the procedure</b>	Arbitration section of the code. Full adversarial hearings and an award supported by detailed reasoning	Does not have to be conducted in the same manner as an arbitration. No requirement to hold hearings nor to support the decision with detailed reasoning	FAA or Labor	Contract breach
<b>Section of the code</b>	Arbitration section	Section on Sales Contracts	FAA	Contract, UCC, CISG
<b>Lodge action against it</b>	Court of Appeal	Action against the decision is instituted at trial level court – Tribunal de Grande Instance	Trial level	Trial level
<b>French court characterization</b>		Not an arbitration agreement – a mandate granted by the parties the sole object of which was to estimate and evaluate the thing being sold	FAA grounds to vacate an award	Breach of contract
<b>Enforcement</b>	Exequatur	Never attains status of judgment	Summary procedure	Never obtains the status of a judgment to be enforced/breach of contract action

# Container Contract and the Arbitration Clause



# The Key to International Commercial Arbitration

- Cultural Gymnastics
- Legal Gymnastics
  - Thank You

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# Questions presented

- Is international commercial arbitration (ICA) fully autonomous from litigation in national courts?
- How and why U.S. courts are getting involved in ICA?

# Evidence from U.S. Courts

Empirical study:

1. to provide the first comprehensive empirical mapping of the various kinds of *border crossings*—the circumstances in which national courts play a role in ICA
2. to record and analyze empirical data of these *border crossings* in cases filed in a key national court for international arbitration-related litigation—the U.S. District Court for the Southern District of New York

3. based on interpretation of these data, to generate a richer understanding of:

- the complex relationship between national courts and international arbitration, and
- how to regulate and navigate these border crossings.

# Process

- *First*, we identified, described, and organized eleven different border crossings
- *Second*, we collected and described survey data from the docket of the Federal District Court for the Southern District of New York:
  - Why NYC?
    - > Perhaps, the most important city in the world for international arbitration
  - Time period: Dec. 29, 1970 - Sep. 15, 2014
  - Data collection process

**TABLE 1. CIRCUMSTANCES IN WHICH A NATIONAL COURT  
MIGHT BE ASKED TO INTERVENE IN AN INTERNATIONAL ARBITRATION**

	<b>Border Crossing</b> (*: indicates a <i>principal</i> crossing, i.e., recognized by the New York Convention)	<b>Timing with respect to arbitral proceeding</b>	<b>Relevant Provisions of the New York Convention or UNCITRAL Model Law</b>	<b>Likely National Courts (+: indicates a clear <i>primary</i> jurisdiction)</b>
1.	Enforcement of the arbitration agreement*	Before or during	New York Convention Art. II; UNCITRAL Model Law Art. 8	Seat of arbitration+; national court of a party
2.	Court issuance of interim measures	Before or during	UNCITRAL Model Law Arts. 9 and 17 J	Seat of arbitration, place of enforcement, or location of the property or evidence
3.	Appointment of arbitrators	Before	UNCITRAL Model Law Arts. 11(3) and 11(4)	Seat of arbitration+
4.	Challenges to arbitrators	Before or during	UNCITRAL Model Law Art. 13(3)	Seat of arbitration+ or a party's home state
5.	Termination of arbitrators' mandate in cases of failure or impossibility to act	During	UNCITRAL Model Law Art. 14	Seat of arbitration+
6.	Challenges to arbitral jurisdiction (in cases where arbitral tribunal rules as preliminary matter that it has jurisdiction)	During	UNCITRAL Model Law Art. 16(3)	Seat of arbitration+
7.	Court enforcement of tribunal-issued interim measures	During	UNCITRAL Model Law Arts. 17 H and 17 I	Seat of arbitration+

Table 1-continued from previous page

	<b>Border Crossing (*: indicates a <i>principal</i> crossing, i.e., recognized by the New York Convention)</b>	<b>Timing with respect to arbitral proceeding</b>	<b>Relevant Provisions of the New York Convention or UNCITRAL Model Law</b>	<b>Likely National Courts (+: indicates a clear <i>primary</i> jurisdiction)</b>
8.	Court assistance in taking evidence	During	UNCITRAL Model Law Art. 27	Anywhere that allows it, cf. 28 U.S.C. § 1782 in the United States
9.	Setting aside of arbitral awards*	After	New York Convention Art. V(1)(e); UNCITRAL Model Law Art. 34	Seat of arbitration has primary jurisdiction, but secondary jurisdiction “under the law of which, that award was made”
10.	Recognition and enforcement of arbitral awards*	After	New York Convention Arts. III and V; UNCITRAL Model Law Arts. 35 and 36	Where the award-creditor seeks it, usually losing party’s jurisdiction or the United States as a default jurisdiction
11.	Execution of enforced arbitral award	After		Where the award-debtor has assets

# Interpreting and classifying data

- Based on the original moving party's motion or filing
  - ✓ e.g., moving party files to set aside, and the opposing party—to recognize and enforce => counted as a single instance of a border crossing (Category 9)
- A single case was normally counted as a single border crossing, but not always (e.g., a motion to compel arbitration accompanied by a request for interim measures in aid of arbitration => counted twice as Category 1 and Category 2 under our classification)
- Highly litigious parties—coming back to courts multiple times during the arbitration process—were identified separately.

# Analyzing data and normative prescriptions for border crossings

## 1. Most trafficked *border crossings*:

- actions to enforce arbitration agreements (111 actions, or 32% of total observed), and
- actions to recognize and enforce arbitral awards (122 actions, or 35 %).
- Note, these are two interventions under the New York Convention.

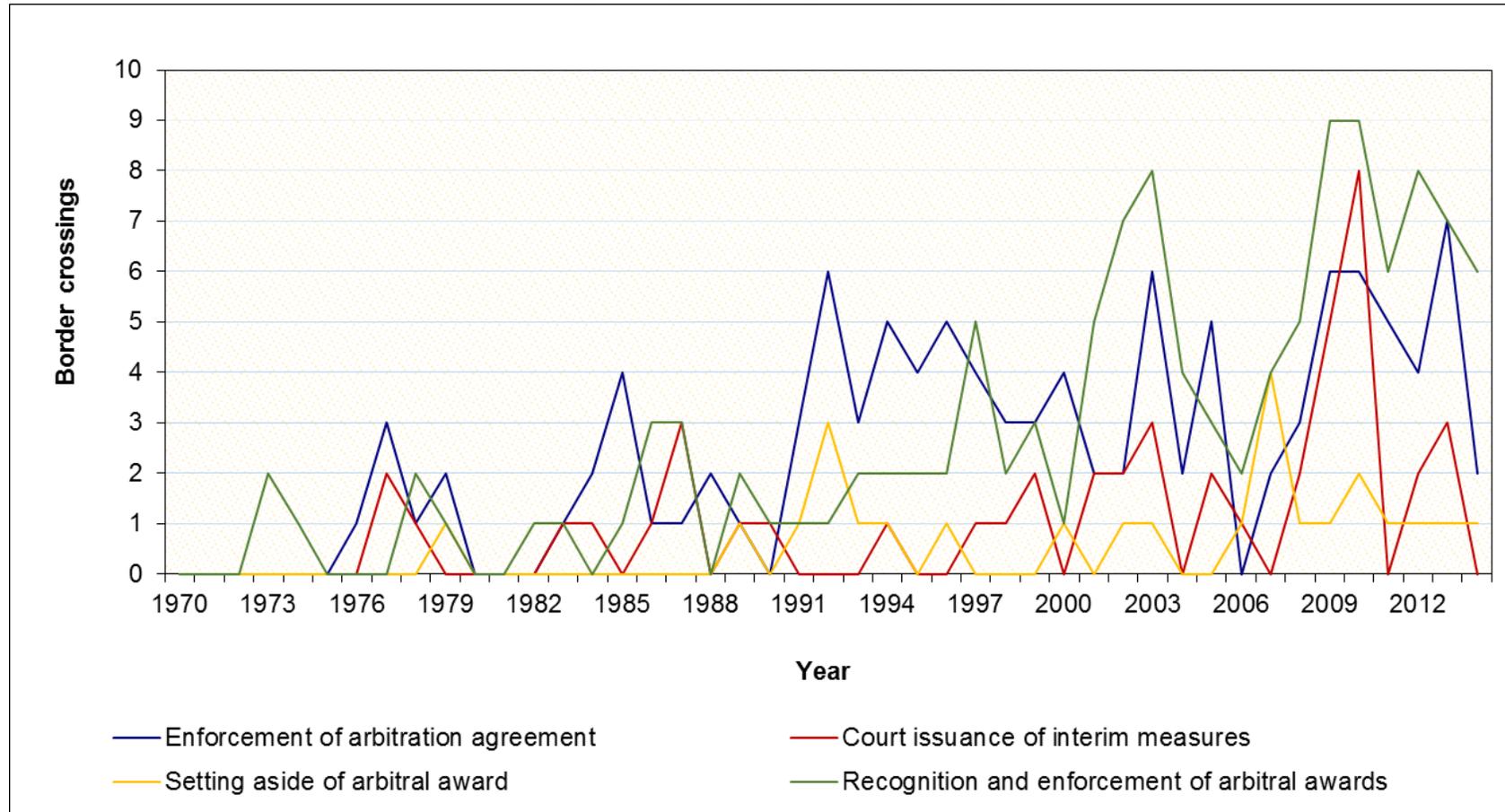
# Analyzing data and normative prescriptions for border crossings

2. Other types of *border crossings* are falling far behind:
- actions to seek interim measures (46 instances, or 13%), and
  - actions to set aside arbitral award (25 actions, or 7%)

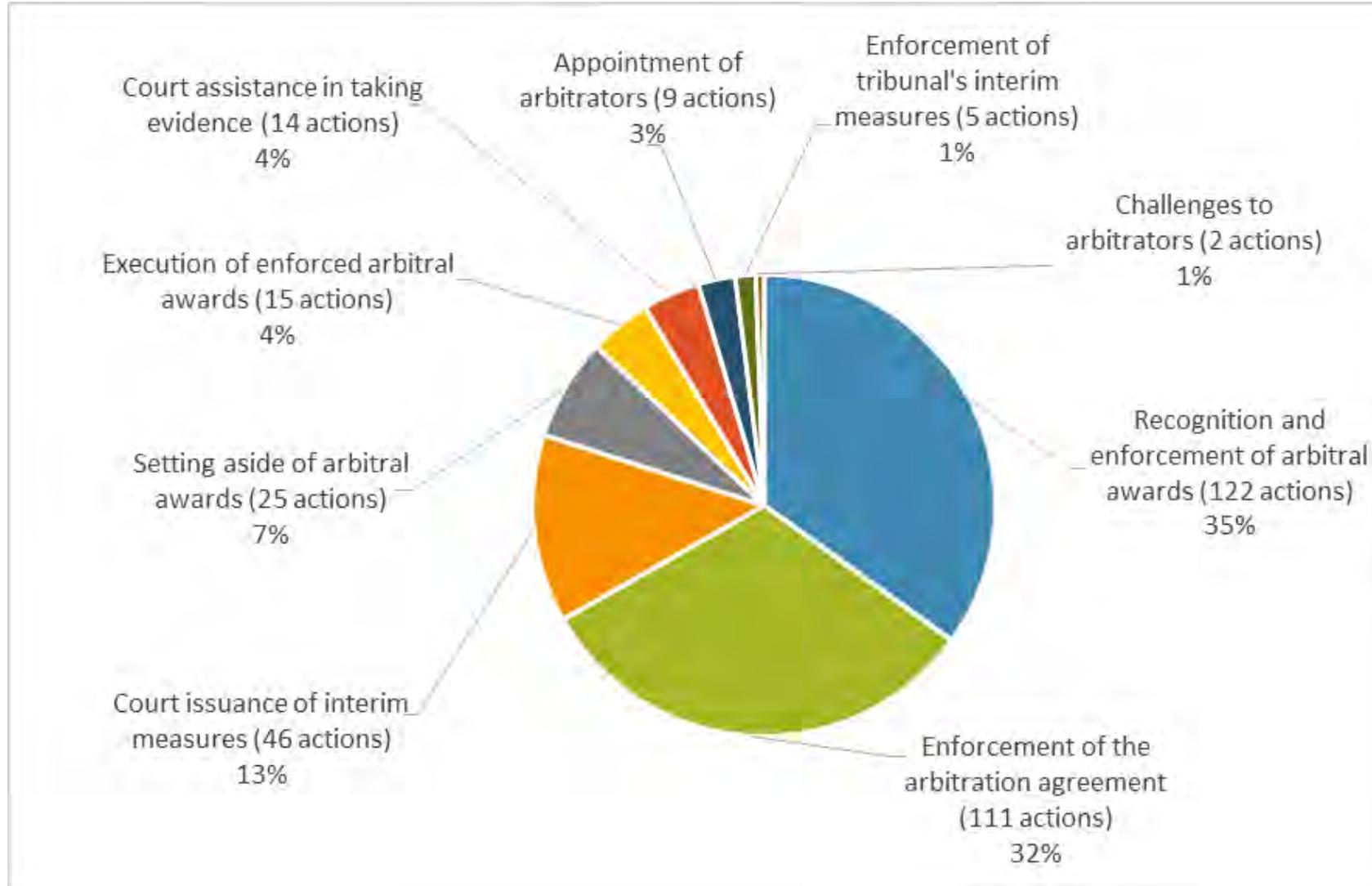
# Analyzing data and normative prescriptions for border crossings

3. Low frequency of resort to *setting aside* and actions to seek *interim measures*:
  - *Setting aside*: the role of pro-arbitration law of the 2<sup>nd</sup> Cir.
  - *Interim measures*: unexpected, especially since most arbitral institutions have revised their rules to offer tribunal-ordered interim measures (in response to the perceived high need)
4. Upward trend for total numbers over the years.

# Four Most Trafficked Border Crossings in SDNY, 12/29/1970-9/15/2014



# Border crossings in SDNY, 12/29/1970-9/15/2014



# Analyzing data and normative prescriptions for border crossings (continued)

1. Courts are heavily vested in aiding the international arbitral process, and increasingly so
2. New York Convention seems to be working
3. No high need for the appointment or challenges of arbitrators with courts
4. Courts appear to be important for such matters as taking evidence and providing interim relief

## Analyzing data and normative prescriptions for border crossings (continued)

5. Award debtor does not move to set aside as often as expected (45 instances only)
6. Predicting a rise in resort to court for aid in execution of arbitral awards (15 observations only, but 12 of them from 2000 to 2014)
  - > the loser really minds when he is being coerced to pay (not so much when he simply loses)

- Thank you!
- Questions?

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## ARTICLE

# AN EMPIRICAL SURVEY OF INTERNATIONAL COMMERCIAL ARBITRATION CASES IN THE US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 1970-2014

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### ABSTRACT

*This Article identifies and organizes the circumstances in which national courts play a role in international commercial arbitrations—border crossings. It then records and analyzes empirical data of these border crossings in cases filed in a key national court for international arbitration-related litigation: the US District Court for the Southern District of New York. Data were collected from the date of entry into force for the United States of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) on December 29, 1970 to September 15, 2014. Based on interpretation of these data, the Article suggests how to regulate the border crossings to best balance the policy goals of international commercial arbitration with reasonable allowances for national sovereignty and fidelity to the New York Convention.*

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*INTRODUCTION*

The role of national courts in international commercial arbitration is more controversial than in domestic arbitration. When arbitration occurs in the fully domestic context, it displaces public court adjudication. For this reason, many national laws cabin off certain subject matter from arbitration altogether. And with respect to subject matter for which arbitration is permitted, national laws typically allow for oversight by courts to protect the rights of more disadvantaged parties. But in the international setting, any national government's interests are diminished because providing credible dispute resolution is believed to increase the net inflow of foreign business. Moreover, the domestic parties are usually local companies doing international business or State entities, not disenfranchised individuals (e.g., women, minorities, workers, the poor).

Indeed, there is a Platonic ideal of international arbitration as a fully autonomous transnational system of dispute resolution.<sup>1</sup> On this

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1. See, e.g., Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 *ARB. INT'L* 179, 181 (2006) ("Today, there is increasingly, I suggest, a new regime. International arbitration is a *sui juris* or autonomous dispute resolution process, governed primarily by non-national rules and accepted international commercial rules and practices. . . . As such, the

view, two or more parties from different countries doing business together agree to resolve disputes privately without any assistance from national courts potentially hostile to the interests of foreign litigants. The parties' agreement to arbitrate reflects an explicit, mutual rejection of national courts or other national public fora for dispute resolution. The ideal is realized in the many cases in which the parties do not contest that they agreed to arbitrate, proceed to arbitrate the dispute, and then accept the award that results.

The reality, however, is that international arbitration always operates in the shadow of national courts, which often intervene directly. It is accordingly more accurate to say that international arbitrations and national courts are engaged in an ongoing partnership that has evolved over time. Indeed, most of the laws, rules, and commentary on international arbitration address the instances in which parties who contracted for international arbitration may choose or be forced to litigate in national courts. Thus, for instance, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"), the touchstone treaty on international commercial arbitration, speaks specifically to the obligations of the signatory States to honor agreements to arbitrate and to recognize and enforce arbitral awards.<sup>2</sup>

As the provisions of the Convention suggest, the state—principally through national courts—may have to intervene at two junctures: (1) before an arbitral proceeding, if a party asserts that it did not agree to arbitrate at all or (2) after the proceeding, if a party refuses to comply with an arbitral award. If one focuses on these explicit instances, the relationship between national courts and international arbitral tribunals seems to resemble a relay race where the baton is passed from judge to arbitrator and then back to judge. But, as the British international lawyer Lord Mustill, who coined the

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relevance and influence of national arbitration laws and of national court supervision and revision is greatly reduced.”).

2. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*]. The *New York Convention* has achieved nearly worldwide acceptance with 156 states to date having become parties to the Convention. *See* United Nations Commission on International Trade Law (UNCITRAL), Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

relay-race analogy, observed, there are many more ways that national courts might be involved in international arbitrations:

In real life the position is not so clear-cut. Very few commentators would now assert that the legitimate functions of the court entirely cease when the arbitrators receive the file, and conversely very few would doubt that there is a point at which the court takes on a purely subordinate role. But when does this happen? And what is the position at the further end of the process? Does the court retake the baton only if and when invited to enforce the award, or does it have functions to be exercised at an earlier stage, if something has gone wrong with the arbitration, by setting-aside the award or intervening in some other way?<sup>3</sup>

Despite the attention paid to the role of national courts in international arbitrations,<sup>4</sup> there is no large-n empirical research and surprisingly little systemic analysis regarding what this Article will refer to as *border crossings*:<sup>5</sup> the various paths by which parties that

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3. D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection—Is the Tide About to Turn?*, 30 *TEX. INT'L L.J.* 71, 75 (1995) (quoting Lord Mustill, *Comments and Conclusions*, in *CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION* 118, 119 (ICC Int'l Court of Arbitration ed., 1993)). Lord Mustill famously compared the relationship between courts and arbitrators to a relay race in an address at an international arbitration conference:

Ideally, the handling of arbitrable disputes should resemble a relay-race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.

*See id.* at 74-75.

4. *See, e.g.*, S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 *J. DISP. RESOL.* 119, 121-22 (2012) (providing “a brief introduction to the relationship between international arbitral proceedings and U.S. federal courts”). *See generally* ICCA CONGRESS SERIES NO. 10, *INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY* (Albert Jan van den Berg ed., 2001); Charles C. Correll, Jr. & Ryan J. Szczepanik, *No Arbitration is an Island: The Role of Courts in Aid of International Arbitration*, 6 *WORLD ARB. & MEDIATION REV.* 565 (2012).

5. This Article uses the phrase *border crossings* purely in a descriptive sense, without any intent to imply that any particular interaction between an international arbitration and a national court is good or bad, cooperative or confrontational. This usage contrasts, for instance, with Gary Born’s reference to *border crossings*, which he characterizes as sanctioned interventions by national courts, and “border incursions,” which he condemns as counterproductive. *See* S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 *J. DISP. RESOL.* 1, 1, 9, 11 (2012) (citing

have plausibly opted for international arbitration may nonetheless end up in national courts. Specifically, there is very little scholarship tracking or analyzing data about the incidence of border crossings in actual national court systems;<sup>6</sup> indeed, this is the first US empirical survey. Furthermore, much of the sizable anecdotal scholarship on the subject of border crossings is fragmentary. Authors typically choose to focus on one or a few categories of border crossings, most prominently those related to the judicial enforcement of arbitration agreements and the judicial role in setting aside or enforcing arbitral awards.<sup>7</sup> There is also growing interest in the trend of national courts ordering pre-award interim, or post-award supplemental, relief in aid of arbitral tribunals, especially as against State parties in the investor-state context.<sup>8</sup> The few accounts that pull all of this together typically list the different categories of judicial intervention, describe them, and give a few illustrative examples. To date, no one has attempted an empirical study of the different types of border crossings together and systematically.

Another common theme in the existing commentary by both academics and practitioners is perceived competition between

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Gary Born, Partner, Wilmer, Cutler, Pickering, Hale and Dorr, LLP, Keynote Address, Center for the Study of Dispute Resolution Annual Symposium 2011, *Boarder Skirmishes: The Intersection between International Commercial Arbitration and Litigation* (Oct. 21, 2011) [hereinafter Gary Born Keynote] (introducing points made by Gary Born in his keynote address at a symposium event in October 2011). Another similar but distinguishable concept is José Alvarez's idea of *boundary crossings*, by which he means the potentially problematic migration of interpretive techniques across different subject matters in international law. *See generally* José E. Alvarez, *Beware: Boundary Crossings*, in *BOUNDARIES OF RIGHTS, BOUNDARIES OF STATE* (Tsvi Kahana & Anat Scolnicov, eds.) (forthcoming Apr. 2016) (N.Y.U. Law Sch. Pub. Law Research Paper Series, Working Paper No. 14-51, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2498182](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498182).

6. There are some rare exceptions. *See, e.g.*, Johan Munck & Helga Hullmann, *Mål om Klander av Skiljedom i Hovrätterna [Challenge of Arbitral Awards before Courts of Appeal]* 2 SvJT 141 (2015), <http://www.sccinstitute.com/media/69180/2015hftxsxxxmunckhullmann-eng.pdf> (providing a review of challenges of arbitral awards opened in the period between January 1, 2004 and May 31, 2014 before Swedish Courts of Appeal).

7. *See generally* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012); Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16 (1999); Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT'L ARB. 297 (2007).

8. A prime example is discovery of assets for enforcement of awards, especially in the investor-state context against state parties. *See, e.g.*, Brian King et al., *Enforcing Awards Involving Foreign Sovereigns*, in *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK* 413, 424-37 (James H. Carter & John Fellas eds., 2010) (discussing attachment and execution in cases involving foreign sovereigns).

national courts and international arbitral tribunals. The two are often portrayed as fighting for jurisdiction. National courts are depicted as defending their jurisdictions to decide disputes with a center of gravity within their sovereign borders against overreaching or encroachment by international arbitral tribunals.<sup>9</sup> And the rules and commentary of the international arbitration community emphasize strategies to avoid resort to national courts as much as possible, presumably to prevent a party from backsliding on its commitment to resolve a controversy by private means.

A concrete example of this tendency to minimize national court involvement is the consensus in the international arbitration literature that a State's courts cannot set aside arbitral awards solely because the parties contractually chose that State's law to govern the substance of any dispute.<sup>10</sup> There is a plain-language suggestion to the contrary in the New York Convention, which states that a signatory State may refuse recognition and enforcement of an award "set aside or suspended by a competent authority of the country in which, *or under the law of which*, that award was made."<sup>11</sup> As a matter of plain language, if an arbitral panel decides a contractual dispute under New York law pursuant to a choice of law provision that the parties agreed to, that arbitral award was made "*under the law*" of New York. It is accordingly at least plausible that a New York court would have set aside jurisdiction even if the arbitral seat was Paris, France and the parties were non-US. But international arbitration experts almost universally construe this textual ambiguity in the Convention as foreclosing such an interpretation, despite a lack of evidence in the legislative history dispositively rebutting the plain-language reading.<sup>12</sup>

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9. See, e.g., Alan Scott Rau, *Crossing the Threshold: Arbitral Jurisdiction after BG Group*, in *MÉLANGES EN L'HONNEUR DU PROFESSEUR PIERRE MAYER* (L.G.D.J. ed.) (forthcoming 2015) (Energy Center Research Paper No. 2014-04, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2492627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492627).

10. See, e.g., 3 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2996-3001 (2d ed. 2014) [hereinafter 3 BORN]; NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 591-92 (5th ed. 2009) [hereinafter REDFERN & HUNTER].

11. New York Convention, *supra* note 2, art. V(1)(e) (emphasis added).

12. The New York Convention says "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Born, for instance, argues that the reference to "under the law of which" pertained to the "largely theoretical case" where the parties provided in the arbitration agreement for a procedural law governing the arbitration different from the law of the place of arbitration. See 3 BORN, *supra* note 10, at 2990. He says that "The Convention's drafting history supports this conclusion" with a footnote to a different part of his treatise. *Id.* However, the cross-referenced part,

This Article aims to provide the first comprehensive empirical mapping of the various kinds of border crossings and, in so doing, to generate a richer understanding of how to regulate and navigate the crossings. This mapping will be done by means of a survey of data on New York Convention-related litigation in the US federal trial court for the Southern District of New York, which includes Manhattan. The federal district court in the SDNY is the busiest venue for border crossings in the world—the John F. Kennedy (JFK) Airport of the international commercial arbitration community. A snapshot of border crossing statistics at the JFK of international arbitration cases can help scholars and practitioners to design and implement more efficient and productive partnerships between national courts and international commercial arbitration. And, at a deeper level, knowledge of the empirical facts on the ground helps us to comprehend what that project of international arbitration actually is—not a Platonic dream of an autarkic system of private dispute resolution across borders, but rather a hybrid private-public model that takes a middle path to avoid the perceived parochialism of full resort to national courts.

The Article proceeds in three parts. Part I identifies, describes, and organizes eleven different border crossings—scenarios in which parties that have plausibly chosen international arbitration may find themselves in national courts. Part II collects and describes survey data from the docket of the Federal District Court for the Southern District of New York from December 29, 1970 (the date when the New York Convention entered into force for the United States) to September 15, 2014, in order to track frequencies per border crossings and trends over time. Part III—the analytical and normative part—takes the description and observations generated by the prior parts to suggest how the role of national courts in international arbitrations can be reconceived. This is a first cut at the data—we envision future studies to examine in greater depth the qualitative information in the collected data on winners, losers, types of claims, and amounts of damages. A brief conclusion follows.

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§11.03[C][1][c], supplies no evidence from the drafting history on this point. In the absence of any such legislative history, it seems more reasonable to construe the language of the Convention according to its plain meaning rather than as referring to an implausible “theoretical” possibility, which Born himself called “a highly unusual, ‘once-in-a-blue-moon’ occurrence.” *Id.* at 2995 (quoting *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 564 F.3d 274, 291 (5th Cir. 2004)).

### I. *THE BORDER CROSSINGS*

The words *border crossings* as used in this Article refer to the various paths by which parties that have plausibly opted for international arbitration may nonetheless end up in national courts. Such crossings may be bidirectional: parties may move from an international arbitral proceeding to a national court proceeding and then back to international arbitration. For example, parties may find themselves in a court requesting discovery from non-parties in the United States and then go back to an arbitral tribunal to present the evidence collected with the court's assistance.

*International arbitration*, in turn, means consensual resolution of disputes between parties of differing nationalities by a private decisionmaker or decisionmakers whose adjudication the disputants have agreed to accept as binding. As the parties in international commercial arbitration generally come from different countries, they do not share a national court. Should a dispute arise in the absence of an arbitration agreement, both sides expect that national courts will favor their own nationals. And so, the parties typically agree to private international arbitration as a substitute to national courts. By contrast, in domestic arbitration, the parties share nationality, and so they are not as dubious about bias in the national court.

Consequently, in the international context the parties have a greater preference for arbitration autonomy to keep resort to national courts to the minimum required by the New York Convention. A key driver behind the growing popularity of international arbitrations is the Convention, itself a multilateral treaty ratified by 156 countries requiring members to enforce foreign or non-domestic arbitration agreements and awards subject to limited exceptions. There is no comparable multilateral treaty for the enforcement of foreign court judgments.

Private dispute resolution by international arbitration thus stands at the crossroads of international and national legal orders. The process occurs under the long shadow of an international law instrument—the New York Convention. But the rules of decision applied to any dispute that is arbitrated are usually drawn from national legal orders, whether of one of the parties or of a benchmark

jurisdiction, like New York for business contract law.<sup>13</sup> Furthermore, although in many instances parties will rely exclusively on the private dispute resolution process, often under the auspices of an institution like the International Chamber of Commerce (the “ICC”), there will be times when a party brings some aspect of the dispute to a national court.

As noted earlier, almost all international arbitration experts acknowledge the essential part that national courts play in the arbitral process.<sup>14</sup> As Lord Mustill observed:

[T]he arbitral process cannot remain effective without a partnership between that process and the courts. The old and sterile confrontation between the “minimalists” and the “maximalists” regarding the part to be played by the domestic courts has now given way to a recognition that the courts must recognise the essential role of arbitration in international commerce, and give it the maximum permissible support; and a converse recognition that arbitration cannot flourish without that support.<sup>15</sup>

Gary Born also underlined the important role of national courts in the international commercial arbitration process,<sup>16</sup> pointing to three specific junctures: (1) enforcement of international arbitration agreements, (2) enforcement of international arbitral awards, and (3) support of arbitral proceedings—for instance, by appointing arbitrators, assisting in the resolution of jurisdictional disputes, affording provisional measures, and facilitating evidence taking.<sup>17</sup>

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13. We hear of invocations of *lex mercatoria*, *lex petrolea*, and so forth, but they are a minority. By the same token, the parties can opt for *ex aequo et bono* arbitration by explicit choice, but this is rare outside of specialized industries and smaller-stakes cases.

14. See, e.g., WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* 181 (2d ed. 2012) (“[S]ome measure of judicial scrutiny over arbitral jurisdiction remains a vital safeguard to the integrity of the process, and constitutes an essential corollary to enforcement of legitimate awards.”); REDFERN & HUNTER, *supra* note 10, at 441 (“[T]he involvement of national courts in the international arbitration process remains essential to its effectiveness.”); W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT’L ARB. 5, 16 (2010) (“But arbitration is not an autonomous system . . . its functioning is inextricably linked to national courts.”).

15. Lord Mustill, *supra* note 3, at 118.

16. See Strong, *supra* note 5, at 9 (referring to Gary Born who, in his keynote address, outlined instances of necessary and desirable involvement of courts in international commercial arbitration).

17. See *id.* at 9-10.

The normative argument for court interventions in the international arbitral process seems especially strong in cases at two opposite ends of a spectrum. At one end are due process-level violations of procedural fairness. An international arbitration may be so poisoned by unfairness against one side that any resultant award should be set aside by a court at the seat of arbitration. On the other end of the spectrum is a lawsuit to recognize or enforce an arbitral award against an award debtor who was afforded notice and full and fair opportunity to make its case before a competent arbitral tribunal. In such a case, a court order reinforces the integrity of the international arbitral process by coercing the award debtor to pay.

International arbitration scholars and practitioners tend to criticize and warn against national court interference in the arbitral process in a range of other circumstances in between the two ends of the spectrum.<sup>18</sup> The most notable of these are undue interference of courts into the arbitrators' competence to decide their own jurisdiction or attempts by national courts to set aside awards generated by arbitral proceedings rendered in foreign countries and under the procedural law of foreign countries.<sup>19</sup>

No list of the border crossings can be fully comprehensive, but the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law" or "Model Law")<sup>20</sup> provide two useful starting points. The New York Convention explicitly mentions two state intervention points—actions to enforce arbitration agreements and actions to enforce or recognize arbitral awards. The Convention also makes indirect reference to a third type of border crossings—an action to set aside an award. The text of the UNCITRAL Model Law, which is commonly perceived as

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18. *See, e.g.*, 2 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2189 (2d ed. 2014) [hereinafter 2 BORN] ("[L]eading international arbitration conventions, arbitration legislation and institutional rules all adopt a basic principle of judicial non-interference in the ongoing conduct of the arbitral proceedings. This principle is fundamentally important to the efficacy of the international arbitral process. . . .").

19. *See, e.g.*, 3 BORN, *supra* note 10, at 2995-3001 (criticizing as "misconceived and violat[ing] both the language and purposes of the Convention" the decisions of Indian, Pakistani, and Indonesian courts, which have construed Article V(1)(e) of the New York Convention as referring to the substantive law applicable to the merits of the dispute rather than the procedural law of arbitration).

20. UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. GAOR, 40th Sess., Supp. No. 17, Annex I, U.N. Doc. A/40/17 (Dec. 11, 1985), *amended by* G.A. Res. 61/33, U.N. GAOR, 61st Sess., Supp. No. 17, U.N. Doc. A/61/17 (Dec. 4, 2006) [hereinafter UNCITRAL Model Law].

seeking to constrain court involvement in international arbitration,<sup>21</sup> explicitly contemplates a role for the “competent court” in the arbitral process in at least 13 out of the 47 articles of the Model Law.<sup>22</sup> These articles can be grouped into 10 discrete types of border crossings—the 3 referenced in the New York Convention, and 7 others:

- (1) enforcement of the arbitration agreement (Article 8);
- (2) court issuance of interim measures (Articles 9 and 17 J);
- (3) appointment of arbitrators and related measures (Articles 11(3) and 11(4));<sup>23</sup>
- (4) adjudication of a challenge of an arbitrator following an unsuccessful challenge under the arbitration agreement or before the arbitral tribunal (Article 13(3));
- (5) adjudication of the termination of the arbitrator’s mandate in cases of failure or impossibility to act by an arbitrator (Article 14);
- (6) adjudication of a preliminary ruling by an arbitral tribunal upholding its own jurisdiction (Article 16(3));
- (7) recognition and enforcement of interim measures issued by an arbitral tribunal (Articles 17 H and 17 I);
- (8) court assistance to arbitral tribunals in taking evidence (Article 27);
- (9) setting aside of arbitral awards (Article 34); and
- (10) recognition and enforcement of arbitral awards (Articles 35 and 36).<sup>24</sup>

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21. *See, e.g.*, REDFERN & HUNTER, *supra* note 10, at 441 (“The Model Law seeks to exclude the involvement of the courts as far as possible.”); *see also* UNCITRAL Model Law, *supra* note 20, art. 5.

22. *See* UNCITRAL Model Law, *supra* note 20, arts. 8-9, 11, 13-14, 16, 17 H-17 J, 27, 34-36.

23. Note that under Article 15 of the UNCITRAL Model Law, the same appointment procedure, involving potential reliance on the court, is used when the appointment of substitute arbitrators is needed. *See id.* art. 15.

24. *See id.* arts. 8-9, 11, 13-14, 16, 17 H-17 J, 27, 34-36; *see also id.* art. 6, which allows each State adopting the law to specify the court or other authority for certain functions of arbitration assistance and supervision as provided for in articles 11(3) (dealing with failure to agree on procedure for appointment of arbitrators), 11(4) (failure to act under an agreed appointment procedure), 13(3) (court deciding on challenge of arbitrators following an unsuccessful challenge with the arbitral tribunal), 14 (deciding on the termination of the arbitrator’s mandate following his/her failure or impossibility to act), 16(3) (deciding whether arbitral tribunal has jurisdiction) and 34(2) (recourse to a court against an arbitral award by an application for setting aside).

Another type of border crossing that is not mentioned in the UNCITRAL Model Law but which has a high current profile is litigation in national courts to obtain evidence or otherwise to aid attachment of the assets of an award debtor within the relevant jurisdiction. In summary, then, there appears to be a total of 11 categories of border crossings (*See* Table 1).

Table 1. Circumstances in Which a National Court Might Be Asked to Intervene in an International Arbitration

	<b>Border Crossing</b> (*: indicates a <i>principal</i> crossing, i.e., recognized by the New York Convention)	<b>Timing with respect to arbitral proceeding</b>	<b>Relevant Provisions of the New York Convention or UNCITRAL Model Law</b>	<b>Likely National Courts</b> (+: indicates a clear <i>primary</i> jurisdiction)
1.	Enforcement of the arbitration agreement*	Before or during	New York Convention Art. II; UNCITRAL Model Law Art. 8	Seat of arbitration+; national court of a party
2.	Court issuance of interim measures	Before or during	UNCITRAL Model Law Arts. 9 and 17 J	Seat of arbitration, place of enforcement, or location of the property or evidence
3.	Appointment of arbitrators	Before	UNCITRAL Model Law Arts. 11(3) and 11(4)	Seat of arbitration+
4.	Challenges to arbitrators	Before or during	UNCITRAL Model Law Art. 13(3)	Seat of arbitration+ or a party's home state
5.	Termination of arbitrators' mandate in cases of failure or impossibility to act	During	UNCITRAL Model Law Art. 14	Seat of arbitration+
6.	Challenges to arbitral jurisdiction (in cases where arbitral tribunal rules as preliminary matter that it has jurisdiction)	During	UNCITRAL Model Law Art. 16(3)	Seat of arbitration+
7.	Court enforcement of tribunal-issued interim measures	During	UNCITRAL Model Law Arts. 17 H and 17 I	Seat of arbitration+

Table 1-continued from previous page

	<b>Border Crossing (*: indicates a <i>principal</i> crossing, i.e., recognized by the New York Convention)</b>	<b>Timing with respect to arbitral proceeding</b>	<b>Relevant Provisions of the New York Convention or UNCITRAL Model Law</b>	<b>Likely National Courts (+: indicates a clear <i>primary</i> jurisdiction)</b>
8.	Court assistance in taking evidence	During	UNCITRAL Model Law Art. 27	Anywhere that allows it, cf. 28 U.S.C. §1782 in the United States
9.	Setting aside of arbitral awards*	After	New York Convention Art. V(1)(e); UNCITRAL Model Law Art. 34	Seat of arbitration has primary jurisdiction, but secondary jurisdiction “under the law of which, that award was made”
10.	Recognition and enforcement of arbitral awards*	After	New York Convention Arts. III and V; UNCITRAL Model Law Arts. 35 and 36	Where the award-creditor seeks it, usually losing party’s jurisdiction or the United States as a default jurisdiction
11.	Execution of enforced arbitral award	After		Where the award-debtor has assets

Before describing the specific border crossings in greater detail, let us consider three different ways to categorize them. One way is to divide them temporally: a national court might be asked to intervene before an arbitral proceeding has started, during the proceeding, or after an award is rendered.<sup>25</sup> A second way would be to categorize them according to the perceived importance of the question posed to a national court. The three crossings mentioned in the New York Convention together might be characterized as *principal* border crossings, and all others as supplemental crossings. A third way to organize interventions by national courts would be geographically. A

25. See, e.g., John J. Barceló III, *Who Decides the Arbitrator’s Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT’L L. 1115, 1118 (2003) (dividing the court-arbitration process into three stages).

court in the State in which an arbitral proceeding takes place might be seen as having *primary* jurisdiction over border crossings<sup>26</sup> and courts in other States as seized of secondary jurisdiction, most significantly for suits in which a winning party seeks to enforce or recognize an arbitral award. This Article will categorize the border crossings in a hybrid fashion relying mostly on the chronological and significance metrics.

#### *A. Enforcement of the arbitration agreement*

International arbitration starts with an agreement between the parties to send disputes between or among them to arbitration. The New York Convention requires such agreements to be in writing to avail of its protections. The treaty binds the courts of signatory States to enforce an agreement to arbitrate unless it is “null and void, inoperative or incapable of being performed.”<sup>27</sup>

Challenges to an arbitration agreement generally take one of two forms. First, after attempting unsuccessfully to get the other side to arbitrate a dispute, a party may sue in a national court in order to compel arbitration. Such suits are typically brought in the national courts of the country in which the arbitration was supposed to take place, or of a country that has a plausible basis of adjudicative jurisdiction (called personal or territorial jurisdiction in the United States) over the defendant who had refused to arbitrate. Second, a party may ignore the arbitration agreement and bring a lawsuit in a national court, acting as if the agreement never existed. The defendant then might plead the arbitration agreement as an affirmative defense or as the basis for a motion to dismiss the suit. In US courts, such a defendant would also typically file a counter-motion to compel arbitration. This second type of suit is usually brought in a jurisdiction that the plaintiff perceives to be friendly, paradigmatically its home jurisdiction if there is a basis for adjudicative jurisdiction over the defendant there.

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26. For the concepts of “primary” and “secondary” jurisdictions and the corresponding powers of courts in these jurisdictions with respect to arbitral awards, *see, e.g.*, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003). *See generally* Alan Scott Rau, *Understanding (and Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT’L ARB. 47 (2010).

27. New York Convention, *supra* note 2, art. II(3); UNCITRAL Model Law, *supra* note 20, art. 8(1).

The doctrine of *separability* in international arbitration famously prescribes that a challenge to the validity of an arbitration agreement is legally distinct from a challenge to the validity of the underlying business contract of which it is a part—the so-called *container* contract. A corollary of separability doctrine is that a challenge to the validity of the container contract does not necessarily entail a challenge to the agreement to arbitrate, and so may be sent to the arbitrators for their adjudication. The exception is when the attack on the container contract contests whether it ever came into existence at all, for example, because the individual who signed on behalf of the contracting counter-party was an imposter.

From a policy perspective, separability doctrine is justifiable as a safeguard against a moral hazard posed by dispute settlement by private arbitrators. Decisions about the validity of arbitration agreements necessarily implicate the power of arbitrators to decide the scope of their jurisdiction—the principle of *Kompetenz-Kompetenz*. But arbitrators have a powerful economic interest to uphold their jurisdiction, since, unlike judges who are public officials paid by a State, their compensation depends to a large extent on their upholding jurisdiction so they can hear the case. National court oversight thus seems critical as a check against the danger that arbitrators will uphold their jurisdiction even when the arbitration agreement is null or void.

But national laws have different approaches as to how they regulate judicial interventions to enforce arbitration agreements at the onset of proceedings. This is in part due to the fact that the invalidity of an arbitration agreement is one of the grounds available under the New York Convention for challenging an arbitral *award* after it has been rendered. And so there is a second opportunity to address the possibility of arbitrators overreaching, but it comes only after considerable time and resources have been spent by participating in arbitral proceedings.

Differences across national jurisdictions also reflect varying assessments of the severity of the moral hazard facing the arbitrators. French law, for example, instructs judges to dismiss onset challenges if an arbitral tribunal has already been set up (meaning that the challenging party at least participated in the arbitration to that point).<sup>28</sup> And, if an arbitral tribunal has not been set up, French law

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28. See NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 1448 (Fr.).

requires a national court to dismiss the case unless it determines that the arbitration agreement is *manifestly* void or *manifestly* not applicable, not simply so.<sup>29</sup> United States courts, by contrast, will retain jurisdiction to hear a challenge to an arbitration agreement even if a tribunal has been set up so long as it is the agreement being challenged, or the party resisting arbitration claims that the container contract never came into existence.

In the United States, both federal and state courts may get involved in the enforcement of international arbitration agreements. Under Section 203 of the Federal Arbitration Act (the “FAA”), US district courts have original jurisdiction over an action or proceeding falling under the New York Convention.<sup>30</sup> Section 206 of the FAA expressly authorizes such courts to compel arbitration in accordance with the arbitration agreement.<sup>31</sup> An action or proceeding to enforce an arbitration agreement may also be started in state courts. However, the defendant will often seek to remove such action or proceeding to US federal court under Section 205 of the FAA, availing itself of the benefits of litigation in the federal court system.<sup>32</sup> The court proceedings on the merits could be accompanied at this stage with a request for interim relief.<sup>33</sup>

### B. *Court issuance of interim measures*

Increasingly, parties to international arbitration agreements seek interim measures<sup>34</sup> before proceedings have begun in order to

29. *See id.*

30. Federal Arbitration Act, 9 U.S.C. § 203 (2015).

31. *Id.* § 206.

32. *Id.* § 205.

33. For analysis of the relevant U.S. case law with respect to interim relief provided by courts in this context, *see generally* Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT’L ARB. 299 (2006).

34. For the purposes of this Article, we use the term “interim measures” or “interim relief,” which encompasses other terms used in arbitration laws and rules with respect to interim measures, such as “provisional measures,” “preliminary measures,” “conservatory measures,” “precautionary measures,” and combination of these terms. *See, e.g.*, REDFERN & HUNTER, *supra* note 10, at 444-45 (referring to the terms used in the English and French versions of the ICC Rules of Arbitration and the Swiss law on international arbitration); *see also* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 709 (Emmanuel Gaillard & John Savage eds., 1999) (commenting on the “not always helpful” terminology used in the context of provisional and conservatory measures). For a definition of interim measures as applicable to international commercial arbitration, *see* UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. GAOR, 31st Sess., Supp. No. 17, ch. V, sec. 7, U.N. Doc. A/31/17 (Dec. 15, 1976), *as revised by* G.A. Res. 65/22, U.N. GAOR, 65th Sess., Supp.

preserve the status quo. The US litigation equivalents are preliminary injunctions, temporary restraining orders, and pre-trial attachments of assets. The need to go to court for interim measures had once been considered the Achilles' heel of international arbitration, since arbitral tribunals used to be incapable of ordering and enforcing interim measures.<sup>35</sup>

Today, however, many leading international arbitral institutions have rules affording tribunals jurisdiction to order interim measures.<sup>36</sup> Still, a national court remains the default, or even the only forum choice, where: (1) an urgent interim measure is needed prior to the constitution of an arbitral tribunal; (2) a party resists compliance with tribunal-ordered interim measures; or (3) the interim measure sought is directed towards a third party, which is not bound by the arbitration agreement and thus beyond the arbitral tribunal's jurisdiction.<sup>37</sup> Generally speaking, requests to courts for interim measures are not held to constitute an infringement or waiver of an agreement to arbitrate, or otherwise to affect the powers of arbitral tribunal.<sup>38</sup>

The New York Convention does not contain any provisions on interim measures. The 1975 Inter-American Convention on International Commercial Arbitration (the "Panama Convention") also has no provisions for interim measures.<sup>39</sup> Conversely, the 1961 European Convention on International Commercial Arbitration does provide for court involvement in the provision of interim relief for

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No. 17, Ch. III & Annex I, U.N. Doc. A/65/17 (Dec. 6, 2010), with new art. 1, ¶ 4, *as adopted* by G.A. Res. 68/109, U.N. GAOR, 68th Sess., Supp. No. 17, Ch. III & Annex II, U.N. Doc. A/68/17 (Dec. 16, 2013) art. 26(2) [hereinafter UNCITRAL Arbitration Rules].

35. *See* Davies, *supra* note 33, at 333.

36. *See, e.g.*, International Chamber of Commerce (ICC) Rules of Arbitration, art. 28 (Jan. 1, 2012), <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/> [hereinafter ICC Rules of Arbitration].

37. *See, e.g.*, Redfern, *supra* note 3, at 86.

38. *See, e.g.*, European Convention on International Commercial Arbitration art. VI(4), Apr. 21, 1961, 484 U.N.T.S. 349; *see also* Arbitration Act 2010 (Act No. 1/2010) art. 9 (Ir.), <http://www.irishstatutebook.ie/eli/2010/act/1/enacted/en/pdf>; Chūsai-hō [Arbitration Act], Law No. 138 of 2003, *amended by* Law No. 147 of 2004, art. 15 (Japan); *International Arbitration Rules*, in INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) (2014) art. 24(3) [hereinafter AAA/ICDR Arbitration Rules]; ICC Rules of Arbitration, *supra* note 36, art. 28(2); UNCITRAL Arbitration Rules, *supra* note 34, art. 26(9).

39. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448, 14 I.L.M. 336 (as implemented by Chapter 3 of the Federal Arbitration Act, 9 U.S.C. §§ 301–307) [hereinafter Panama Convention].

international arbitrations.<sup>40</sup> The UNCITRAL Model Law, which in 2006 introduced a separate Chapter IV A (Interim Measures and Preliminary Orders<sup>41</sup>) dedicated primarily to tribunal-ordered interim relief, contains only one article on court-ordered interim measures.<sup>42</sup>

The issue of court-ordered interim measures is thus left largely to national lawmakers and is dealt with differently in various domestic laws. Arbitration laws of many jurisdictions, including Austria, England, France, India, South Korea, Russia, and Sweden, provide for court-ordered interim measures in support of arbitration.<sup>43</sup> Some other States, including Italy, Greece, Brazil, and Thailand, still do not allow interim measures to be ordered by arbitral tribunals, thus making the court the only forum choice for a party seeking interim relief.<sup>44</sup> The rules of arbitral institutions also anticipate court aid on

40. European Convention on International Commercial Arbitration, *supra* note 38, art. VI(4).

41. Preliminary orders are generally akin to temporary restraining orders used in litigation in the United States. Note, however, that the UNCITRAL Model Law uses the term “preliminary orders” for interim measures that can be issued on an *ex parte* basis by the arbitral tribunal. See UNCITRAL Model Law, *supra* note 20, art. 17 B.

42. See UNCITRAL Model Law, *supra* note 20, art. 17 J (establishing that the court has the same power of issuing interim measures in relation to arbitration proceedings as it has in relation to proceedings in court).

43. See ÖSTERREICHISCHES SCHIEDSRECHT [AUSTRIAN ARBITRATION ACT] BUNDESGESETZBLATT I [BGBl I] No. 7/2006, § 585 (Austria), translated by Riegler/Fremuth-Wolf/Platte in STEFAN RIEGLER ET AL., ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE 812-13 (2007) [hereinafter Austrian Arbitration Act]; Arbitration Act, 1996, c. 23, § 44 (Eng.) [hereinafter English Arbitration Act]; Закон РФ о Международном Коммерческом Арбитраже [Law of the Russian Federation on International Commercial Arbitration] ROSSIISKAIA GAZETA [ROS. GAZ.] Aug. 14, 1993, amended by Federal’nyi Zakon No. 250-Ф3, Dec. 3, 2008, art. 9 (Russ.); Arbitration Act, Act No. 1767, Mar. 16, 1966, amended by Act. No. 10207, Mar. 31, 2010, art. 10 (S. Kor.); 4 § LAG OM SKILJEFÖRFARANDE [ARBITRATION ACT] (Svensk författningssamling [SFS] 1999:116) (Swed.), <http://www.sccinstitute.com/media/37089/the-swedish-arbitration-act.pdf>; Davies, *supra* note 33, at 326 (citing S.N.T.M. Hyproc. v. Snach, Cass. 2e Civ. June 8, 1995 (Fr.), in 1996 REV. ARB. 125, 126) (holding by the Cour de Cassation that “the existence of an arbitration agreement is no obstacle to a judge granting ‘protective measures’ under the New Code of Civil Procedure”); see also Arbitration and Conciliation Act, 1996, No. 26 of 1996, § 9 (India). Note that the Supreme Court of India recently held that Indian courts can order interim relief under Section 9 or any other provision of the Arbitration Act only in support of arbitrations sitting in India. Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., Sept. 6, 2012.

44. See CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] arts. 86-87 (Braz.); KODIKAS POLITIKES DIKONOMIAS [KPOL.D.] [CODE OF CIVIL PROCEDURE] VII:889 (Greece), translated in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 7 (Jan Paulsson & Lise Bosman eds., Supp. 72 2007) (“The arbitrators may not order, amend, or revoke interim measures of protection.”); C.p.c. art. 818 (It.), translated in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 6 (Jan Paulsson & Lise Bosman

interim relief, generally providing that such help can be requested from the court prior to the constitution of an arbitral tribunal, and, in limited circumstances, even thereafter.<sup>45</sup>

In the United States, the Federal Arbitration Act does not contain provisions expressly authorizing national courts to order interim relief in aid of arbitration.<sup>46</sup> But US courts are generally perceived as willing to grant interim measures with respect to international arbitration when such measures support, rather than impede, the arbitral process.<sup>47</sup> Prior to the constitution of an arbitral tribunal, the jurisdiction of a federal court to order interim measures may be based on its subject-matter jurisdiction over the underlying dispute.<sup>48</sup> Once the arbitration is commenced, the petition for interim relief could arguably be brought to the court independently of the underlying claim.<sup>49</sup> In granting provisional remedies, the US federal courts will generally apply the Federal Rules of Civil Procedure (the “FRCP”), such as Rule 65 for preliminary injunctions and temporary restraining orders.<sup>50</sup>

However, US state law (as opposed to federal law) may also play a role, even in an international commercial case in federal court under the FAA. This is because provisional remedies available under Rule 64 of the FRCP (e.g., arrest, attachment) are governed by the law of the state where the federal court is located.<sup>51</sup> And so, even in the US District Court for the Southern District of New York—a federal court—New York *state* law will govern the issuance of attachment in

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eds., Supp. 49 2012) (“The arbitrators may not grant attachments or other interim measures of protection. . . .”); Arbitration Act 2002 § 16 (Thai.), *translated in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 2 (Jan Paulsson & Lise Bosman eds., Supp. 37 2003).

45. See, e.g., AAA/ICDR Arbitration Rules, *supra* note 38, art. 24; Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC) art. 23 (Jan. 1, 2015), [http://cn.cietac.org/rules/rule\\_E.pdf](http://cn.cietac.org/rules/rule_E.pdf) [hereinafter CIETAC Arbitration Rules]; Arbitration Rules of the Singapore International Arbitration Centre (SIAC), art. 26 (Apr. 1, 2013), <http://www.siac.org.sg/our-rules/rules/siac-rules-2013> [hereinafter SIAC Arbitration Rules]; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) art. 32 (Jan. 1, 2010), [http://www.sccinstitute.com/media/40120/arbitrationrules\\_eng\\_webbversion.pdf](http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf) [hereinafter SCC Arbitration Rules]; ICC Rules of Arbitration, *supra* note 36, art. 28.

46. Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2015).

47. See, e.g., 2 BORN, *supra* note 18, at 2540-41. For further analysis of the decisions of the U.S. federal courts, see Davies, *supra* note 33, at 303-12.

48. See Davies, *supra* note 33, at 303.

49. See *id.* at 311-12.

50. Fed. R. Civ. P. 65.

51. Fed. R. Civ. P. 64.

aid of arbitration. Specifically, Section 7502(c) of the Civil Practice Law and Rules of New York provides courts with the power to order two types of provisional measures—a preliminary injunction and an order of attachment—with respect to a pending arbitration or an arbitration that is about to be commenced:

inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.<sup>52</sup>

A number of other states in the United States have adopted statutes, some of them based on the UNCITRAL Model Law,<sup>53</sup> granting their courts the power to order interim measures in support of arbitration.<sup>54</sup>

Among the various courts available to the parties in international arbitration, it is the courts at the seat of arbitration that often have primary jurisdiction with respect to interim measures requests. This jurisdiction is typically concurrent with the arbitral tribunal once constituted, although the exact boundaries between the interim-measures powers of court and tribunal remain unclear.<sup>55</sup> Other national courts, such as those where the property in dispute or key evidence is located, or where enforcement can be expected, regularly get involved in providing interim relief<sup>56</sup> or enforcing tribunal-ordered interim measures. The role of these other courts may, however, be limited due to domestic law restrictions on assisting arbitral tribunals sitting beyond the jurisdiction of the court.<sup>57</sup>

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52. N.Y. C.P.L.R. 7502(c) (MCKINNEY 2005). The role of state law in interim relief applications has prompted us to conduct a supplemental search of border crossings in the Southern District of New York with reference to Section 7502(c), in addition to interim relief cases applying federal law.

53. Most recently, such statute was adopted in Georgia in 2012. *See* GA. CODE ANN. §§ 9-9-20 to 9-9-59 (2012).

54. *See* Davies, *supra* note 33, at 316-17; *see also* CAL. CIV. PROC. CODE § 1297.93 (West 1988); CONN. GEN. STAT. §§ 50a-109 (1989), 52-422 (1978); N.Y. C.P.L.R. § 7502(c) (MCKINNEY 2005); N.C. GEN. STAT. § 1-567.39(c)(1) (2014); OHIO REV. CODE ANN. §§ 2712.14-2712.16 (West 1991); OR. REV. STAT. § 36.470(3)(a) (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 172.175(c) (West 1997).

55. *See, e.g.*, Charles Price, *Conflict with State Courts, in* INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 39, 40 (Ass'n for Int'l Arbitration eds., 2007).

56. *See* Davies, *supra* note 33, at 300-03.

57. One of the concerns that have been raised in this respect is whether the country's commitment to international arbitration should go as far as providing assistance to foreign

Moreover, under some national laws, courts' power to order interim measures and whether such power is exclusive to the courts or shared with an arbitral tribunal depends on the type of interim relief sought.<sup>58</sup>

### C. Court appointment of arbitrators and related measures

A separate category of border crossings relates to the appointment of arbitrators by the court. Domestic arbitration laws commonly permit the parties to agree on any procedure for the appointment of arbitrators. They also typically provide for a default procedure and an appointing authority—usually a court—to be relied upon if the parties cannot agree, or if the arbitrators fail to act in accordance with an agreed-upon selection procedure (such as where two party-appointed arbitrators cannot decide on a presiding arbitrator to constitute a three-person panel).<sup>59</sup> Where there is a statutory role for courts in appointments, the relevant domestic laws commonly provide that the courts have the final say on the appointment of arbitrators and their decisions are not subject to appeal.<sup>60</sup> In some countries, the national laws confer the functions of the default

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arbitrations that might have no or minimum connections with the jurisdiction at stake, especially when it is not the jurisdiction of the seat. *See id.* at 301.

58. For instance, under the laws of the People's Republic of China, once the arbitral proceedings have begun, the courts appear to have exclusive jurisdiction with respect to requests for preservation of property and evidence. The application for such conservatory measures is made with an arbitral institution if one is used, which then forwards the request to the municipal court with jurisdiction over granting such measures. Consistent with these laws, the latest edition of the CIETAC Arbitration Rules provides in Article 23(1) that "[w]here a party applies for *conservatory* measures pursuant to the laws of the People's Republic of China, CIETAC shall forward the party's application to the competent court designated by that party in accordance with the law." CIETAC Arbitration Rules, *supra* note 45, at art. 23(1) (emphasis added). However, Article 23(3) further provides that "[a]t the request of a party, the arbitral tribunal may decide to order or award any *interim* measure it deems necessary or proper in accordance with the applicable law or the agreement of the parties. . . ." *Id.* (emphasis added). Thus, the CIETAC Arbitration Rules permit tribunal-ordered interim measures. Yet, it is unclear how such measures are distinct from conservatory measures under Article 23(1), which can be ordered only by the courts. Arguably, beyond the exclusive jurisdiction of the courts with respect to measures on property and evidence preservation, the tribunals can order other interim measures, especially where such measures are not governed by the laws of the People's Republic of China and will be enforced outside of China.

59. *See, e.g.*, English Arbitration Act, *supra* note 43, §§ 16-18; NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 1452 (Fr.); Arbitration Law, Royal Decree No. M/34, art. 15 (Apr. 16, 2012) (Saudi Arabia); BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 179 (1988) (Switz.); *see also* UNCITRAL Model Law, *supra* note 20, art. 11.

60. *See, e.g.*, UNCITRAL Model Law, *supra* note 20, art. 11(5).

appointing authority on an arbitral institution, not a national court.<sup>61</sup> This is the rarer scenario.

In practice, when a party resists arbitration, a request for the appointment of an arbitrator often accompanies a request to compel arbitration. In the United States, in addition to its powers to compel arbitration under 9 U.S.C. §206, a US district court having jurisdiction under Chapter 2 of the Federal Arbitration Act, has the power to appoint arbitrators in accordance with the provisions of an applicable arbitration agreement.<sup>62</sup>

#### *D. Court deciding on a challenge to an arbitrator*

National arbitration laws also generally provide for border crossings into national courts for challenges to arbitrators.<sup>63</sup> In jurisdictions adopting the UNCITRAL Model Law, the rules on challenges are outlined in Article 13, which allows the parties to agree on a procedure for challenging an arbitrator. It also provides that, failing such agreement, a challenge can be made, first, before the arbitral tribunal in accordance with Article 13(2). If, however, the challenge under the procedure as agreed by the parties or provided for in Article 13(2) is unsuccessful, Article 13(3) permits the challenging party to request a court to decide on the challenge within thirty days.<sup>64</sup> Article 13(3) determinations are not subject to appeal. While the court proceedings on the challenge are pending, Article 13 permits the arbitral tribunal, including the challenged arbitrator, to continue the arbitral proceedings, even to the point of rendering an award.<sup>65</sup>

The availability of, and grounds for, a request for court review of an arbitral tribunal's adjudication of a challenge to an arbitrator varies across jurisdictions. For instance, in England and Germany, judicial review of challenges is considered mandatory and cannot be limited by contract between the parties.<sup>66</sup> By contrast, court review is more limited in France, Switzerland, and Singapore. Courts in those

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61. *See, e.g.*, Arbitration Law of the People's Republic of China (promulgated by Order No. 31 of the President of the People's Republic of China, Aug. 31, 1994) art. 32; Law of the Russian Federation on International Commercial Arbitration, *supra* note 43, art. 11.

62. 9 U.S.C. § 206.

63. *See, e.g.*, English Arbitration Act, *supra* note 43, § 24; FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW, *supra* note 61, art. 180(3).

64. *See* UNCITRAL Model Law, *supra* note 20, art. 13(3).

65. *Id.*

66. *See, e.g.*, JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 324 n.418 (2012).

countries typically refuse to review arbitral panel denials of challenges or permit them only in limited circumstances, such as when a challenge is based on recently discovered information.<sup>67</sup>

The challenge of an arbitrator can also be made in setting aside proceedings before a court after an award is rendered. A party might move to vacate an award on the ground that the composition of the arbitral tribunal was not in accordance with the arbitral agreement.<sup>68</sup> This becomes the only option available for parties where a national arbitration law, like the US Federal Arbitration Act,<sup>69</sup> does not accord an explicit right for courts to address challenges until a final award is rendered.

A related issue is the request for disqualification of an attorney or a law firm from representing a party in international arbitration. Such requests would normally be addressed to the courts. In New York, in the context of ongoing arbitral proceedings, the courts (and not the arbitral tribunals) have exclusive jurisdiction to address attorney disqualification requests based on conflicts of interest and professional responsibility violations.<sup>70</sup> Although, for the purposes of this study, we will categorize them together with arbitrator challenges, in theory, this resort to national courts could constitute an independent border crossing in its own right.

#### E. Court deciding on the termination of the arbitrator's mandate

An additional border crossing is permitted pursuant to Article 14 of the UNCITRAL Model Law, which regulates failure or impossibility to act by an arbitrator. Specifically, if an arbitrator becomes *de jure* or *de facto* unable to perform or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws or if the parties agree on the termination.<sup>71</sup> If there is any controversy over whether arbitrators have failed to act, under Article 14(1) of the UNCITRAL Model Law, any party may

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67. *Id.* at 324 n.419.

68. *See, e.g.*, UNCITRAL Model Law, *supra* note 20, art. 34(2)(a)(iv).

69. *See, e.g.*, WAINCYMER, *supra* note 68, at 324. For the right of the U.S. court to remove arbitrators before the final award is made, *see generally* Yulia Andreeva, *How Challenging is the Challenge, or Can U.S. Courts Remove Arbitrators Before an Arbitration Has Come to an End?*, 19 AM. REV. INT'L ARB. 127 (2008).

70. *See, e.g.*, *Nw. Nat'l Ins. Co. v. Insko, Ltd.*, 2011 WL 4552997 (S.D.N.Y. 2011); *In Re Arbitration Between R3 Aerospace, Inc. & Marshall of Cambridge Aerospace Ltd.*, 927 F. Supp. 121 (S.D.N.Y. 1996).

71. *See* UNCITRAL Model Law, *supra* note 20, art. 14.

request a court to decide on the termination of the arbitrator's mandate. A resultant decision of the court is not subject to appeal.<sup>72</sup>

National arbitration laws may also provide for court involvement with respect to the arbitrator's right to resign. For instance, in cases of failure or impossibility to act, Article 14 of the UNCITRAL Model Law allows an arbitrator to resign without establishing further conditions for resignation. By contrast, the Belgian Judicial Code provides that an arbitrator cannot resign without prior judicial approval.<sup>73</sup> Similarly, the Netherlands Code of Civil Procedure requires approval of the parties, a designated appointed authority, or a court.<sup>74</sup> The US Federal Arbitration Act does not have an analogue to UNCITRAL Model Law Article 14(1), and so there are no separate data recorded for this border crossing in our study. However, the assistance of a US court might be invoked under 9 U.S.C. §206, by framing the issue as one in which arbitrators are not acting in accordance with the relevant arbitration agreement.

#### F. *Court deciding on the matter of the arbitral tribunal's jurisdiction*

As discussed above, arbitrators, as adjudicators, are understood to have jurisdiction to determine the scope of their own jurisdiction—a fundamental principle of judicial independence. In international arbitration circles, this is known as the principle of *Kompetenz-Kompetenz*. But in light of the possibility that arbitrators will be self-serving in upholding their jurisdiction (particularly since they have an economic incentive to do so), all national laws envision resorting to national courts for judicial review of arbitral panel jurisdictional decisions, especially those to affirm. For instance, Article 16(3) of the UNCITRAL Model Law allows any party, within thirty days of having received the notice of an arbitral tribunal's preliminary award upholding its own jurisdiction, to request a court to review the holding.<sup>75</sup> Judicial review thus serves as a sort of interlocutory appeal on the threshold question of arbitral jurisdiction. Article 16(3) further provides that any decision of the court is not subject to appeal; while the decision of the court is pending, the arbitral tribunal is authorized

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72. *Id.*

73. *See, e.g.,* WAINCYMER, *supra* note 68, at 328 n.447 (referring to CODE JUDICIAIRE [C.JUD] art. 1689 (Belg.)).

74. *See id.* (referring to RV art. 1029(3)-(4) (Neth.)).

75. UNCITRAL Model Law, *supra* note 20, art. 16(3).

to continue the arbitral proceedings.<sup>76</sup> A similar right to review an arbitral tribunal's threshold jurisdictional determination is part of the domestic laws of many countries, including such leading arbitral jurisdictions as France, Germany, and Switzerland.<sup>77</sup>

Obviously, the greater risk in an arbitral tribunal's jurisdictional holding is that it will find jurisdiction where it should not, i.e., that the panel will find a dispute arbitrable. Thus, German law only provides for judicial review of a tribunal's *affirmation* of jurisdiction.<sup>78</sup> In most jurisdictions, however, the relevant national laws provide for judicial review of all arbitral jurisdictional holdings, regardless of whether the tribunal affirms or denies jurisdiction.<sup>79</sup> In practice, there are very few instances where an arbitral panel refuses to find jurisdiction. Accordingly, these national laws are more about aesthetic symmetry rather than practical effect, as the more precisely calibrated German law implicitly acknowledges.

National laws also set out varying standards of review to be applied by courts in checking arbitral decisions on jurisdiction.<sup>80</sup> Some countries treat the arbitrators' decision as provisional and authorize *de novo* review by courts.<sup>81</sup> Other countries defer to the tribunal's determination with respect to its own jurisdiction and apply an unreasonableness or manifest-error standard of review.<sup>82</sup>

Finally, the laws of some countries permit the parties to enter into arbitration agreements that explicitly cut off judicial review of the arbitral tribunal's holding on its own jurisdiction.<sup>83</sup> Such

76. *Id.*

77. See NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C] art. 1502 (Fr.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], promulgated Dec. 5, 2005, BGBl. I at 3202, last amended by Gesetz [G], Oct. 10, 2013, BGBl. I at 3786, § 1040(3) (Ger.); FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW, *supra* note 61, art. 190(2)(b).

78. See, e.g., 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1101 n.294 (2d ed. 2014) [hereinafter 1 BORN] (citing Bundesgerichtshof [BGH] [Federal Court of Justice] June 6, 2002, SCHIEDSVZ 39, 2003 (Ger.)).

79. See *id.* (referring to decisions providing for judicial review of negative jurisdictional awards in Belgium, England, France, Italy, Sweden, Switzerland, and the United States).

80. See Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 94 (2012).

81. See, e.g., 1 BORN, *supra* note 78, at 1107-10.

82. See, e.g., Bachand, *supra* note 82, at 94-95 (citing *Ace Bermuda Ins. Ltd. v. Allianz Ins. Co. of Canada*, 2005 ABQB 975 (Can.) (where the Court of the Queen's Bench of Alberta held that the standard of review relied upon was "one of reasonableness and deference")).

83. For instance, agreements to enhance competence-competence, that is to agree to finally resolve jurisdictional issues by arbitration, are permitted under the English law. See, e.g., 1 BORN, *supra* note 78, at 1097. By contrast, the law of Germany does not allow the parties to exclude the competence of the German courts with respect to tribunal's jurisdiction.

agreements however are rare, even in the countries that allow them. Absent such an agreement, judicial resolution of arbitral tribunal jurisdictional holdings is available in most countries. Generally, national laws allow the arbitral panel to continue its proceedings even to the point of issuing an award while judicial review of the panel's jurisdiction is pending.<sup>84</sup> In any event, if a party did not contest jurisdiction at the outset, it can still make the challenge in a proceeding to set aside or refuse enforcement of an arbitral award after it has been rendered.

### G. Court enforcement of tribunal-ordered interim measures

Part I.B above focused on court-ordered interim measures in aid of arbitration; here we discuss court enforcement of interim measures ordered directly by an arbitral tribunal. A strong recent movement in national arbitration laws<sup>85</sup> and institutional arbitration rules<sup>86</sup> is the tendency to give international arbitral tribunals the power to order interim relief.<sup>87</sup> These include measures: (1) seeking to preserve the subject-matter of the dispute; (2) assisting the arbitral proceeding (ordering discovery or preservation or production of evidence); and (3) securing the effective execution of the award. The arbitration laws and rules generally provide a party opposing interim measures the

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Thus, the German courts can always review jurisdictional determinations made by arbitral tribunals. *See id.* at 1121-25.

84. *See id.*

85. *See, e.g.*, Federal Arbitration Act, *supra* note 46; Austrian Arbitration Act § 593, *in* RIEGLER ET AL., *supra* note 43, at 812-13; Arbitration Law, Law No. 138 of 2003, art. 24 (Japan); Law of the Russian Federation on International Commercial Arbitration, *supra* note 43, art. 17.

86. *See, e.g.*, AAA/ICDR Arbitration Rules, *supra* note 38, art. 24(1); Deutsche Institution für Schiedsgerichtsbarkeit e.V. [DIS] [Arbitration Rules of the German Institution of Arbitration], § 20.1 (July 1, 1998), <http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10>; ICC Rules of Arbitration, *supra* note 36, art. 28(1); London Court of International Arbitration (LCIA) Arbitration Rules art. 25.1 (Oct. 1, 2014), [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx) [hereinafter LCIA Arbitration Rules]; Rules of Arbitration of the Vienna International Arbitral Centre (VIAC) art. 33(1) (July 1, 2013), <http://www.viac.eu/en/arbitration/arbitration-rules-vienna/93-schiedsverfahren/wiener-regeln/144-new-vienna-rules-2013>; UNCITRAL Arbitration Rules, *supra* note 34, art. 26(1).

87. For further review of arbitration rules providing arbitral tribunals with the power to order interim measures and the role of the court with regard to interim measures, see, for example, Christopher Boog, *Interim Measures—Relevance of the Courts at the Place of Arbitration and Other Places*, *in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 199 (Franco Ferrari ed., 2013); *see also* 2 BORN, *supra* note 18, at 2428-2511.

opportunity to object,<sup>88</sup> but may also allow for *ex parte* requests in emergencies.<sup>89</sup> The latter are particularly controversial, as they seem incompatible with the consensual nature of arbitration.<sup>90</sup> Nevertheless, the UNCITRAL Model Law now authorizes *ex parte* applications for “preliminary orders” that are binding on the parties and do not require going to a court for enforcement.<sup>91</sup> Such preliminary orders are limited to 20 days and will expire thereafter unless the tribunal extends the time period after the encumbered party has had an opportunity to interpose its objections.<sup>92</sup>

Some national laws have no special provisions on arbitral tribunals’ power to order interim measures;<sup>93</sup> others provide detailed rules on the tribunals’ power and courts’ role in enforcing any tribunal-ordered interim measures.<sup>94</sup> Such court enforcement of tribunal-ordered interim measures may lead to additional border crossings and may require modification of the measures by the court

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88. See, e.g., LCIA Arbitration Rules, *supra* note 88, art. 25.1 (“The Arbitral Tribunal shall have the power [to order interim and conservatory measures] upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application.”); see also Austrian Arbitration Act § 593(1), in RIEGLER ET AL., *supra* note 43, at 812 (providing for on notice application for interim measures “[u]nless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party and after hearing the other party, order such interim or protective measure it deems necessary . . .”).

89. See, e.g., UNCITRAL Model Law, *supra* note 20, arts. 17 B-17 C (discussing conditions of granting preliminary orders, which may be requested by the moving party without notice to any other party).

90. See, e.g., Hans van Houtte, *Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 ARB. INT’L 85 (2004); see also United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Seventh Session (Vienna, Sept. 10-14, 2007), ¶ 53-60, U.N. Doc. A/CN.9/641 (Sept. 25, 2007). Also note the results of the 2012 international arbitration survey conducted by the School of International Arbitration at Queen Mary University of London with the support of White & Case LLP, which are indicative of the divide on the desirability of *ex parte* applications, with 51% of respondents replying that they believe the arbitrators should have such power, while 43% of respondents stating that they should not (6% were unsure). See 2012 INTERNATIONAL ARBITRATION SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS (2012).

91. See UNCITRAL Model Law, *supra* note 20, art. 17 B.

92. See *id.*, art. 17 C.

93. See *id.*

94. See, e.g., Austrian Arbitration Act § 593(1), in RIEGLER ET AL., *supra* note 43, at 812, which authorizes the arbitral tribunal to order interim or protective measures it “deems necessary in respect of the subject-matter in dispute if the enforcement of the claim were otherwise frustrated or significantly impeded, or there were a risk of irreparable harm.” The Act also provides for the procedure and standards of enforcement of such measures by the district courts in Austria, including the grounds for refusing enforcement by the court. *Id.*

prior to enforcement.<sup>95</sup> Provisions on tribunal-ordered interim measures are also incorporated in the rules of international arbitral institutions, such as Article 28(1) of the ICC Rules of Arbitration, which gives the arbitral tribunal a broad power to “order any interim or conservatory measure it deems appropriate.”<sup>96</sup>

In an effort to harmonize domestic arbitration laws concerning tribunal-ordered interim measures, the UNCITRAL Model Law introduced a new Chapter IV.A in 2006. The chapter also addressed the role of national courts in the enforcement of tribunal-issued interim measures.<sup>97</sup> For instance, a party objecting to the enforcement of interim measures may assert any ground listed in Article 36(1)(a)(i), (ii), (iii), or (iv),<sup>98</sup> which mirror the grounds for refusing enforcement of arbitral awards under Article V(1)(a)–(d) of the New York Convention.

*Emergency arbitration* rules are a new frontier in international arbitration related interim measures.<sup>99</sup> Such rules aim to serve the

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95. One of the most specific rules in this respect is provided by Section 593(3) of the Austrian Arbitration Act: “Where the measure provides for a means of protection unknown to Austrian law, the court may, upon request and after hearing the other party, enforce such measure of protection under Austrian law which comes closest to the measure ordered by the arbitral tribunal. In this case the court may also, upon request, reformulate the measure ordered by the arbitral tribunal in order to safeguard the realization of its purpose.” *See id.* § 593(3). The Act further states that a court shall refuse enforcement of a measure if the “measure provides for a means of protection unknown to Austrian law and no appropriate means of protection as provided by Austrian law has been requested.” *Id.* § 593(4).

96. *See* ICC Rules of Arbitration, *supra* note 36, art. 28; *see also* LCIA Arbitration Rules, *supra* note 88, art. 25.1(ii), which provides the arbitral tribunal with more limited power “to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration.”

97. *See* UNCITRAL Model Law, *supra* note 20, at ch. IV A (Interim Measures and Preliminary Orders). Note that an interim measure is defined by the Model Law as “any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.”

*Id.* art. 17.

98. *Id.* art. 17 I.

99. On emergency arbitration, *see, e.g.*, AAA/ICDR Arbitration Rules, *supra* note 38, art. 6; ICC Rules of Arbitration, *supra* note 36, art. 29(1); SCC Arbitration Rules, *supra*

parties' needs in cases where urgent relief is needed prior to the constitution of the arbitral tribunal. For instance, emergency arbitration rules have been introduced by the ICC (Article 29 of the ICC Rules of Arbitration, including the Emergency Arbitrator Rules found in Appendix V of the ICC Rules) and the AAA/ICDR (Article 6 of the ICDR International Dispute Resolution Procedures). These rules provide for the appointment of an emergency arbitrator at a very early phase of a dispute. Often, however, as with ordinary arbitral tribunals, the jurisdiction of an emergency arbitrator with respect to interim measures will be concurrent to the jurisdiction of national courts.<sup>100</sup> Where no emergency arbitration is available under the controlling rules, or a party against whom an emergency interim measure is invoked refuses to comply with the emergency arbitrator's order, court enforcement may be necessary.<sup>101</sup>

To summarize, tribunal-ordered interim measures are of intense present interest in the international arbitration community. Provisional relief is a big part of litigation on the ground in national courts, particularly in the United States. Accordingly, because international commercial arbitration aspires to provide a relatively autonomous alternative to national court litigation, there has been a campaign to empower analogues to the type of interim measures that can be had in national courts. Nevertheless, the courts are not entirely written out of the equation and remain an important backstop to the enforcement of any interim measures that arbitral tribunals may issue, especially when a burdened party seeks to object or have them lifted.

#### H. *Court assistance in taking evidence*

Article 27 of the UNCITRAL Model Law authorizes an arbitral tribunal, or a party with the approval of the tribunal, to request

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note 45, art. 32(4); SIAC Arbitration Rules, *supra* note 45, art. 26.2; *see also* Boog, *supra* note 89, at 203-04.

100. *See, e.g.*, ICC Rules of Arbitration, *supra* note 36, art. 29(7) (providing for a parallel jurisdiction of emergency arbitrator and national courts by stipulating that “[t]he Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules”).

101. *See, e.g.*, AAA/ICDR Arbitration Rules, *supra* note 38, art. 6; ICC Rules of Arbitration, *supra* note 36, art. 29 (“Emergency Arbitrator”); SCC Arbitration Rules, *supra* note 45, App. II (“Emergency Arbitrator”).

assistance in taking evidence from a competent court.<sup>102</sup> Specifically, courts can order the preservation or production of material evidence and documents or compel party witnesses to appear in arbitral proceedings. To be sure, the arbitral tribunal also has the power under domestic arbitration laws to summon party witnesses and request relevant documents.<sup>103</sup> Generally, however, the arbitral tribunal has no coercive power to threaten or punish non-compliance and therefore must turn to a court.<sup>104</sup>

Court assistance is also indispensable when a party wishes to rely on evidence or oral testimony from a *non-party* to the arbitration agreement. In the United States, discovery against non-parties might be obtained pursuant to 28 U.S.C. §1782. This statute authorizes district courts to provide assistance to foreign and international tribunals by ordering non-parties to hand over relevant material evidence for use before them. The US courts are divided on whether the statute authorizes such assistance to private foreign or international arbitral tribunals, and whether a party must go to a tribunal first before making a request to a US court.<sup>105</sup> Most countries do not have a statute like 28 U.S.C. §1782 that might arguably be construed to authorize a national court to order discovery from non-parties for use in a private international arbitral proceeding.

### *I. Setting aside of arbitral awards and related actions*

The making and delivery of an arbitral award to the parties does not mean that border crossing have come to an end. A common theme is that over ninety percent of arbitral awards are complied with voluntarily, and so courts need not get involved at all.<sup>106</sup> But when a losing party believes that an award was erroneously rendered, it may move to vacate it in a national court.

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102. See UNCITRAL Model Law, *supra* note 20, art. 27.

103. See, e.g., Federal Arbitration Act, 9 U.S.C. § 7.

104. See *id.*

105. See, e.g., THE COMM. ON INT'L COM. DISPUTES, THE NEW YORK CITY BAR ASS'N; 28 U.S.C. § 1782 AS A MEANS OF OBTAINING DISCOVERY IN AID OF INTERNATIONAL COMMERCIAL ARBITRATION—APPLICABILITY AND BEST PRACTICES, [http://www.nycbar.org/pdf/report/1782\\_Report.pdf](http://www.nycbar.org/pdf/report/1782_Report.pdf).

106. This data have been supported by survey results. See, e.g., Loukas Mistelis & Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT'L ARB. 319, 343 (2008).

An action to set aside or vacate an arbitral award usually takes place in a national court of the seat of arbitration, which would have primary jurisdiction. Parties sometimes seek to vacate an award in their home courts, especially if the relevant jurisdiction is the center of gravity of the dispute in question. The New York Convention mentions setting aside in Article V(1)(e), but does not specify the grounds on which an award might be set aside, thus leaving it up to domestic arbitration laws. Many such laws adhere to Article 34 of the UNCITRAL Model Law, which adopts the grounds for refusing recognition and enforcement of arbitral awards under the New York Convention as the grounds for setting aside.

In addition to provisions for setting aside or vacating an arbitral award in a national court (common to almost all states), some jurisdictions also provide for limited appeal to a court. For instance, Section 69 of the English Arbitration Act allows limited appeal on issues of law, and some national laws allow appeal of arbitral awards on both issue of law and fact (the Argentine Civil Code, Article 758; the Iraqi Civil Code, Article 273-74).<sup>107</sup> The US courts, on top of the statutory grounds in the Federal Arbitration Act,<sup>108</sup> permit setting aside of arbitral awards that were rendered in “manifest disregard of law,”<sup>109</sup> although the standard is exceedingly difficult to meet. Some countries adopt a “middle position”: their laws permit setting aside of arbitral awards when the arbitrators failed to apply the law the parties chose,<sup>110</sup> thus allowing, in a sense, a meta-review of the merits.

### J. Recognition and enforcement of arbitral awards

When a losing party refuses to satisfy an arbitral award, the winning party may ask a national court for an order to enforce the award. Recognition and enforcement of arbitral awards is perhaps the

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107. See CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 646 (2012); see also Sapna Jhangiani & Nicola Vinovrški, *Appeals of Issues of Foreign Law under the English Arbitration Act 1996—a Matter of Fact*, 7 DISP. RESOL. INT’L 15 (2013).

108. 9 U.S.C. § 10.

109. See DUGAN, *supra* note 107, at 644 (referring to Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 24-25 (2d Cir. 1997)).

110. See DUGAN, *supra* note 107, at 646 (citing Law of Arbitration in Civil and Commercial Disputes, Sultanati Decree No. 47/97, art. 53(d) (July 1, 1997) (Oman) (permitting annulment of arbitral award “where the arbitrators have failed to apply the law chosen by the parties to govern their dispute”). For a text of the Law, see *Sultanati Decree No. 47/97 Promulgating the Law of Arbitration in Civil and Commercial Disputes*, in ICAA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Jan Paulsson & Lise Bosman eds., 1984 & Supp. 59 2010).

most commonly known and discussed category of border crossings—it is the centerpiece of the New York Convention.<sup>111</sup> The Convention requires signatory states to enforce foreign arbitral awards unless one of the grounds listed in Article V applies. For instance, under Article V(1)(e), recognition and enforcement of an arbitral award may be refused if it has been set aside “by a competent authority of the country in which, or under the law of which, that award was made.” However, the contracting States to the New York Convention are not obliged to refuse recognition of an award in this case; instead, recognition and enforcement *may* be refused. Consequently, the courts of some countries, such as France, will recognize an award that has been set aside in another country.

One controversial issue specific to US federal courts is the dismissal of suits to enforce foreign arbitral awards on the ground of *forum non conveniens*—a common law doctrine under which cases which are more properly brought in other forums are dismissed. The US Court of Appeals for the Second Circuit has consistently approved such dismissals, based not on Article V, but on its reading of Article III of the New York Convention. This Article states that signatory states “shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure of the territory where the award is relied upon.*”<sup>112</sup> *Forum non conveniens*, according to the US courts, is such a “rule of procedure.”<sup>113</sup> Opponents of this view have argued that Article V provides the exclusive grounds for refusal to entertain a foreign award enforcement action, but to no avail. In our study, these cases are coded as award enforcement actions.

Another way in which national courts get involved in the enforcement of international arbitration awards is when a winning party takes an arbitral award and obtains a judgment confirming it or refusing to set it aside.<sup>114</sup> Judicial confirmation of international

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111. Foreign arbitral awards may also be enforced under the provisions of regional treaties, such as the Panama Convention. *See* Panama Convention, *supra* note 39.

112. New York Convention, *supra* note 2, art. III (emphasis added).

113. *See, e.g.,* Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 496 (2d Cir. 2002) (“The doctrine of forum non conveniens, a procedural rule, may be applied in domestic arbitration cases brought under the provisions of the Federal Arbitration Act, . . . and it therefore may be applied under the provisions of the Convention.” (citation omitted)).

114. *See, e.g.,* Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc., 157 F. Supp. 245 (S.D.N.Y. 2001).

arbitral awards is not required under the New York Convention; in fact, the abolition of the requirement for judicial confirmation was a major innovation over the Convention's predecessor, the Geneva Convention of 1927<sup>115</sup>. However, there might be a shorter statute of limitations (the New York Convention does not specify a limitations statute) for foreign arbitral awards as compared to foreign judgments.<sup>116</sup> Also, specific to New York, New York state courts will enforce a foreign judgment against a defendant without independently establishing personal jurisdiction over the defendant, while US national courts in New York, such as the SDNY, require personal jurisdiction over the defendant prior to enforcing an arbitral award against it. In both scenarios, an award creditor would be better served by a foreign judgment (i.e., because the creditor has more time to confirm a judgment than an award, or does not have to establish personal jurisdiction over the award debtor), and so seeks judicial confirmation, typically in a national court at the seat of arbitration.

#### *K. Execution of Enforced Arbitral Awards and Other Instances*

Even after an arbitral award is recognized by a national court, an award creditor might still require court assistance to execute on the assets of a recalcitrant award debtor, especially in arbitrations involving States and state entities which may assert sovereign immunity defenses. The most straightforward such case is when the award creditor seeks to attach the assets of the debtor in the jurisdiction to satisfy the award. Increasingly, however, a special issue has arisen in the post-judgment context because of the US federal courts' liberal discovery rules. Award creditors come to the SDNY not only to enforce against assets in the jurisdiction, but also to obtain discovery regarding an award debtor's assets outside of the United States. This sort of discovery is not available in any other country's courts. As a result, the US national courts serve as a sort of clearinghouse for forensic accounting of the assets of the award

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115. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301.

116. *See, e.g.,* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572 (2d. Cir. 1993) (refusing enforcement of an ICC arbitral award as time barred). *Cf.* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 29 F.3d 79 (2d. Cir. 1994) (enforcing a French court judgment confirming the above ICC arbitral award at the seat of arbitration).

debtor. This trend is controversial from a policy perspective, since it involves the US courts in global discovery sometimes with little or no connection to the United States.

\* \* \*

In summary, national court involvement in the international arbitration process is indispensable and diverse. Apart from the most common border crossings anchored in the New York Convention or national arbitration laws based on the UNCITRAL Model Law, additional instances of border crossings may derive from international treaties (such as the European Convention on International Commercial Arbitration<sup>117</sup>), national laws, and rules of major arbitral institutions (ICC, LCIA, AAA/ICDR, SCC).

## *II. BORDER CROSSINGS IN THE US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK*

New York is probably the most important city in the world for international commercial arbitration. The multilateral treaty that provides the basic architecture for the transnational enforcement of arbitration agreements and awards bears its name. Many parties, both foreign and domestic, choose to conduct arbitrations in New York, which is the headquarters of the American Arbitration Association's International Centre for Dispute Resolution, and the location of a regional office of the International Chamber of Commerce ("ICC"). As a center of global finance and commerce, many businesses have bank accounts or assets in New York that make it a key enforcement jurisdiction. New York law is often chosen as the benchmark law in business contracts, even as between parties that are not US nationals and as to transactions that have no connection to the United States.<sup>118</sup> New York's federal and state courts have a reputation for neutrality that make them attractive fora for litigation in support of arbitration. And, because many international arbitration cases that start in New York state courts are removed to US federal courts located in New York, those courts are a particularly valuable vantage point from which to collect data and test theories about border crossings.

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117. For instance, while the New York Convention is silent on the provision of interim relief by courts in aid of international arbitration, such assistance by the courts are anticipated by the European Convention. *See* European Convention on International Commercial Arbitration, *supra* note 38, art. VI(4).

118 *See, e.g.*, *Intern. Standard Elec. v. Bidas Sociedad Anonima*, 745 F. Supp. 172 (S.D.N.Y. 1990).

Surprisingly, no one has done so—a lacuna that this Article seeks to fill.

The Article aimed to survey all litigation related to international arbitration that originated in the US District Court for the Southern District of New York (SDNY) after December 29, 1970, when the New York Convention entered into force in the United States. It is the first article in a planned series that will examine and analyze these data about international arbitration litigation in the SDNY. Future articles in the series will apply statistical treatments to the data and analyze the data to glean qualitative information on winners, losers, types of claims, and amounts of damages.

In collecting and coding the data, we relied on both published and unpublished cases reported in the Westlaw database by employing the following methodology. First, we searched for all cases containing a reference to any provision of Chapter 2 of the Federal Arbitration Act (FAA)—the statute by which the New York Convention has been implemented in the United States. An advanced search for “9 usc 20\*” & CO(SDNY) returned a list of 308 cases for a period from December 29, 1970 to September 15, 2014.

Second, we performed a similar search for cases in the Southern District of New York that contain any reference to the provisions of Chapter 3 of the FAA, the provisions implementing the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”), which entered into force for the United States on October 27, 1990. The advanced search for “9 usc 30\*” & CO(SDNY) returned an additional list of 19 cases. To avoid duplications for cases found on both lists, we cross-referenced and deleted from the smaller Panama Convention list all cases already present on the New York Convention list. As a result, we crossed out 10 duplicate cases and added the remaining 9 Panama Convention cases to the New York Convention list, yielding a total of 317 observations from 1970 to the present day.

Third, we performed an additional search to locate cases in the SDNY involving requests for court assistance in taking evidence in aid of international arbitration from third parties within the court’s jurisdiction—Category 8 in Table 1. Here, we searched for all cases in the Southern District of New York that contained the terms “28 usc 1782”—the statute authorizing US federal courts to assist in the collection of evidence for foreign and international tribunals—and the terms “arbitration” or “arbitral” to limit the search results to cases in

which the relevant “foreign or international tribunal” was an arbitral panel. The advanced search for arbitra! & “28 usc 1782” & CO(SDNY) produced a list of 37 results, which were then analyzed for border crossings with respect to court assistance in taking evidence, with the earliest of such cases dating back to 1994.

Fourth, we searched for cases where interim measures were ordered by the court in the SDNY under section 7502(c) of the Civil Practice Law and Rules of New York.<sup>119</sup> Here, the advanced search for arbitra! & “7502(c)” & CO(SDNY) returned a list of 23 cases, which were then cross-referenced against cases already listed in the New York Convention list and then analyzed in search of additional instances of border crossings of Category 2—Court issuance of interim measures.

Finally, we analyzed all cases on the lists by classifying identified border crossings into one of the 11 categories generated in Part I based on the New York Convention, the UNCITRAL Model Law, and recent high-profile litigation. As we proceeded with the analysis, occasional non-arbitration cases were crossed off the list. This would happen, for instance, when the New York Convention was mentioned in a case only in a footnote as an analogy without directly invoking its provisions.

Cases were classified based on the original moving party’s motion or filing. For instance, if a moving party filed to vacate an arbitral award and the opposing party then cross-moved to confirm the same award, the case was counted as a single instance of a border crossing—in this example, Category 9 (Setting aside of arbitral awards). Similarly, if a party initially filed to confirm and enforce an arbitral award, and the opposing party moved to dismiss, the case was counted as a single instance of a Category 10 border crossing—Recognition and enforcement of arbitral awards. However, in a case where a party sued on a dispute despite the presence of an arbitration agreement, and the opposing party counter-moved to compel arbitration and stay court proceedings pending arbitration, we coded it as an action to enforce an arbitration agreement, a Category 1 border crossing.

Generally speaking, a single case would normally be counted as a single border crossing. Occasionally, multiple border crossings for a

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119. For reasons of such search for state law references in the U.S. district court practice, please *see supra* note 51 and the accompanying text, explaining the role of state law in provisional remedies granted by federal courts.

single case were recorded where a litigious party brought multiple actions or sought divergent forms of relief in the US federal district court within the context of a single case. For instance, if a motion to compel arbitration also contained a request to the court to appoint an arbitrator or to order an interim measure in aid of arbitration, such cases were counted as two instances of border crossings—categories 1 and 3 (Enforcement of the arbitration agreement and Appointment of arbitrators) and categories 1 and 2 (Enforcement of the arbitration agreement and Court issuance of interim measures), accordingly. The results of our analysis are presented below (Table 2 and Table 3).

Table 2. Border Crossings in SDNY, 12/29/1970-9/15/2014

Year/Border crossing	Enforcement of the arbitration agreement	Court issuance of interim measures	Appointment of arbitrators	Challenges to arbitrators	Termination of the arbitrator's mandate	Challenges to arbitral jurisdiction	Enforcement of tribunal's interim measures	Court assistance in taking evidence	Setting aside of arbitral awards	Recognition and enforcement of awards	Execution of enforced arbitral awards	Annual total
1970	-	-	-	-	-	-	-	-	-	-	-	-
1971	-	-	-	-	-	-	-	-	-	-	-	-
1972	-	-	-	-	-	-	-	-	-	-	-	-
1973	-	-	-	-	-	-	-	-	-	2	-	2
1974	-	-	-	-	-	-	-	-	-	1	-	1
1975	-	-	-	-	-	-	-	-	-	-	-	-
1976	1	-	-	-	-	-	-	-	-	-	-	1
1977	3	2	-	-	-	-	-	-	-	-	-	5
1978	1	1	-	-	-	-	-	-	-	2	-	4
1979	2	-	1	-	-	-	-	-	1	1	-	5
1980	-	-	-	-	-	-	-	-	-	-	-	-
1981	-	-	-	-	-	-	-	-	-	-	-	-
1982	-	-	-	-	-	-	-	-	-	1	-	1
1983	1	1	-	-	-	-	-	-	-	1	-	3
1984	2	1	1	-	-	-	-	-	-	-	-	4
1985	4	-	1	-	-	-	-	1	-	1	-	7
1986	1	1	-	-	-	-	-	-	-	3	1	6

Table 2-continued from previous page

Year/Border crossing	Enforcement of the arbitration agreement	Court issuance of interim measures	Appointment of arbitrators	Challenges to arbitrators	Termination of the arbitrator's mandate	Challenges to arbitral jurisdiction	Enforcement of tribunal's interim measures	Court assistance in taking evidence	Setting aside of arbitral awards	Recognition and enforcement of awards	Execution of enforced arbitral awards	Annual total
1987	1	3	-	-	-	-	-	1	-	3	1	9
1988	2	-	1	-	-	-	-	-	-	-	-	3
1989	1	1	-	-	-	-	-	1	1	2	-	6
1990	-	1	-	-	-	-	-	-	-	1	-	2
1991	3	-	-	-	-	-	-	-	1	1	-	5
1992	6	-	-	-	-	-	-	-	3	1	-	10
1993	3	-	-	1	-	-	-	-	1	2	-	7
1994	5	1	1	-	-	-	-	1	1	2	-	11
1995	4	-	1	-	-	-	1	-	-	2	-	8
1996	5	-	1	1	-	-	-	-	1	2	-	10
1997	4	1	-	-	-	-	-	2	-	5	-	12
1998	3	1	1	-	-	-	-	1	-	2	1	9
1999	3	2	-	-	-	-	-	-	-	3	-	8
2000	4	-	-	-	-	-	-	-	1	1	1	7
2001	2	2	-	-	-	-	-	-	-	5	1	10
2002	2	2	-	-	-	-	1	-	1	7	-	13
2003	6	3	-	-	-	-	-	-	1	8	1	19
2004	2	-	-	-	-	-	-	-	-	4	2	8
2005	5	2	-	-	-	-	1	1	-	3	-	12
2006	-	1	-	-	-	-	-	1	1	2	2	7
2007	2	-	-	-	-	-	-	-	4	4	-	10
2008	3	2	-	-	-	-	-	-	1	5	-	11
2009	6	5	-	-	-	-	-	-	1	9	-	21
2010	6	8	-	-	-	-	-	2	2	9	2	29
2011	5	-	-	-	-	-	-	2	1	6	1	15
2012	4	2	-	-	-	-	1	1	1	8	1	18
2013	7	3	1	-	-	-	-	-	1	7	1	20
2014	2	-	-	-	-	-	1	-	1	6	-	10
Total	111	46	9	2	-	-	5	14	25	122	15	349

Table 3. Litigious Parties in SDNY, 12/29/1970-9/15/2014

	Case name	Border Crossings
1.	Thai-Lao Lignite (Thai) Co., Ltd. v. Gov't of Lao People's Democratic Republic <sup>120</sup>	10, 11
2.	Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd. <sup>121</sup>	1, 2, 10, 11
3.	Sanluis Dev., L.L.C. v. CCP Sanluis, L.L.C. <sup>122</sup>	9, 10
4.	Gerling Glob. Reinsurance Corp. v. Sompo Japan Ins. Co. <sup>123</sup>	7, 11
5.	U.S. Titan, Inc. v. Guangzhou Zhen HUA Shipping Co., Ltd. <sup>124</sup>	1, 1, 1
6.	Ermenegildo Zegna Corp. v. Lanificio Mario Zegna, S.p.A. <sup>125</sup>	10, 11
7.	Banco de Seguros del Estado v. Mutual Marine Offices, Inc. <sup>126</sup>	2, 7, 9
8.	Pan Atl. Grp., Inc. v. Republic Ins. Co. <sup>127</sup>	7, 10
9.	Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala <sup>128</sup>	10, 11
10.	Andros Compania Maritima, S.A. v. Intertanker Ltd. (consolidated, incl. Holborn Oil Trading Ltd. v. Interpetrol Bermuda Ltd.) <sup>129</sup>	2, 8, 10, 11
11.	Jamaica Commodity Trading Co. Ltd. v. Connell <sup>130</sup>	1, 10
12.	Ideal Mut. Ins. Co. v. Phoenix Greek Gen. Ins. Co. <sup>131</sup>	1, 2, 3

*Notes:* 1 – Enforcement of the arbitration agreement; 2 – Court issuance of interim measures, 3 – Appointment of arbitrators; 4 – Challenges to

120. See 997 F.Supp.2d 214 (S.D.N.Y. 2014); 924 F.Supp.2d 508 (S.D.N.Y. 2014); 2011 WL 3516154 (S.D.N.Y. 2011).

121. See 2012 WL 4801452 (S.D.N.Y. 2012); 2010 WL 1050988 (S.D.N.Y. 2010).

122. See 556 F.Supp.2d 329 (S.D.N.Y. 2008); 498 F.Supp.2d 699 (S.D.N.Y. 2007).

123. See 348 F.Supp.2d 102 (S.D.N.Y. 2011); 2005 WL 3601904 (S.D.N.Y. 2005).

124. See 2003 WL 23309445 (S.D.N.Y. 2003); 182 F.R.D. 97 (S.D.N.Y. 1998); 16 F.Supp.2d 326 (S.D.N.Y. 1998).

125. See 2003 WL 21709424 (S.D.N.Y. 2003); 2002 WL 31427341 (S.D.N.Y. 2002).

126. See 230 F.Supp.2d 427 (S.D.N.Y. 2002); 230 F.Supp.2d 362 (S.D.N.Y. 2002).

127. See 878 F.Supp. 630 (S.D.N.Y. 1995); 1995 WL 38179 (S.D.N.Y. 1995).

128. See 793 F.Supp. 444 (S.D.N.Y. 1992); 123 F.Supp.2d 174 (S.D.N.Y. 2000).

129. See 718 F.Supp. 1215 (S.D.N.Y. 1989); 658 F.Supp. 1205 (S.D.N.Y. 1987); 430 F.Supp. 88 (S.D.N.Y. 1977).

130. See 1991 WL 123962 (S.D.N.Y. 1991); 766 F.Supp. 138 (S.D.N.Y. 1991); 1985 WL 1423 (S.D.N.Y. 1985).

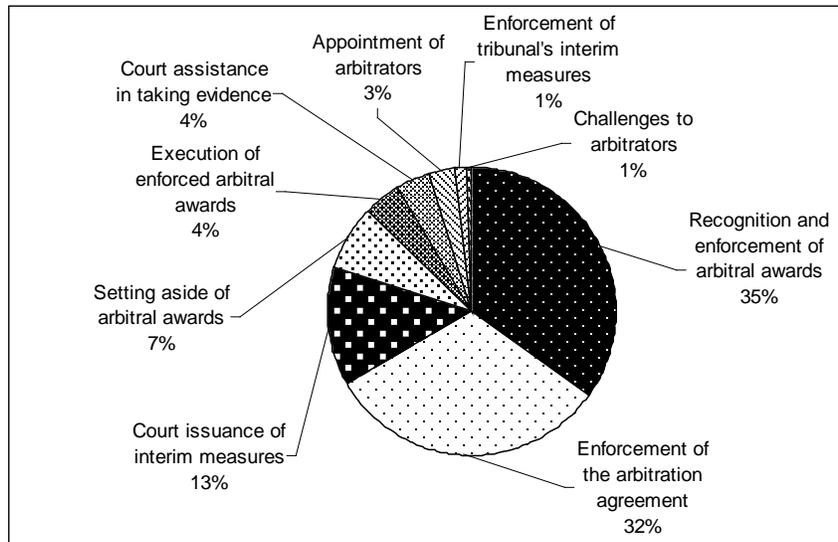
131. See 1987 WL 28636 (S.D.N.Y. 1987); 1984 WL 602 (S.D.N.Y. 1984).

arbitrators; 5 – Termination of the arbitrator’s mandate; 6 – Challenges to arbitral jurisdiction; 7 – Enforcement of tribunal’s interim measures; 8 – Court assistance in taking evidence; 9 – Setting aside of arbitral awards; 10 – Recognition and enforcement of arbitral awards; 11 – Execution of enforced arbitral awards.

**III. ANALYZING THE DATA AND NORMATIVE PRESCRIPTIONS FOR BORDER CROSSINGS**

There are several conclusions to be drawn from the data. First, the two most highly trafficked border crossings are, as expected, the two that are the central focus of the New York Convention: actions to enforce arbitration agreements and actions to enforce or recognize arbitral awards. Between 1970 and 2014, there were 122 actions (35% of all border crossings observed) in the Southern District of New York involving suits to enforce arbitral awards, and 111 actions (32% of all border crossings) to enforce arbitration agreements (Table 2; Chart 1).

Chart 1. Border Crossings in SDNY, 12/29/1970-9/15/2014



Falling far behind, but ranking at numbers three and four in the top five border crossings are two that are not a surprise: 46 actions to seek interim measures (13%) and 25 suits to set aside or vacate

arbitral awards (7%). These data confirm natural expectations for the most trafficked border crossings and provide useful insight into frequency of crossings relative to each other (for trends over the years, see Chart 2 below).

Still, the frequency of resort to interim measures and set-aside actions seemed to us unexpectedly low. With respect to interim measures, despite the considerable commentary in the international arbitration literature, and initiatives by major international arbitration associations to build in-house capacities, there did not appear to be as many suits relating to such measures as we had expected. Nor was there an appreciable increase in recent years: other than the eight observations in 2010 and five observations in 2009, the typical annual frequency count was one to three instances, and observations in that range were recorded as early as 1977 and 1978. Moreover, there does

Chart 2. Four Most Trafficked Border Crossings in SDNY, 12/29/1970-9/15/2014

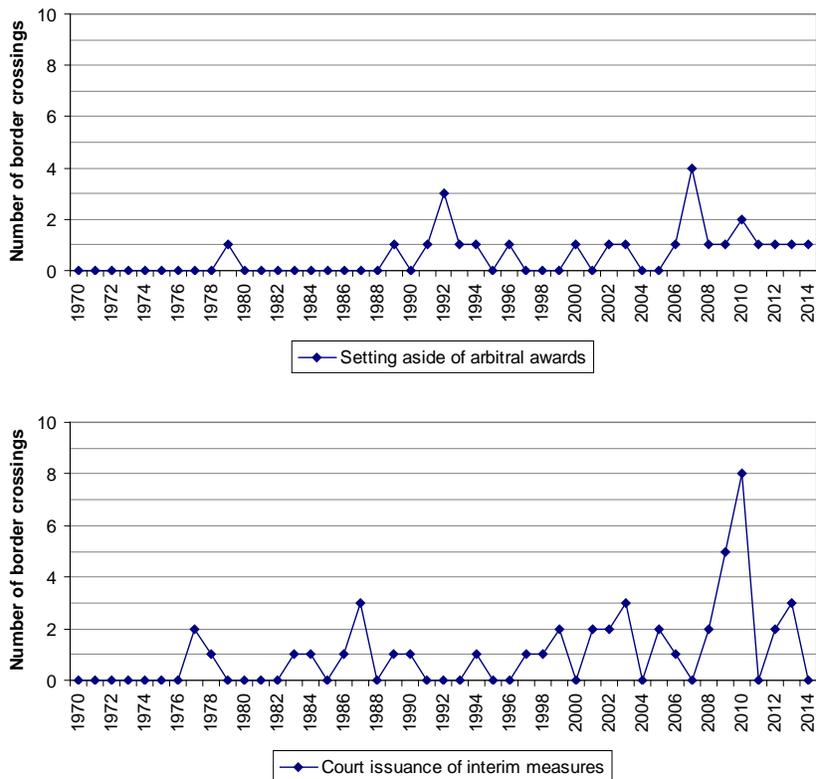
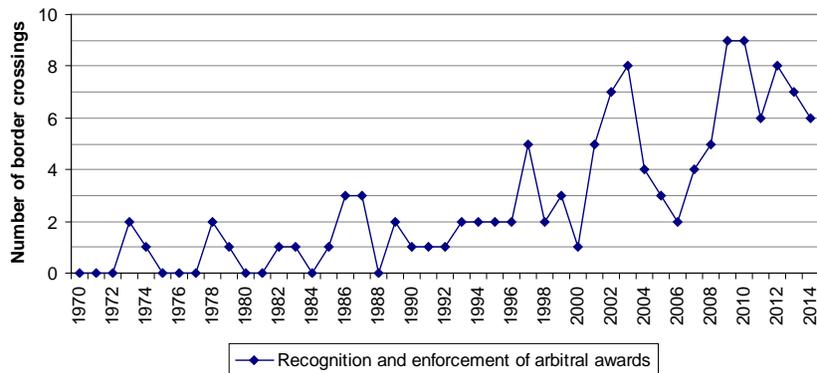
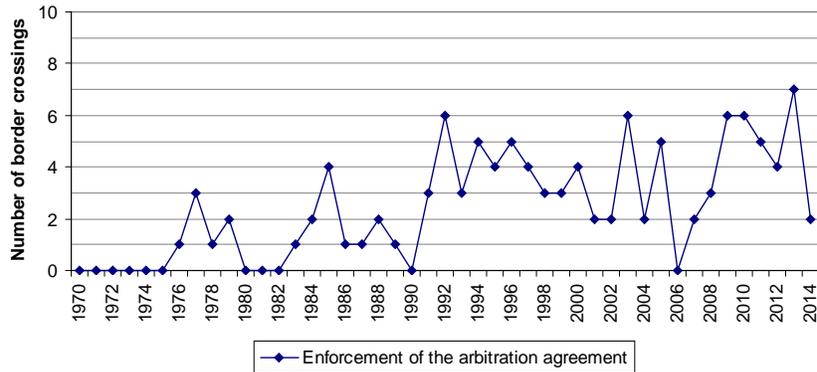


Chart 2-continued from previous page



appear to have been a drop-off after 2010 as leading private arbitral institutions started implementing internal interim, provisional, or emergency measure granting capacity. With respect to the number of set-aside actions we expected more instances where a party initiated a lawsuit to vacate an arbitral award.<sup>132</sup> The low frequency may be due to party expectations based on the law of the Second Circuit that the trial court will be highly unlikely to vacate an international arbitral award that falls under the New York or Panama Conventions.

Those four border crossings dwarfed all others. The fifth-ranked border crossing comprised actions to aid in the execution of an arbitral award, of which we counted fifteen, all but two coming since

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132. We coded cases where there was a cross-motion to vacate after an initial suit to confirm or enforce an arbitral award as recognition or enforcement actions, since that was how they started.

1998. And we only observed 14 instances where a party sought to get court assistance in taking evidence, including discovery from a third party under 28 U.S.C. §1782. The result is low but not surprising, given that the US Court of Appeals for the Second Circuit—the appellate court that includes SDNY—has interpreted the statute not to apply to international arbitral tribunals—a result that has been cast into some doubt by a subsequent US Supreme Court decision.<sup>133</sup> Moreover, as the protracted multi-country litigation between Chevron and Ecuador demonstrates, there can be multiple discovery requests by a party, not all of them filed in the same district.<sup>134</sup> Thus, for any given parties, the actual number of border crossings for discovery under 28 U.S.C. §1782 could be higher than those observed in SDNY. We had also expected to see more suits involving requests to appoint arbitrators or challenging them that we actually observed—nine of the former and two of the latter.

In terms of annual totals, it seems that there has been an upward trend in border crossings, at least since the 1970s and 1980s. However, the levels of international arbitration-related litigation have seemed fairly stable since 1992 or so, with a peak of 29 observations in 2010 (with the second highest of 21 observed in 2009). It may be too early to tell, but it seems that there has been a downward trend since 2010. One explanation for this peak might be the global economic crisis that possibly led to more disputes in arbitration and litigation.

The statistics of arbitral institutions appears to reflect a similar tendency. The ICC, for instance, reported a greater than normal increase in requests for arbitration already in 2008 (663, as compared to 599 in 2007 and 593 in 2006), and an even higher increase for 2009 – 817 requests for arbitration (the highest ever in the history of the ICC arbitration).<sup>135</sup> On the back end of the arbitration process, the ICC then reported the highest number of awards rendered for the years 2011, 2012 and 2010 (508, 491, and 479, respectively).<sup>136</sup> If one

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133. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

134. Over the years, Chevron and Ecuador filed multiple requests for discovery. The United States Court of Appeals for the Third Circuit calculated in 2011 that Chevron Corporation alone had submitted at least 25 motions for discovery under 28 U.S.C. §1782 in various courts in the U.S. *See In re Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011).

135. For the ICC arbitration statistics, see the ICC International Court of Arbitration Bulletin and information presented on the ICC website at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>.

136. *Id.*

assumes that similar trends were present in other arbitral institutions and ad hoc arbitration,<sup>137</sup> one would also expect higher number of border crossings for 2009 and 2010, as observed in the Southern District of New York. Also, we understood that we would not see any border crossings in Categories 5 and 6—courts deciding on the termination of the arbitrator’s mandate and reviewing a preliminary ruling by an arbitral tribunal upholding its own jurisdiction. Both are border crossings under the UNCITRAL Model Law which are not contained in the Federal Arbitration Act.

Finally, we observed several persistent litigious border-crossers, although not so many as expected (see Table 3 above). One explanation for the low number of repeat border crossings may be that some additional crossings occur at the state court level or in other federal judicial districts and therefore are not observable in SDNY. More likely, the number of repeat crossers is small because an award debtor unhappy with the generative arbitration will probably not do anything and refuse to pay rather than hire lawyers to continue to challenge an arbitral award in costly court litigation.

These conclusions, in turn, generate some policy recommendations and normative themes. First and at the most abstract level, the New York Convention seems to be working fairly well, notwithstanding occasional calls to amend it (e.g., to add provisions for enforcement of interim measures) or even to junk it altogether.<sup>138</sup> Actions to enforce arbitration agreements and awards are still the main international arbitration events in national courts, and they far outnumber any other proceedings. In future work, we plan to engage in more detailed analysis of the facts of these cases to generate ideas about how national statutes might be revised or amended to make these high-traffic crossings more efficient.

Second, there appear to be a few underutilized border crossings (e.g., those related to the appointment of arbitrators or challenges of arbitrators) that might be closed in national laws to make arbitration

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137. The AAA/ICDR experienced a more steady increase in its caseload for international cases, reporting 703 cases for the year 2008, 836—for 2009, 888—for 2010, and 994—for 2011. See 3 *ICDR INT’L ARBITRATION REPORTER* (July 2012), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_019805](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_019805). In 2012, the ICDR administered 996 international arbitration cases. See 4 *ICDR INT’L ARBITRATION REPORTER* (Sept. 2013), [https://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTAGE2015007&RevisionSelectionMethod=LatestReleased](https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2015007&RevisionSelectionMethod=LatestReleased).

138. See Jack Graves, *Court Litigation Over Arbitration Agreements: Is It Time for a New Default Rule?*, 23 *AM. REV. INT’L ARB.* 113, 136 (2012).

more autonomous. In particular, the FAA, the UNCITRAL Model Law, and most major non-UNCITRAL statutes, provide for national court jurisdiction over arbitrator appointments and challenges. However, the data reveal that this is not a highly trafficked border crossing. With respect to appointments (there were only 9 observations in the 45 years surveyed), perhaps more might be done to incorporate alternative appointment procedures into institutional rules. With respect to challenges, it seems to us prudent and better policy to keep this at the institution or tribunal level rather than leave room for resort to courts. And, to serve parties who choose *ad hoc* arbitrations, institutions should fine-tune “*a la carte*” rules that allow parties to invoke them solely for issues involving the appointment or challenge of arbitrators.

Third, by contrast to the relative disuse and lack of need for resort to courts for appointment, challenge, and termination of arbitrators, courts do seem to be important in taking evidence or providing interim relief for arbitral proceedings. This state of affairs harkens back to the ancient partnership between the common law courts and courts of equity in early modern England and the United States. Common law courts handled substantive claims for money damages, but if a litigant there wanted supplemental provisional relief or discovery, he or she had to go to the equity court or chancery.<sup>139</sup> It seems to us apt to envision a similar partnership between national courts and international arbitral tribunals, with the former in the role of chancery and the latter in the role of a common law court.

Fourth, as Table 3 indicates, there appears to be a handful of persistent-objector litigious parties that attempt to get into national court as often as they can. Although abusive border crossings do not happen very often, there could—and should be—more attention paid to how national laws and institutional rules could be amended or designed to deter this sort of behavior. Of course, that is not to say that we would necessarily want to deter a party that is seeking to go into national courts because it believes in good faith that it never agreed to arbitration and is being railroad. But we do want to deter a party that is just being stubborn when it did plausibly agree to arbitration. How can we solve this puzzle? One start to a solution would be to find a way to lock them into the national courts of one

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139. See JOHN LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 271-98 (2009). See generally J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* (2d ed. 1979).

jurisdiction—the primary jurisdiction, which would be designated by the parties or the place of arbitration. This could be done by inculcating a norm of designating a court of primary jurisdiction in arbitration agreement drafting. To reduce parallel proceedings in courts and arbitration, greater stays of proceedings under 9 U.S.C. §3 could also be used.

Fifth, disappointed parties in international arbitrations have not initiated suits to set aside or vacate arbitral awards in the Southern District’s trial courts as much as one would have expected—only 25 times in 45 years. International arbitration scholars and practitioners as a group are reluctant to acknowledge a broad scope of national courts’ set-aside powers, especially in non-primary jurisdiction courts. As noted above, the reluctance flies in the face of the fact that a plain-language reading of words of the New York Convention suggests that set-aside jurisdiction is appropriate in any State “under the laws of which” an arbitral award was made. The data reveal that at least in the United States, even though in theory an award debtor could move first to set aside an award rendered in New York, it does not often do so. This in turn, suggests that concerns about recognizing multiple set-aside jurisdictions may be overblown. This is particularly true since the New York Convention does not require courts of signatory nations to deny recognition of an arbitral award on the ground that it was set aside by a foreign court—a discretion that the US courts of the Southern District have sometimes inadvertently forgotten.

Finally, we predict that there will be a rise in resort to court for aid in execution of arbitral awards. For this category of border crossings, we observed a total of 15 instances, including three observations made between 1971 and 1999 and 12 – from 2000 to 2014. Further growth of these border crossings will be assisted by the recent high-profile Argentina case decided by the US Supreme Court in June 2014.<sup>140</sup> This trend leads us to the hypothesis that an award debtor does not react as much as expected when it loses an arbitral award. Consequently, it does not pay lawyers to try to set it aside. But the loser really minds when the award creditor begins the process of coercing it to pay.

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140. *See* Republic of Argentina v. NML Capital Ltd., 134 S. Ct. 2250 (2014).

*CONCLUSION*

As the pace of global commerce quickens, the use of international arbitration to resolve commercial and investor-state disputes will accelerate correspondingly. But international arbitrations occur in the shadow of State-based international legal obligations (like the New York Convention) policed by national courts. Everyone knows this, but no one has explored what this partnership looks like on the ground by sifting the data. This Article is a first cut at filling this gap, using data from the Southern District of New York—the JFK airport of the international commercial arbitration world. The findings confirm some expectations and reflect doubt upon others. What is clear, however, is that national courts are heavily vested in aiding the international arbitral process, and there are ways to make them more effective in doing so.

## A Brief History of American International Commercial Arbitration Time

By Benjamin G. Davis, Professor of Law, University of Toledo, College of Law

(reprinted in part from Benjamin G. Davis, *American Diversity in International Arbitration: A New New Arbitration Story or Evidence of Things Not Seen*, *Fordham Law Review Symposium (Forthcoming 2020)*)

At the turn of the twentieth century, the complexity of court process and the common law hostility to arbitration clauses was a significant concern for Americans doing interstate and international trade.<sup>1</sup> Domestic and foreign counterparts could not be sure up until there was an arbitration award, that the other American party would not simply walk away from the arbitration agreement.<sup>2</sup>

In the early 20<sup>th</sup> century, New York was the center of US international trade and so these concerns were particularly acute for the New York business community.<sup>3</sup> At the center of the significant efforts to address the problem of unenforceable arbitration clauses and enforcement of arbitral awards – as luck would have it for purposes of this Symposium in New York – was a New York *cotton* merchant of German origin named Charles Leopold Bernheimer, the Father of (American) Commercial Arbitration.<sup>4</sup> The travails of a cotton merchant importing and exporting that cotton is a central story of the development of modern arbitration laws.<sup>5</sup> At the same time, that the cotton at the center of disputes had been grown by formerly enslaved and then subjugated blacks provides a leitmotif of the ever present but unseen blacks in American international commercial disputes.

### III. From New York Arbitration Act to Federal Arbitration Act Chapter 1

Inspired by the then German arbitration law and other sources and thanks to the significant efforts of Bernheimer and others, in 1920 New York adopted the New York Arbitration Act, the first modern arbitration law.<sup>6</sup> The New York Arbitration Act was the model for the Federal Arbitration Act of 1925 (now Chapter 1) that made arbitration agreements valid, irrevocable and enforceable, save for such grounds at law and equity to invalidate any contract. FAA Chapter 1 was a significant development but, with hindsight, it had two difficulties. One was that (at least up to *Prima Paint* in 1967) it was originally understood as a procedural rule for the federal courts (and therefore not applicable in state courts).<sup>7</sup> Second, what is now FAA Chapter 1 was not considered a source of federal question jurisdiction and

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<sup>1</sup> Imre Szalai, *Outsourcing Justice, The Rise of Modern Arbitration Laws in America* 27, 30 (Carolina Academic Press 2013); Julius Henry Cohen and Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 269-270 (1926)

<sup>2</sup> (“Unfortunately, business has become so used to the doctrine of revocability of arbitration agreements that these clauses are not regarded in the same light as other contractual obligations, and the party who refuses to perform his agreement frequently does not realize that he is violating his plighted word.”) Julius Henry Cohen and Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 269-270 (1926)

<sup>3</sup> 47 per cent of US foreign commerce was through New York for example in 1914. Imre Szalai, *Outsourcing Justice, The Rise of Modern Arbitration Laws in America* 56 (Carolina Academic Press 2013)

<sup>4</sup> Imre Szalai, *Outsourcing Justice, The Rise of Modern Arbitration Laws in America* 25 (Carolina Academic Press 2013)

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 83. The saga of the work of Bernheimer and others is well worth the read in this excellent book.

<sup>7</sup> (Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.) *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)

would be applied in those federal courts if there were independent federal question and/or diversity jurisdiction. So in 1958 at the time of the New York Convention Conference, if a case was in state court and could not be removed to federal court on the basis of federal question jurisdiction or diversity, one would have to look back to the state law of arbitration. Now, if that state law of arbitration was still the common law hostility toward arbitration clauses, arbitration would run into the problems seen in New York at the turn of the century but now 50 years on. Of course, through the pro-arbitration jurisprudence of the Supreme Court since *Prima Paint* the federal court/state court FAA Chapter 1 distinction has been almost obliterated.<sup>8</sup>

#### IV. Enter the New York Convention of 1958 and the US Delegation Report

In 1958 the New York Conference with delegates from over 40 countries was held to review an International Chamber of Commerce proposal to create a treaty that would replace the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.<sup>9</sup>

The original draft proposal of the New York Convention focused on recognition and enforcement of foreign arbitral awards only - improving on some of the problems associated with the enforcement mechanism for foreign arbitral awards of the Geneva Convention of 1927 (such as double exequatur).

However, it became clear that there would be a problem if arbitration agreements were not addressed in the proposed new treaty as there would be two regimes with possibly not the same signatories between the 1923 Geneva protocol and the proposed Convention. So a draft on arbitration agreements was included late in the proceedings (now Article II of the New York Convention). As detailed in the United States Delegation's report:

Article II: The purpose of this Article is to round out the convention by providing an appropriate treaty rule with respect to agreements or contracts to arbitrate. The inclusion of such a rule was occasioned partly by a desire for logical completeness and partly by the need to define the relationship of the new convention to the Geneva Convention. The latter is closely interlocked with the Protocol on Arbitration Clauses signed at Geneva, September 24, 1923. The Geneva instruments together form a unit, and if the Convention were to be replaced, it would be necessary either to define the relationship between the new convention and the Protocol or to provide for replacement of the latter instrument also.<sup>10</sup>

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<sup>8</sup> ("9 U.S.C. § 2. [Footnote 30] Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.") *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 (1983) and of course *Southland Corp. v. Keating*, 465 U.S. 1 (1984)

<sup>9</sup> 1958 Report Of The U.S. Delegation To The United Nations Conference On International Commercial Arbitration - ARIA Vol. 19 No. 1 92, 94 (2008).

<sup>10</sup> 1958 Report Of The U.S. Delegation To The United Nations Conference On International Commercial Arbitration - ARIA Vol. 19 No. 1 92, 100 (2008).

In the absence of an Article II, one could imagine different states being parties to the Geneva Protocol and the proposed New York Convention with different regimes applying therefore to arbitration clauses and arbitration awards. By developing an Article II for the New York Convention, this problem would be averted as a signatory state to the New York Convention would have a stand alone pro-international commercial arbitration structure for the arbitration clauses and the arbitration awards subject to the treaty.

In 1958, while present at the creation of the New York Convention, what is interesting is to see how the United States was essentially a passive or functionally absent participant. This passivity was not due to some inadequacy of the members of the delegation but was in accordance with the delegation's instructions. The United States delegation did not attempt to exert a strong influence on the content of the convention, confining itself to exposition of its views on matters of basic principle and emphasizing the value of the pragmatic as opposed to the multilateral convention approach to progress in arbitration.<sup>11</sup>

At the end of the conference in 1958, the US delegation strongly recommended that the US NOT sign or adhere to the New York Convention. A significant reason was that many United States' states still retained the common law non-enforceability of arbitration agreements. The New York trend had not yet reached many states and state courts by 1958. And, as noted above, at that time the applicability of the FAA (now Chapter 1) was only in federal courts. The FAA Chapter 1 was not a source of federal question jurisdiction and would apply only in federal courts when there was an independent federal question and/or diversity jurisdiction. It was not seen as applying in state courts leaving that domain to the state approach: whether modern like New York or common law hostility like some 25 states at that time.

So in 1958, the US delegation recommended strongly against the US signing or adhering to the New York Convention and stated their opposition was due to

1. The convention, if accepted on a basis that avoids conflict with State laws and judicial procedures, will confer no meaningful advantage on the United States.
2. The convention, if accepted on a basis that assures such advantages, will override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures.
3. The United States lacks a sufficient domestic legal basis for acceptance of an advanced international convention on this subject matter.
4. The convention embodies principles of arbitration law which it would not be desirable for the United States to endorse.<sup>12</sup>

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<sup>11</sup> 1958 Report Of The U.S. Delegation To The United Nations Conference On International Commercial Arbitration - ARIA Vol. 19 No. 1 92, 95 (2008).

<sup>12</sup> 1958 Report Of The U.S. Delegation To The United Nations Conference On International Commercial Arbitration - ARIA Vol. 19 No. 1 92, 95 (2008).

The Delegation stated a concern for exacerbating federal-state tensions with the imposition of federal law to preempt state law if this multilateral convention was adopted.<sup>13</sup> They were concerned with appearances in 1958 stating:

Hence, adherence to the convention would be looked upon as a sudden Federal intrusion in an area in which it hitherto had failed to exercise its constitutional legislative authority to the full limits. The fact that this intrusion would be accomplished by the treaty power and would affect arbitrations otherwise lying outside Federal jurisdiction seemingly might imply that the motive was more to curtail *State rights* than to facilitate foreign trade arbitrations. (Emphasis added)<sup>14</sup>

Preempting state law with a multilateral treaty that would exacerbate already existing federal-state tensions were significant direct concerns of the US delegation in 1958. That leads us to ask what were the principal federal-state tensions in the immediate period up to 1958 with an international multilateral treaty dimension?

Let us start at World War II. In the aftermath of the Holocaust and Nuremberg and the signing of the UN Charter, there was the 1948 Genocide Convention signed by the United States in 1948. This convention so greatly concerned the protagonists of the southern way of life (segregation) that they pushed for the Bricker amendment in 1953 to weaken the treaty power of the federal government. That Bricker Amendment was ultimately defeated when then President Eisenhower promised not to sign any other human rights treaties or bring them for Senate advice and consent after the Genocide Convention. The long shadow of those concerns might be demonstrated by the fact that the Genocide Convention was ultimately ratified only on November 25, 1988 (40 years later) in the period right after the 1988 elections at the end of the Reagan Administration and before the start of the Bush I Administration.<sup>15</sup> So that is 1953.

In 1954, just four years before the New York Conference, the United State Supreme Court decided *Brown v/ Board of Education*<sup>16</sup> outlawing segregation in schools and triggering enormous upheaval. But we must also remember that *Brown* was argued before the Supreme Court in 1952, just six years before the New York Convention so its impact was being felt all through the early 1950's. After 1954, in 1955-

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<sup>13</sup> 1958 Report Of The U.S. Delegation To The United Nations Conference On International Commercial Arbitration - ARIA Vol. 19 No. 1 92, 117 (2008).

<sup>14</sup> 1958 Report Of The U.S. Delegation To The United Nations Conference On International Commercial Arbitration - ARIA Vol. 19 No. 1 92, 116 (2008).

<sup>15</sup> Dunoff, Ratner and Wippman, *International Law Norms, Actors, Process, A Problem-Oriented Approach* 218-219 (Fourth Edition Wolters Kluwer 2015). ("These efforts, collectively known as the Bricker Amendment after Senator John Bricker of Ohio, grew out of conservative senators' concerns over the UN Charter and early human rights treaties, such as the Genocide Convention. Some Bricker Amendment supporters feared that the Charter's human rights provisions would give Congress power to enact civil rights legislation otherwise beyond its constitutional powers. In addition, many amendment supporters, including conservative Southern Democrats, believed that the Genocide Convention and other human rights treaties could be interpreted in a way that could override racially discriminatory state laws.")

<sup>16</sup>*Brown v. Board of Education of Topeka* 347 U.S. 483 (1954)

56 there was the Montgomery Bus Boycott.<sup>17</sup> In 1957 there was Little Rock and the federalizing of the Arkansas national guard by President Eisenhower when integration of Central High School by the Little Rock 9 was attempted that fall.<sup>18</sup> And in this period there was the birth or rebirth of massive resistance and the state interposition arguments.<sup>19</sup>

For fear of exacerbating federal-state tensions, the US delegation in that atmosphere recommending against the United States signing or adhering to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards seemed kind of revelatory to me. In the context of the civil rights struggles of black Americans at that time and the white hot federal-state tensions about segregation, adding the log of federal preemption in the arbitration arena to the fire seemed a bridge too far. And so the United States was not an immediate signatory.

In this new new story then, the struggle for civil rights of black Americans/oppression of black Americans is another leitmotif behind Federal hesitancy toward multilateral treaties generally and exacerbating federal/state tensions in particular. That leitmotif rebounds in the American international commercial arbitration space in the strong opposition to the New York Convention of the US delegation in 1958. We see the traces of this worry in the careful choice of words of the delegation report which echoed themes in the civil rights movements of state's rights, federal overreach, and excessive use of the treaty power.

To buttress the possibility of such an intersection, I was drawn to the following commentary on arbitration in Alabama:

Reading Alabama arbitration cases of the 1990s, living in Alabama, and talking with Alabama lawyers have given me a distinct perspective on Alabama courts' resistance to the Federal Arbitration Act. I see analogies between that resistance and Alabama courts' earlier resistance to the federal civil rights laws. In both cases, local populists defended Alabama's traditions against cosmopolitan, modernizing trends. In both cases, an underlying issue was whether those with power in Alabama courts would continue to inflict "home-cooked justice" on those without power in Alabama courts. In both cases, it ultimately took direct action by the United States Supreme Court to force Alabama into line with the country as a whole.

Of course, there are differences, too. Injustices committed by pro-plaintiff courts pale in comparison with injustices committed by those who resisted civil rights. Nevertheless, I keep hearing echoes of that earlier "massive resistance" when Alabama lawyers express opposition to federal arbitration law. The subtext of their opposition to arbitration frequently seems to be: "That's not the way we try cases down here. If you Yankee corporations want to do business here, then

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<sup>17</sup> <https://kinginstitute.stanford.edu/encyclopedia/montgomery-bus-boycott>

<sup>18</sup> <https://www.history.com/topics/black-history/central-high-school-integration>

<sup>19</sup> <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/massive>

y'all are going to have to answer to *our* local judges and juries." Sweet Home Alabama.<sup>20</sup>

#### V. United States Accession in 1968 to the New York Convention of 1958

It was only in 1968 that the New York Convention was signed by the United States after a substantial effort by business and legal communities to pass pro-arbitration legislation as state laws (36 states then having arbitration laws enforcing arbitration agreements thus reversing the common law hostility), the US agreeing to participate in The Hague Conference on Private International Law and the competitive disadvantage US business was experiencing in not being a signatory.<sup>21</sup>

Doing the significant and difficult work of making state laws pro-arbitration reduced the risk of federal-state tension as a pillar of resistance to the accession to the New York Convention. At the same time, the international competitive environment pushed the United States business and legal community to want the United States to join the other major trading nations in having a modern regime for international commercial arbitration. The Supreme Court's pro-arbitration decision-making also moved forward in *Prima Paint* strengthening the FAA Chapter 1 federal law edifice for arbitration. One can add another dimension in this new new story to this list: that between 1958 and 1968, many things changed (Civil Rights Act of 1964, Voting Rights Act of 1965, and all of the cases of desegregation of schools) on the civil rights arena with significant federal exercise of authority in these areas of federal-state tensions that had engulfed the 1950's. Finally in 1970, the United States acceded to the New York Convention coming into line with other modern trading partners.

#### VI. Retelling this same story through other lenses

(.....)

Just like the New York Arbitration Act was part and parcel of a turn of the 20<sup>th</sup> century reform movement across the courts, my hope in telling this story this way is to have those who do not see or imagine themselves in international commercial arbitration think again about what they have thought of themselves. For if one has a sense of what the forbearers have done in a given field, one has a sense of ownership that can provide confidence in moving forward in that arena. At least it has done so for me.

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<sup>20</sup> Stephen Ware, *The Alabama Story*, ABA Dispute Resolution Magazine 27 (Summer 2001)

<sup>21</sup> S. EXEC. REP. NO. 90-10, at 4-7 (2d Sess. 1968) (Kearney Report)

Do you find that the given non-disclosure justifies challenge (and annulment?) You may find it helpful to consider again the IBA Guidelines, particularly section 3.4 (Orange List) and section 4.4.1 (Green List).

**AT & T CORPORATION AND ANOTHER  
v. SAUDI CABLE CO.**

Court of Appeal, Mar. 20, 21, 22; May 15, 2000; May 15, 2000.  
[2000] 2 Lloyd's Rep. 127.\*

Before LORD WOOLF, M.R., LORD JUSTICE POTTER and LORD JUSTICE MAY

The applicants (AT & T) were among seven international telecommunications companies, who in 1992 were invited by the Saudi Arabian Ministry of Post Telephone and Telegraph (MOPTT) to submit bids for the Saudi Kingdom's sixth telecommunications expansion project ("TEP-6"). One of the requirements of the bid was that cable required for TEP-6 should be acquired from Saudi Cable Co. (SCC) (the respondents).

In 1993 SCC approached each of the bidders with a view to reaching agreement for the supply of cable for TEP-6 in the event that the bidder was ultimately successful in obtaining the TEP-6 contract, and on Aug. 10, 1993 concluded a Pre-Bid Agreement (PBA) with AT & T. Paragraph 6 of that agreement provided that upon award of any cable related contract to AT & T the parties would meet promptly and negotiate in good faith mutually satisfactory agreements. The PBA also contained an arbitration clause submitting disputes to the International Chamber of Commerce, the place of arbitration being London. English law was thus the proper law of the arbitration agreement (the curial law).

In May, 1994 it became clear that AT & T was going to be awarded the contract and the TEP-6 contract was concluded between AT & T and MOPTT on Aug. 13, 1994. One of the disappointed bidders was a competitor company Northern Telecom Ltd. (Nortel) a substantial Canadian company.

AT & T and SCC began negotiating pursuant to the PBA. These negotiations came to nothing and AT & T terminated the PBA on Dec. 10, 1994. On Feb. 3, 1995 AT & T filed a request for arbitration with the ICC claiming a declaration that the PBA had been correctly terminated. SCC filed its answer claiming that the contract had not been validly terminated and asking for an order that AT & T comply with the agreement and negotiate in good faith.

Each party nominated their arbitrator and the arbitrators then had discussions to see if they could agree on the appointment of a chairman of the tribunal.

In the event Mr. L. Yves Fortier, Q.C., who practised in Montreal was confirmed as chairman. Unfortunately the fact that Mr. Fortier was a non-executive director of Nortel was not disclosed. [Both parties accepted that one aspect of the nondisclosure involved secretarial error. One of Mr.

\* Reprinted with permission of Lloyd's Law Reports (Informa Law & Finance).

Fortier's secretarial assistants seems to have sent AT & T an electronic file with an incomplete version of Mr. Fortier's CV, a file that omitted his Nortel non-executive directorship. On the same day one of Mr. Fortier's other assistants sent a different attorney in an unrelated matter a different electronic file with the full and correct CV.]

The tribunal made two awards, one in September, 1996 and the other in 1997, both in favour of SCC.

In November, 1998, while further hearings about the appropriate sum payable to SCC by AT & T were being conducted it was discovered that Mr. Fortier was a non-executive director of Nortel. AT & T filed a challenge to Mr. Fortier with ICC. That challenge was rejected and on Sept. 16, 1999 the arbitrators produced their third award which assessed the damages payable by AT & T to SCC.

AT & T applied for the removal of Mr. Fortier and for the awards to be set aside on the grounds of bias in that Mr. Fortier was a non-executive director of Nortel which was a competitor company that had been unsuccessful in the bid for the TEB-6 project.

SCC sought to rely on the ICC finality clause which provided inter alia:

Decisions of the [ICC] Court as to the appointment, confirmation, challenge . . . of an arbitrator shall be final.

Held, by Q.B. (Com. Ct.) (LONGMORE, J.), that

(1) English law had well developed rules about bias and no English Court could contemplate enforcing an award affected by bias; questions of bias were free-standing questions and were not to be determined by reference to the rules of the ICC which would interpret its own rules in the way that seemed to it to be correct; they should not be subject to interference in relation to their own rules by the Court applying the curial law;

(2) an English Court should respect the finality provision in any rules of an arbitral body such as ICC which chose to introduce both a concept of independence and a method by which any challenge to an arbitrator's independence could be determined;

(3) the finality clause precluded inquiry into whether there was any breach by Mr. Fortier of any obligation to disclose facts which might call his independence into question under the rules of the ICC;

(4) the submission that any failure to disclose in breach of ICC rules, if established, was misconduct which must inevitably result in all three awards being set aside and the revocation of Mr. Fortier's authority to determine the dispute would be rejected; it depended whether the awards were affected by the rules of assumed bias whatever those rules were as applied to arbitrators; it could not be the case that any breach of the obligation to disclose however venial must lead to an award being set aside; and the question to be asked was whether the arbitrator was (or must in law be presumed to have been) biased;

(5) the present state of English law in relation to apparent or assumed bias, as it applied to Judges and inferior tribunals was that there was an automatic disqualification for any Judge who had a pecuniary interest (such as owning shares) in one of the parties or was otherwise so closely connected with a party that he could truly be said to be judge in his own cause; apart from that, it was for the Court to determine whether there was a real danger of bias in the sense that the\*128 Judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or might be pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue;

(6) Mr. Fortier had no direct pecuniary interest in or close connection to a party to the arbitration;

(7) there was no danger of unconscious bias in the sense of Mr. Fortier being pre-disposed or prejudiced against AT & T's case for reasons unconnected with the merits of the case; he decided the proceedings on the evidence and on their merits without any danger of being infected by bias; AT & T's applications would be dismissed.

AT & T appealed on the issues of misconduct and bias.

Held, by C.A. (LORD WOOLF, M.R., POTTER and MAY, L.JJ.), that (A) As to bias

(1) when deciding whether bias had been established, the Court personified the reasonable man; the Court considered on all the material which was placed before it whether there was any real danger of unconscious bias on the part of the decision maker; and this was the case irrespective of whether it was a Judge or an arbitrator who was the subject of the allegation of bias (see p. 136, col. 1; p. 139, cols. 1 and 2; p. 141, col. 1);

(2) the learned Judge was entitled to come to the decision which he did for the reasons which he gave; the allegation of apparent bias or the possibility that there was actual though unconscious bias on the part of Mr. Fortier failed; the indirect interest of Mr. Fortier in Nortel did not affect the way he performed his responsibilities as an arbitrator and criticism of the Judge's decision on bias would be rejected (see p. 136, col. 2; p. 139, col. 2; p. 141, col. 2).

(B) As to misconduct (1) (per Lord WOOLF, M.R., and MAY, L.J.), Mr. Fortier's non-executive directorship of Nortel did not call in question his independence; and the main plank of AT & T's case concerned the possible disclosure of confidential information to a non-executive director of a competitor, rather than Mr. Fortier's independence as arbitrator (see p. 137, col. 2; p. 141, col. 2);

(2) (per Lord WOOLF, M.R., POTTER and MAY, L.JJ.) even if it were a procedural mishap it would be inappropriate in the circumstances of this case to set aside the awards or to remove Mr. Fortier; the appeal would be dismissed (see p. 137, col. 2; p. 140, col. 2; p. 141, col. 2);

**JUDGMENT**

LORD WOOLF, M.R.:

*Introduction*

1. This is an appeal by AT & T Corporation ("AT & T") and Lucent Technologies Inc. ("Lucent") (collectively called "AT & T" unless the context otherwise requires) from the judgment of Mr. Justice Longmore delivered on Oct. 13, 1999. The Judge dismissed AT & T's application for the removal and revocation of the appointment of Mr. L. Yves Fortier, Q.C. as third arbitrator and chairman of an ICC tribunal ("the tribunal") and the setting aside of three partial awards by the tribunal in favour of the respondents Saudi Cable Co. ("SCC"). The partial awards were dated as follows: first partial award, Sept. 4, 1996; second partial award, July 2, 1998; third partial award, Sept. 15, 1999.

2. The grounds of the application were that, at all relevant times before Nov. 29, 1998, AT & T was unaware that Mr. Fortier was a non-executive director of a competitor company of AT & T. The competitor is Nortel of Canada ("Nortel"). Nortel was not simply a commercial rival of AT & T in the field of telecommunications. It had also been a disappointed bidder for the contract out of which the disputes being arbitrated arose and could be a competitor for further contracts.

*The facts*

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4. The PBA also provided that any disputes arising out of or in connection with the PBA should be finally settled by arbitration. The arbitrators decided that the PBA was governed by the law of New York which recognizes the provision quoted above as a binding contractual obligation. The arbitration clause contained in the PBA provided for submission of disputes to the International Chamber of Commerce ("ICC"), the place of arbitration being London. Accordingly English law is the proper law of the arbitration agreement.

*The appointment of the arbitrators*

\* \* \*

12. Article 2.13 of the ICC rules states that the decision of the ICC as to any challenge of an arbitrator shall be final and the reason for its decision shall not be communicated.

13. The parties agreed on Mr. Fortier as the chairman of the tribunal subject to ICC approval and the ICC asked Mr. Fortier (as well as the other arbitrators) to sign a Statement of Independence on a standard printed form. The form required him to declare to the ICC his willingness to act as an arbitrator and to check one of two boxes. The text beside the first box reads:

I am independent of each of the parties and intend to remain so; to the best of my knowledge, there are no facts or circumstances, past or present, that need to be disclosed because they might be of such nature as to call into question my independence in the eyes of any of the parties.

The text beside the second box reads:

I am independent of each of the parties and intend to remain so; however, in consideration of Article 2, paragraph 7 of the ICC Rules of Arbitration, I wish to call your attention to the following factors and circumstances which I hereafter disclose because I consider that they might be of such a nature as to call into question my independence in the eyes of any of the parties. (Use separate sheet if necessary.)

14. The instruction on the form as to which text to complete was in these terms:

The choice of which box to check will be determined after you have taken into account, inter alia, whether there exists any past or present relationship, direct or indirect, with any of the parties, their counsel, whether financial, professional or of another kind and whether the nature of any such relationship is such that disclosure is called for pursuant to the criteria set out below. Any doubt should be resolved in favour of disclosure.

15. Mr. Fortier put a cross in the first box and signed the document on Mar. 28, 1995. He was then confirmed by the ICC as the third arbitrator and chairman of the tribunal. The Judge stated that he was satisfied that, when Mr. Fortier signed the document, he considered himself to be independent of the parties, that he intended to remain so and it never occurred to him that his non-executive directorship of Nortel could call into question his independence in the eyes of either of the parties.

16. It emerged in the course of the proceedings that, in addition to his directorship of Nortel, which was a non-executive directorship, Mr. Fortier also held 474 Nortel shares in accordance with his practice of acquiring a shareholding in any corporation on whose board he sat. It also appears that within his share portfolio he held 300 "common" shares in AT & T. Neither shareholding was disclosed prior to his appointment. However, the substance of AT & T's complaint relates to Mr. Fortier's directorship of Nortel, rather than to his small (and effectively insignificant) shareholding.

\* \* \*

22. Following the ICC's dismissal of AT & T's challenge, AT & T commenced legal proceedings pursuant to ss. 1 and 23 of the Arbitration Act, 1950 for an order that AT & T be at liberty to revoke and make void the appointment and authority of Mr. Fortier and have him removed and for the partial awards to be set aside.

23. On Sept. 20, 1999 Mr. Fortier wrote a letter to both solicitors which speaks for itself. It is in the following terms:

Upon reading the Skeleton Arguments of the parties over the weekend, it occurs to me that there is one point which may perhaps require clarification.

Reference is made in both Skeleton Arguments to the contract known as TEP-8. I pointed out in my affidavit of 12 July 1999, (paragraphs 29-31) that matters such as submissions or tenders for contracts in the ordinary course of Nortel's business are not brought to the attention of the Board of Directors or its committees and that I was entirely unaware of the TEP-8 project until I received Clifford Chance's letter of 3 December 1998.

In the interest of completeness and to avoid any possible misunderstanding I should add that at the time I was approached to act in this arbitration, I had no knowledge whatever of the TEP-6 project and I learned of it only through the arbitration process.

\* \* \*

### *Conclusions*

#### *Bias*

35. It is possible to deal with the contention of presumed bias or automatic disqualification shortly. Sir Sydney Kentridge with his usual realism recognized that before this Court, he was in considerable difficulty. The decision in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. and Another*, [2000] 1 All E.R. 65 confirms the correctness of the decision of the Judge.

36. On the facts, there are two difficulties in the way of AT & T relying on disqualification. First of all, Nortel was not a party to the arbitration and therefore Mr. Fortier had no direct personal interest in its outcome. The second difficulty is that, while it was argued that Mr. Fortier had an indirect interest because of his shareholding in Nortel, even projects on the scale of TEP-6 and TEP-8 could not have been of any material benefit to Mr. Fortier. It is unrealistic to suggest that Mr. Fortier could be said to be in a position where he was either directly or indirectly acting as "a judge in his own cause". This Lord Browne-Wilkinson said in *ex parte Pinochet (No. 2)* is "the rationale of the whole rule" (see [1999] 2 W.L.R. 272 at p. 283). I see no reason to differ from the Judge on this aspect of the appeal.

\* \* \*

42. [...] The important point for this appeal which Lord Justice Simon Browne identified is that, when deciding whether bias has been established, the Court personifies the reasonable man. The Court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. This is the case irrespective of whether it is a Judge or an arbitrator who is the subject of the allegation of bias.

43. Was there a real danger here, viewing the matter objectively, that Mr. Fortier was predisposed or prejudiced against AT & T because he was a non-executive director of Nortel? As to this, adopting our role of personifying the reasonable man, I consider that Mr. Justice Longmore was entitled to come to the decision which he did for the reasons he gave. In coming to my conclusion, I take into account that:

(a) Mr. Fortier is an extremely experienced lawyer and arbitrator who, like a Judge, is both accustomed and who can be relied on to disregard irrelevant considerations. In saying this we make it clear we do not attach any importance to the fact that Mr. Fortier at all times believed himself to be acting appropriately. He must be judged by objective standards.

(b) There is no reason to reject Mr. Fortier's statements in the letter of Sept. 20, 1999 that he was entirely unaware of the TEP-8 project until December, 1998 and the TEP-6 project until he became involved in the arbitration process. Until he was aware of the projects there could, of course, be no possibility that they could prejudice him and so no obligation to disclose his connections with Nortel.

(c) Any benefit which could indirectly accrue to Nortel as a result of the outcome of the arbitration would be of such minimal benefit to Mr. Fortier that it would be unreasonable to conclude that it could influence him.

(d) Mr. Fortier's involvement with Nortel as a result of his non-executive directorship was limited. It was accurately described as an incidental part of his professional life. The role of non-executive directors can differ but the nature of Mr. Fortier's directorship is well illustrated by his letter of Sept. 20, 1999.

(e) Mr. Fortier did not attach importance to his involvement with Nortel. This is illustrated by his readiness to resign his directorship when he was challenged by AT & T.

(f) Mr. Fortier conducted himself in the course of the arbitration in a manner which provided no support for any suggestion that he was prejudiced and the contrary has not been suggested.

44. It was extremely unfortunate that the mistake about the directorship meant that it was not disclosed, but, on the evidence which is available, that innocent non-disclosure provides the filmiest of arguments that the indirect interest of Mr. Fortier in Nortel would or might affect the way he performed his responsibilities as an arbitrator. I therefore reject the criticism of the Judge's decision on bias.

#### *Misconduct*

\* \* \*

#### *[Finality of the ICC's decision]*

49. Turning to the express provision of the ICC rules which provides that a decision of the ICC Court should be final, I do not accept the view of Mr. Justice Longmore that the finality provision means that the English

Courts have no power to review the decision of the ICC court. The finality provision does not operate to exclude the English Court's jurisdiction under s. 23 of the 1950 Act. Accordingly, Mr. Justice Longmore was entitled to consider whether there had been "misconduct" by breaching the terms of the arbitration agreement. When doing so the Court, if required to interpret the ICC rules, would naturally pay the closest attention to any interpretation of the ICC rules adopted by the ICC court, but the English Courts retain their jurisdiction to determine whether the ICC rules have been breached when entertaining an application to remove for alleged misconduct.

50. In this case, the decision of the ICC court provides no assistance because the decision was not a reasoned one. We do not know the basis upon which the complaint of AT & T was dismissed.

51. Article 2.7 and the arbitrator's declaration refer to "independence" and do not refer to "impartiality". This is in contrast to the Uncitral Model Law on international commercial arbitration as adopted by the United Nations Commission International Trade Law of June 21, 1985. Article 12 of the Model Law requires the person approached with regard to a possible appointment as an arbitrator to "disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". In most situations it will be because of a connection or other relationship with a party that the appointment of an arbitrator will be capable of challenge on the grounds of a lack of impartiality. Where this is the situation, the potential arbitrator will not be independent of the parties and will therefore clearly be subject to the express requirement of art. 2.7. I do not consider that it would be right to approach the interpretation of art. 2.7 in a narrow and restrictive manner. However, in this case it is not necessary to express any concluded view as to the application of art. 2.7 to a potential arbitrator whose alleged lack of independence is due to a connection with a third party. If, as I consider the position to be here, Mr. Fortier is not disqualified from acting as an arbitrator on the grounds of bias at common law, I cannot see how he can be said to lack the necessary independence to which art. 2.7 refers.

52. AT & T's primary complaint about Mr. Fortier is that they would not have selected him as an arbitrator because they would not have wished to disclose confidential information to even a non-executive director of a competitive rival. Sir Sydney Kentridge stressed in his submissions the dangers to AT & T of information being made available to Mr. Fortier when he owed the duties of a non-executive director to Nortel. If an arbitrator disclosed confidential information to a competitor of a party to an arbitration in the course of the proceedings, he would certainly be open to a charge of misconduct. But this misconduct would not involve a breach of any obligation to be "independent". As Sir Sydney developed his submissions, it became increasingly clear that, while AT & T were complaining of bias, their concerns were equally, if not more strongly, focused on their need to preserve confidentiality. Article 2.7 and the arbitrator's declaration are not addressing this need. The need for confi-

dentiality, which can be critical in an arbitration, does not depend on art. 2.7, but on the duty of any arbitrator not to breach the obligations of confidence which he owes to the parties to the arbitration.

53. Mr. Fortier was under the impression he had given a complete CV. Because of the error AT & T was not aware of his connection with Nortel. This connection was obviously a matter of which AT & T would have wished to be aware before it agreed to Mr. Fortier's appointment. If it had been, it would have been perfectly reasonable for AT & T to indicate that it would prefer an arbitrator who was not a non-executive director of Nortel because of its concerns as to confidentiality. AT & T was deprived of this opportunity, but the ICC rules do not provide any support for an allegation that Mr. Fortier was guilty of misconduct because of the error in the CV.

54. In any event, Mr. Fortier having been appointed an arbitrator and the arbitration having reached the stage it has, it would be inappropriate, in the absence of bias, to set aside the awards or to remove Mr. Fortier. Furthermore, although AT & T's concerns as to the need to preserve confidentiality are understandable, in the case of an arbitrator as experienced as Mr. Fortier, the risk of his actually making disclosure of confidential information to Nortel, consciously or unconsciously, is sufficiently remote to be ignored. In any event, Mr. Fortier offered to resign his non-executive directorship but, no doubt recognizing the reality of the situation, AT & T did not accept this offer. That being so, I find this allegation to be lacking in conviction.

55. AT & T is unable to show any grounds for setting aside the awards or removing Mr. Fortier based on bias or misconduct. This appeal is, accordingly, dismissed.

#### QUESTIONS AND COMMENTS

1. The AT & T case is one of the high profile cases testing the limits of the duty of disclosure. The challenge raised in the AT & T case relies on two alleged irregularities: i) lack of full disclosure, and ii) connection with a party, who—although not a party to the dispute—has an interest in the outcome of the dispute.

2. As far as disclosure is concerned, consider the following issues:

—What can and cannot be omitted? (one of the basic issues in *Commonwealth Coatings*.) Justice Longmore of the Queens Bench Division (Commercial Court) found that arbitrator Fortier's position in Nortel "was more of an incidental than a vital part of his professional life" and that this alleviated his failure to disclose it. Lord Woolf held in a similar vein that "[i]nnocent non-disclosure provides the flimsiest of arguments that the indirect interest of Mr. Fortier in Nortel would or might have affected the way he performed as an arbitrator." Is this point decisive?

—Suppose Fortier had been a non-executive director of **one of the parties**. This may have been an equally "incidental part of his professional life". Would the situation be the same?

# The Role of U.S. Courts in International Commercial Arbitration

By Benjamin G. Davis, Professor of Law, University of Toledo College of Law

## I. Introduction

### A. Situating arbitration in the dispute resolution lexicon

As contrasted with litigation in a court or administrative judge proceeding, in arbitration the decision-maker is a Sole Arbitrator (one arbitrator sitting alone) or an Arbitral Tribunal (usually made up of three persons). For purposes of this session I will use the term “arbitral tribunal” to refer to both Sole Arbitrators and Arbitral Tribunals.

Arbitration is generally seen as one of the forms of Alternative Dispute Resolution. Alternative Dispute Resolution is usually viewed as negotiation, mediation, and arbitration as well as various hybrid processes (such as mediation and arbitration together or med-arb or arb-med or early neutral evaluation to name a couple of examples of hybrid systems).

In negotiation, the parties (through their representatives or directly) negotiate the resolution of a dispute that has arisen and, if successful, might memorialize said agreement in a settlement agreement. Mediation involves a neutral whose role is to assist the parties’ in settling their dispute. The result of such a negotiation or mediation might, for example, be a settlement agreement signed by the parties. Failure to comply with such a settlement agreement would open the way to some type of adjudicatory process where, like in any contract dispute, the injured party would prove its case against the breaching party and a judgment rendered. If dissatisfied with the judgment, and the law permitted it, appeals could be made from the decision of the lower court.

What distinguishes arbitration from other forms of Alternative Dispute Resolution such as negotiation and mediation is that arbitration is an adjudicatory process. By describing it as an adjudicatory process, I mean that arbitration is a method in which the decision-maker (now the Arbitral Tribunal) is endowed with the power to render a judgment (called an arbitral award) and not just beholden to the parties to make a settlement agreement.

### B. Situating arbitration in the multi-door courthouse concept

With the development of Alternative Dispute Resolution in the court system over the last 40 years in the United States, the concept of a multi-door courthouse has developed. The multi-door courthouse concept involves looking beyond just litigating a dispute to see if alternatives to the classic litigation model might serve to help resolve a given dispute more efficiently in terms of use of judicial, party and societal resources. Thus, after a lawsuit is filed, it is possible that parties would be referred by the court to a mediator who would attempt to help them settle prior to trial.

Another kind of process that can happen in the courthouse is that the parties are referred by the court to arbitration under a statutory mechanism of court-annexed arbitration. In court-annexed arbitration, a state statute empowers the court to offer this possibility to the parties. If accepted, parties are heard by an arbitrator appointed under that scheme who renders an award. If a party

objects to the award, then it is likely that the matter returns to the litigation track before a judge to be heard *de novo*.

### C. Arbitration beyond the court-annexed arbitration

Other than the above briefly described special statutory court-annexed arbitration system, the vast majority of what is considered arbitration is based on parties choosing – pre-dispute (prior to the dispute arising) or post-dispute (after a dispute has arisen) – to arbitrate the potential or actual disputes (arbitration clause or submission agreement). The arbitral tribunal is a private tribunal (i.e. not appointed by a court but by the will of the parties) that conducts a procedure (the arbitral procedure) that if completed culminates in the arbitral award (the arbitral award). The vast majority of these arbitral awards may be enforced by a court (enforcement of the award) without having a new adjudicative procedure on the merits of the dispute. There are generally very limited grounds to attack in court said arbitral award. This limited judicial review is one of the reasons that arbitration is such a powerful adjudicative mechanism that has become so popular.

### D. The ubiquity of arbitration

There are very many kinds of arbitration in the United States. Arbitration is everywhere. For example, if one has a cellphone service contract, most likely arbitration is foreseen as the dispute resolution mechanism in said contract. Arbitration is found in consumer contracts, securities and finance contracts (for example, between a client and a securities dealer), sports contracts (in all of the major sports leagues and in the Olympics), employment contracts, labor contracts, construction contracts, and commercial contracts, as a few examples. Specialized forms of arbitration can be found in religious communities.

On the international level, arbitration can be found as the preferred method of dispute resolution in international commerce. Businesses tend to see an advantage in not risking having their disputes heard in a foreign court and judgments of courts are often much harder to get enforced across borders than arbitral awards. Businesses also see an advantage in being able to select the arbitrators as opposed to having a judge imposed on them by a court. In addition, businesses find attractive the competitive advantage of having sometimes very delicate disputes heard in a confidential arbitral process as opposed to the process in open court in which competitors might be able to glean information about their operations.

Further types of arbitration have also emerged. When businesses make investments overseas, treaty based structures for disputes between businesses and the states where they have invested (investor state arbitration) are another developing dimension of arbitration. For example, the North American Free Trade Agreement had such an arbitral mechanism as do other bilateral investment treaties (or BIT's signed by two states) that foresee such investment treaty arbitration. In international trade disputes between states arising at organizations like the World Trade Organization, arbitration procedures can be found but this time only with states as the parties. It is even possible that as part of a dispute that has arisen between states in their international relations, the states prefer to have their dispute heard in arbitration. Truly, arbitration is everywhere.

While arbitration is everywhere, that does not necessarily mean it is popular. For a series of reasons, issues have emerged about whether in the domestic setting arbitration provides a “second class” form of justice or none at all. On the international commercial plane, sometimes arbitration is seen as a necessity that is relatively better than being in court proceedings abroad, but still has its downsides.

#### E. What is the source of the power for the arbitrator to adjudicate the disputes?

For the most part, arbitration is a creature of contract. Thus, when parties enter into a contract they will include an arbitration clause that foresees an arbitral mechanism as the means of resolving any disputes under the contract. This type of arbitration clause is called a pre-dispute arbitration clause or agreement. More rarely, after a dispute has arisen, parties may agree to make a submission agreement by which they submit their dispute to an arbitral mechanism. At the heart of the overwhelming majority of arbitration is this expression of the parties’ joint will through the agreement to a pre-dispute arbitration clause and to a much lesser extent through a submission agreement once a dispute has arisen.

Coupled with the arbitration agreement are the legal regimes to enforce the parties’ choice of arbitration. Each country has its form of national legislation that determines its arbitration legal regime. For example, in the United States at the Federal Level we have Federal Arbitration Act Chapter 1, the New York Convention and FAA Chapter 2, and the Inter-American Convention and FAA Chapter 3. On the Ohio level, there is the Ohio Arbitration Act (ORC 2711) for various domestic (non-international or internal to avoid the "domestic/domestic relations" confusions) arbitrations, the Ohio International Commercial Arbitration Act (ORC 2712) for International arbitration (when not covered by the FAA Chapter 2 and NY Convention) and the Supreme Court Rule of Superintendence 15.

#### F. Federal Arbitration Act

In the United States, for arbitration other than labor arbitration, the principle statute in place is the Federal Arbitration Act of 1925. As we will see, the Federal Arbitration Act is made up of Chapter 1 primarily focused on domestic arbitration, and Chapters 2 and 3 which are more focused on international arbitration. For labor arbitration, a vital act is the Labor Management Relations Act of 1947 that we will discuss briefly.

In addition to the Federal Arbitration Act, there are state arbitration laws in many of the states of the United States. The interaction in our federalism between the Federal Arbitration Act and state laws is an interesting aspect of arbitration in the United States. At the heart of that interaction is the United States Supreme Court arbitration decisional law. The Supreme Court has been and continues to be – whatever its formation of Justices – a pro-arbitration/arbitration friendly court. As we will see, that pro-arbitration jurisprudence has been enormously influential in state courts and federal courts in the United States.

Beyond the state or national law, there are arbitration treaties. Beyond the treaties described in investor-state arbitration, the principal treaty that has developed arbitration on the international plane is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention has been described as the most

successful treaty ever created. It is the reason that arbitral awards are usually more easily enforceable than foreign court judgments around the world.

In sum, the parties' agreement to arbitrate, the national legal regime that is arbitration friendly or unfriendly, and the treaty regime that states have accepted form a triumvirate that underpins the adjudicatory role of arbitration.

## **II. The Nature of Arbitration**

### **A. The duality of the arbitration clause**

As above, arbitration is primarily a creature of contract (with the post-dispute submission agreement being rare as compared with a pre-dispute arbitration agreement). At the same time, as a creature of contract it also has a dual nature in the sense that it is also a procedure for adjudicating disputes – a form of private justice – that looks back on the parties' compliance or lack thereof with their contractual obligations. Thus, while the arbitration clause in a contract has to be drafted by the parties (thus containing a contract drafting issue), the arbitration procedure that is derived from that contractual clause will put in place a process for justice to be rendered. That arbitral process would likely include the actual constitution of the arbitral tribunal, the arbitral procedure and the arbitral award. These steps are all done in a private setting (as contrasted with a civil process in court) and this private procedure renders private justice. The award as rendered in this private procedure then is inserted through the enforcement process in the courts into the legal regime of a country by the authority of the state being used to order compliance with the arbitral award.

### **B. The actors in arbitration**

For all this to happen there are a number of actors working in the arbitration sphere. In order to facilitate your understanding, I suggest that you should be aware of these various actors in an arbitration as well as begin to have a first understanding of the typical steps of an arbitration procedure. Figure 1 below provides a way of understanding these actors and steps.

Figure 1. Steps and Actors in a U.S. Arbitration

Actors	Parties	Arbitral Tribunal	Arb. Institutions	Federal and State courts	Federal and State Legislatures	Federal and State Executive	International Treaties and Agreements
Steps in Arbitration Procedure							
Arbitration Clause	xx			Xx			Xx
Constitution of the Arbitral Tribunal	xx	xx	xx	X			
Arbitral Procedure	xx	xx	xx				
Arbitral Award		xx	xx				
Enforcement of the Arbitral Award	xx			Xx	xx	Xx	Xx

A brief description of each of these actors is provided below.

**Parties:** At the heart of arbitration are the parties to the contract who have stipulated an arbitration agreement between them. These parties to the contracts may be individuals, partnerships, corporations, state-owned enterprises, and even states. They may be persons of very modest means such as a short order cook at a Wafflehouse or they may be giant multinational corporations with operations that span the globe. The parties are the entities responsible for the drafting of the arbitration clause. These parties have the freedom to draft the clause, subject to any constraints imposed by the law. In some cases, it is only one party drafting the clause and submitting it on a take it or leave it basis to the other – for example, a cellphone service contract. In other settings, the arbitration clause is a much more complicated negotiation – for example, the negotiations to construct Disneyland Paris or any major construction project. The parties are the masters of the arbitral process also including constituting the arbitral tribunal and the arbitration procedure. If, however, the parties fail to agree there are fallback methods in place to keep the arbitration going forward. Finally, the parties seek to enforce or attack the award in court after the end of the arbitration as they seek compliance/seek to block efforts to force compliance with the arbitration award.

**Arbitral Tribunal:** There is an old adage that arbitration is only as good as the arbitrators. Thus, the constitution of the arbitral tribunal is a central aspect of developing the arbitral process. Arbitrators can be selected in many ways and according to various methods. A typical situation would be where the Claimant and the Respondent each nominate an individual to be one of the co-

arbitrators. Then, based on the agreement of the parties, the parties may allow the co-arbitrators to choose the Chair of the Arbitral Tribunal. But, there are many ways to have the arbitral tribunal put in place (list methods, appointment of all by an institutional appointing authority, appointment by the Chief Justice of a court, etc).

**Arbitral Institutions:** Parties have two basic choices when drafting the arbitration agreement: 1) make their own procedure (called *ad hoc* arbitration) or 2) take advantage (for a fee) of the expertise of an arbitral institution (institutional arbitration). Drafting an arbitration clause is very hard work as we will see, and the prudent party would tend to take advantage of the expertise of an arbitral institution. The hallmarks of arbitral institutions are to provide model arbitration clauses as well as sets of rules governing the arbitration procedure. If properly written, the parties' arbitration clause will make reference to and incorporate the arbitration scheme of an institution's rules. Examples of well known international arbitral institutions are the American Arbitration Association ([www.adr.org](http://www.adr.org)), the International Chamber of Commerce International Court of Arbitration ([www.iccwbo.org](http://www.iccwbo.org)), JAMS ([www.jamsadr.com](http://www.jamsadr.com)), the CPR Institute for Dispute Resolution ([www.cpradr.org](http://www.cpradr.org)), the Hong Kong International Arbitration Center ([www.hkiac.org](http://www.hkiac.org)), the London Court of International Arbitration ([www.lcia.com](http://www.lcia.com)), the London Court of International Arbitration ([www.lcia.org](http://www.lcia.org)), the Chinese International Economic and Trade Arbitration Commission ([www.cietac.org](http://www.cietac.org)), and the Singapore International Arbitration Centre (<https://www.siac.org.sg/>), among still others. If arbitration is only as good as the arbitrators, arbitral institutions are only as good as the people who work in their secretariat and apply their rules. What differentiates one international arbitration institution from another is the level of supervision of the arbitral process, the experience in international commercial arbitration, and the extent to which parties, arbitrators, and courts have had to address arbitrations conducted under the rules of these centers.

**Federal and State Courts:** Up to now our focus has been on the private actors (parties, arbitral tribunals, and arbitral institutions). What those private actors do or fail to do can lead to the Federal and State courts becoming involved in the arbitration. For example, one can imagine a lawsuit filed in a federal court and the defendant asserts as an affirmative defense that there is an arbitration clause and seeks the court to dismiss the case in court and compel the parties to arbitration. The willingness of the courts to play such a role is based on the applicable law (statute or common law) and the manner in which that court applies/interprets that law. Very schematically, the United States is a very arbitration friendly environment. In particular, the US Supreme Court decisional law and therefore all of the courts are on the whole very hospitable to arbitration.

**Federal and State legislatures:** At the federal level we have the Federal Arbitration Act. As mentioned above, the Federal Arbitration Act is coupled with a very pro-arbitration Supreme Court decisional law. The Federal Arbitration Act is a skeleton act that is primarily focused on the interventions of the courts in the arbitration rather than being a complete arbitral regime. There are numerous curious things about the Federal Arbitration Act. One of the most significant points is that on its own, the Federal Arbitration Act Chapter 1, which governs primarily domestic arbitrations, does not grant a federal court subject matter jurisdiction. Thus, subject matter jurisdiction in such a federal court would have to be based on some other federal question (other

than the FAA) being in question or diversity jurisdiction. Another aspect of the Federal Arbitration Act is that some of its provisions apply both in federal AND state court – another quirk of the US Supreme Court decisional law. There are periodically efforts to revise the Federal Arbitration Act which tend to fail as there is fear that the US Supreme Court decisional law would falter. In contrast to the federal regime, many states have passed arbitration laws which appear to be primarily about demonstrating to the world that their state is arbitration friendly.

Under Federal Law, international commercial arbitration is governed by the New York Convention and Federal Arbitration Act Chapter 2 or the Inter-American International Commercial Arbitration Convention and Federal Arbitration Chapter III.

**Federal and State Executive:** Periodically, federal and/or state regulators have stepped into the arbitration world. For example, consumer protection agencies worried about fraudulent arbitration have stepped in to shut down arbitral tribunals when the fraud comes to light. An example is the Attorney General of Minnesota who shut down the National Arbitration Forum due to improprieties that had been noted.

**International Treaties and Agreements:** Above we mentioned some of the treaties that are present in the arbitration world. The United States is a signator to some of these key treaties including the New York Convention. This ratification in turn places an obligation on the United States. Compliance with that obligation can be done in the form of legislation passed internally or through the responses of the courts to the legal regime that governs arbitration.

### **C. The Steps in an arbitration**

In Figure 1 above, I have tried to indicate to some extent with xx's when different actors intervene in the arbitral process. Here I describe in general the steps of an arbitration.

Initially, it is the parties that make the determination about the content of the arbitration clause. In the United States, the parties have the broadest of autonomy in that drafting. The parties' arbitration clause may incorporate the rules of an arbitral institution.

Once the dispute arises and depending on what the arbitration clause requires, it is then the parties with or without the help of an arbitral institution will constitute the Arbitral Tribunal. If selected, these institutional rules, in turn, may guide or affect how the process of constitution of the arbitral tribunal should be done. In the absence of institutional rules, the local law may provide guidance to the parties on the process of getting the arbitral tribunal in place (the Federal Arbitration Act provides little if any guidance but only provides for how a court can step in if there is a failure of the process chosen by the parties to constitute the arbitral tribunal).

Once the arbitral tribunal is in place, the institutional rules (and the local law) may give powers to the arbitrators for the subsequent phases of Arbitral Procedure. The procedural rules (jurisdiction, pleading rules, evidence) that apply in the courts do NOT apply in arbitration unless the parties so specify they are to apply. As a result, it is for the parties and the arbitrators to fashion the procedure for the arbitration. That arbitral procedure has to comply with background rules of due process, but it should not be underestimated how much flexibility the parties have

(party autonomy) and failing their agreement, the Arbitral Tribunal has (arbitral discretion) in setting the course of the arbitral procedure. The arbitration friendly environment in the US makes it certain the parties and arbitrators have wide latitude to exercise their arbitral discretion in conducting the arbitral procedure.

Once the arbitrators have deliberated they render the arbitration award. The formal requirements for such an award are minimal in the United States, in contrast to many other countries and the international norm. For example, an arbitral award rendered in the United States need not state the reasons for the award – it can just state the result. Once the arbitrators have rendered the award they are said to be *functus officio* with no ability to change anything about their award, subject to minor points.

As an end to the cycle, the enforcement of the arbitral award is the means by which the state orders a recalcitrant party to comply with the terms of the award or voids an award that was improperly or irregularly rendered under the limited grounds for attacking an award.

### III. The Specificity of International Commercial Arbitration

#### A. The sources of relevant norms for international arbitration.

In contrast to domestic (or to avoid confusion with domestic relations courts, non-international) US arbitration, the distinctive feature of international arbitration is the complex articulation between four sources of norms:

- a) Party Autonomy as expressed in the arbitration clause or party agreement to arbitrate
- b) Arbitral Institutional rules or rules of other than state origin (ICC, AAA, CIETAC, ad hoc rules etc)
- c) National Arbitration Laws (FAA Chapter 2 (and 3), UNCITRAL Model Law on International Commercial Arbitration as legislated in countries, other national arbitration laws such as the English Arbitration Act of 1996, or the Indian Arbitration and Conciliation Act)
- d) International agreements (1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, the Washington Convention, the European Convention, etc.)

#### B. The articulation between these norms

In international arbitration in addition to the four levels of norms for each country, one tends to think in terms of how these norms articulate in different countries with varying arbitration cultures. Thus, to use the prosaic phrase sometimes used to synthesize the view of the regimes in different countries, some countries are more arbitration friendly and some countries are less arbitration friendly. These national legal cultures play out in two

principal places: the country in which the arbitration occurs (i.e. where the place of arbitration is) and the country where a winning party seeks to enforce the arbitral award (which may be the same country or a different country).

Figure 2 – articulation between these norms

Place of Arbitration (in say Country A)	Place of Enforcement (in say Country B)
Arbitration Clause	Arbitration Clause
Arbitral Institution Rules	Arbitral Institution Rules
National Law	National Law
Treaty	Treaty

For example, an arbitral tribunal sitting in Country A (having a place of arbitration in Country A is another way to say it) may make an award which grants a party damages and interest on those damages. The winning party may seek to enforce that arbitral award in another country (Country B) (place of enforcement in Country B might be another way to say this) in which there is a public policy exception against interest ever being granted in arbitral awards. Thus, the courts of Country B might refuse to enforce the interest portion of the award or even the entire award depending on the arbitration unfriendliness of Country B. Knowing of such a risk, the party that was seeking the remedy might have sought at the beginning of the arbitration to recast the interest part of the request for arbitration in a form that might pass muster with the Country B court in case there was an award to be enforced in Country B. For example, as damages for lateness or charges.

**C. Arbitral Culture Gymnastics differing national visions of arbitration**

**i. What is arbitration?**

The case of *Frydman v. Cosmair, Inc. (1995)* provides a useful introduction to the international commercial arbitration environment. In this contract dispute, the plaintiff filed in state court and the defendant sought to have the matter removed to federal court alleging the matter was an arbitration subject to the 1958 New York Convention and FAA Chapter 2. Unlike FAA Chapter 1, FAA Chapter 2 (implementing the 1958 New York Convention) does provide federal question jurisdiction (See FAA Chapter 2 Section 205). The summary below gives you a sense of what the federal district court had to do. It had to understand the nature of the price determination clause in terms of the law that would apply to it between two French persons who entered the contract in France. The US district court followed the US choice of law rules that led it to look to French law as the law to apply to understand whether French law characterized this procedure as arbitration. French law in fact used the term price arbitration for this type of procedure, but the manner in which French law dealt with such a price arbitration was different from how French law addressed arbitration more broadly (some of the differences are shown in the

table below). After understanding whether French law would consider this to be arbitration, the US district judge concluded that the price arbitration that the parties had agreed to was in fact not arbitration in the sense that he as an American judge would understand. Thus, the New York Convention and FAA Chapter 2 would not apply to the relationship of these parties. As a consequence, the federal district court judge did not have federal question jurisdiction under FAA Chapter 2 and the New York Convention. So the matter was remanded back to the state court for proceedings there.

A summary of the case is presented below and highlights the need to understand the contract terms, see what the applicable law that would be applied to the contract would be, see what the implications of the application of that foreign law would be as the contract is inserted in the US arbitration regime, and then see whether the FAA Chapter 2 and the New York Convention would apply or not to the relevant clause.

**Frydman v. Cosmair, Inc. (1995)**

Frydman files in state court (Supreme Court of New York) alleging fraudulent conversion, conspiracy to defraud, and aiding and abetting fraud.

Defendants remove the action to the USDC pursuant to sections 203 and 204 of the law implementing the New York Convention 9 USC Sections 201-208

Plaintiffs move to remand to the state court arguing that this action does not relate to an arbitration falling under the Convention.

Contract formation – what law applies? State law which governed the contract formation

What state law governed the contract formation? – Contract formed in France between French citizens =) French law applies

Parties agree: 1) agreement to arbitrate the value of plaintiff’s Paravision shares 2) contract to buy Plaintiff’s Paravision holdings at a price to be determined by the same person who had been appointed for the arbitration.

<b>Types of arbitration</b>	<b>French General Arbitration</b>	<b>French Price Arbitration (Article 1592 French Civil Code)</b>	<b>US General Arbitration</b>	<b>US Price arbitration</b>
				<b>Appraisal</b>
<b>Legal nature of the decision</b>	<b>Arbitral award has status as a judgment</b>	<b>Price appraisal does not have the status of a judgment</b>	<b>Means of resolving disputes – a judgment</b>	<b>Means of fixing the price term for contracting parties – never a judgment</b>

<b>Nature of the procedure</b>	<b>Arbitration section of the code. Full adversarial hearings and an award supported by detailed reasoning</b>	<b>Does not have to be conducted in the same manner as an arbitration. No requirement to hold hearings nor to support the decision with detailed reasoning</b>	<b>FAA or Labor</b>	<b>Contract breach</b>
<b>Section of the code</b>	<b>Arbitration section</b>	<b>Section on Sales Contracts</b>	<b>FAA</b>	<b>Contract, UCC, CISG</b>
<b>Lodge action against it</b>	<b>Court of Appeal</b>	<b>Action against the decision is instituted at trial level court – Tribunal de Grande Instance</b>	<b>Trial level</b>	<b>Trial level</b>
<b>French court characterization</b>		<b>Not an arbitration agreement – a mandate granted by the parties the sole object of which was to estimate and evaluate the thing being sold</b>	<b>FAA grounds to vacate an award</b>	<b>Breach of contract</b>
<b>Enforcement</b>	<b>Exequatur</b>	<b>Never attains status of judgment</b>	<b>Summary procedure</b>	<b>Never obtains the status of a judgment to be enforced/breach of contract action</b>

“Because this action does not relate to an arbitration falling under the Convention, and because no other basis for federal subject matter jurisdiction has been alleged, this Court lacks subject matter jurisdiction. Accordingly, plaintiffs’ motion to remand this case to the Supreme Court of the State of New York is granted.”

**ii. What is a Convention award?**

Please take a look at Article 1 (1) of the New York Convention. The New York Convention applies in two settings:

- 1) where the award is rendered in a state other than the one in which recognition and enforcement of such awards are sought

State here does not mean American state but is at the level of the nation like the United States, France etc. What this provision would mean is that an award rendered between an American party and a German party with place of arbitration in Geneva, Switzerland would be characterized as a Swiss arbitration (not American or German even though the parties are American or German) award for purposes of the New York Convention and FAA Chapter 2 applying to it. If said Swiss award were sought to be recognized and enforced in the United States it would be considered a 1958 New York Convention and FAA Chapter 2 award for which a federal district court would have jurisdiction.

- and 2) when the award is not considered domestic in the state where the recognition and enforcement are sought.

Reading FAA Chapter 2, Section 202, in conjunction with this language of the 1958 New York Convention Article 1(1), it is possible that an arbitration award rendered with the place of arbitration in the United States might be considered a non-domestic award and as a result the 1958 New York Convention would apply (if there was a sufficient reasonable relationship with one or more foreign states). Thus there would be proper federal question jurisdiction in the US district court to entertain motions for recognition and enforcement.

On the other hand, each country in the world has its definition of what is a domestic award. For example, it use to be the rule in Germany that if parties had selected German procedural law to apply in their arbitration, even if the arbitration was held outside of Germany (say in Australia), German law and German courts would consider such an arbitration award a domestic arbitration award and the 1958 New York Convention would not apply. Why? Because for the German law and courts the selection of German procedural law to guide the arbitration was determined to cause an award to be treated as a domestic award.

So, the types of awards to which the New York Convention might apply – even if rendered in the United States or any other country – have to be reviewed to determine whether the 1958 New York Convention and its implementing legislation in that country (for the US, FAA Chapter 2) apply to the specific award.

### iii. Different state visions: the commercial reservation and the reciprocity reservation

Under Article 1(3) of the New York Convention, each state can make a reservation that it will only apply the Convention to legal relationships that are commercial under the national law of the State making such declaration. When a country has made that reservation, it becomes important when seeking recognition and enforcement of the foreign arbitral award to see whether the arbitral award in question would be considered commercial in the country. If the view of commercial (the commercial exception) is narrower in the country where one is seeking recognition and enforcement than in the country where the award was rendered, it is possible that the courts of the country where a party is seeking recognition and enforcement would not consider the award a New York Convention award. The consequence is that the award would be examined by those courts under whatever other regime was present in that country's law for evaluation of foreign arbitral awards.

Under Article 1(3) a second reservation is that a country will only apply the New York Convention to awards that are made in countries that are signatories to the New York Convention. This is the reciprocity exception. So if the award is rendered in a country that is not a signatory and the country where one is seeking to recognize and enforce the award has made the reciprocity reservation, the 1958 New York Convention would not apply. The consequence is that the award would be examined by those courts under whatever other regime was present in that country's law for evaluation of foreign arbitral awards.

Obviously, if a country has not made the commercial reservation or the reciprocity reservation it is signaling the broadest acceptance of the application of the 1958 New York Convention. The point here is to note that these types of reservations are permitted by the language of the New York Convention and for you to understand the implications of such decisions by said countries.

#### iv. Different state visions more generally

For every word of the New York Convention, the courts of contracting states may have different interpretation related to their history. The breadth or narrowness of those interpretations influence the efficacy of international arbitration in that country. Countries that have narrow interpretations of ways to attack the arbitration agreement or the arbitration award are considered to be more arbitration friendly than countries' that take a more expansive interpretation of ways to attack the arbitration agreement or the arbitration award. For example, an award rendered in Egypt might be set aside by an Egyptian court for being in violation of Egyptian international public policy, yet the recognition and enforcement of the award in the United States might be granted as US international public policy is a narrower exception in the United States. In general, just as on the domestic non-international arbitration side, the United States is very pro-arbitration and particularly pro-international commercial arbitration.

## IV. Hello Complexity

### A. FAA Chapter 1 and the equivalent issue under other countries' arbitration laws

For the United States, international commercial arbitration is governed principally by FAA Chapter 2 implementing the 1958 New York Convention (we are leaving to the side the FAA Chapter 3 and the Inter-American Convention or other regional or bilateral regimes for arbitration). At the same time, FAA Chapter 2 Section 208 makes a reference back to Chapter 1 that can potentially lead to aspects of Chapter 1 and its Supreme Court decisional law being applicable to the international commercial arbitration.

One example is to imagine someone seeking the recognition and enforcement of a foreign arbitral award rendered abroad in the United States. Assuming that the New York Convention under Article 1(1) applies and this is a Convention award, please note Article VII (1) of the New York Convention which states in relevant part “nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon.” The question becomes what is the law or treaties of the United States in that setting. One might take the view that the grounds for not recognizing or enforcing the foreign arbitral award that are in Article V of the New York Convention could be the exclusive grounds on which such an award could be attacked in the US court. Another view might be that Article VII provides an opening to US domestic Chapter 1 grounds being applied that is not prevented by FAA Chapter 2, Section 208’s residual application language which states “Chapter 1` applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.” It may seem somewhat circular but the idea is that the Convention opens the way to other grounds than Article V applying through its Article VII so there is no conflict with the Convention. There is also no conflict with FAA Section 208 and so a party could assert FAA Chapter 1 grounds should be applied. But, then the question becomes whether the non-statutory common law grounds (arbitrary and capricious, manifest disregard of the law, and public policy – derived from labor arbitration and having migrated to FAA Chapter 1 arbitration) apply. And further, has *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) stating only the statutory grounds apply in FAA Chapter 1 arbitration cut off the possibility of application of these non-statutory grounds for international commercial arbitration also? That remains unanswered at this point.

A pre-*Hall v. Mattel* case called *In the Matter of the Arbitration of Certain Controversies between Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996) seemed to open the way for precisely this type of analysis in which on the one hand the arbitral award that the Claimant was seeking to enforce had been rendered in Cairo,

**Egypt (i.e. place of arbitration in Cairo, Egypt) and had been set aside by the Egyptian Court. When the successful Claimant sought the recognition and enforcement of the arbitral award in the United States, the US District Court said the Claimant could rely on the manifest disregard of the law ground from the common law grounds then applicable in FAA Chapter 1 rather than the New York Convention Article V grounds. The US common law ground was a narrower ground than the ground as applied by the Egyptian court and so the award that had been set aside in Egypt (dead in Egypt) was recognized and enforced in the United States (alive in the United States). Similar types of analyses have happened in other countries under the New York Convention so this is a type of quirk in the New York Convention that may or may not be found in different countries legal systems. Also, the approach of *Chromalloy* has been a subject of controversy both domestically and internationally. What survives of this approach for common law grounds post-*Hall v/ Mattel* or at all for the FAA Chapter 1, Section 10 statutory grounds to be applicable remains an open question.**

**Another example would be with an arbitral award that was rendered in the United States but was considered a non-domestic award that was a New York Convention award pursuant to the last sentence of Article I(1) of the New York Convention. New York Convention Articles V (1) (a), (d), (e) include references to “law” as grounds for non-recognition. For this Convention award rendered in the United States would that law be the New York Convention itself (but remember the Article VII language described above), the FAA Chapter 2 and Section 208 blocking a return to Chapter 1? Or might this be a case where the law to be applied is the US domestic law grounds of FAA Chapter 1 including the common law grounds? If FAA Chapter 1 statutory grounds would apply has *Hall v/ Mattel* limited the application of the common law grounds here too?**

**The above are examples of how in US law the New York Convention is read with the Federal Arbitration Act Chapter 2 and Chapter 1 to try to identify the relevant law that might be applied by a United States federal or state district court to the arbitration award. One should not minimize this complexity and the need for careful reading of the Supreme Court decisional law for the United States.**

**For the same reasons, when the award is rendered in the United States or abroad and is sought to be enforced in a foreign country the interaction between the treaty regime, the local law regime and the courts is important to understand as to the likelihood of a recognition and enforcement action prospering. One reason the adoption of the UNCITRAL Model Law on International Commercial Arbitration was so significant is that it provided a “plug-in” modern arbitration law with grounds for setting aside and/or recognition of a foreign arbitral award that mirror those in the New York Convention. Such identity of grounds facilitates the possibility of coherence between the treaty obligation and the national law covering international commercial arbitration. At the same time, countries diverge so even if a country has a coherent regime between treaty and its**

national law which is the UNCITRAL Model Law, that does not guarantee that every other country with the same identical treaty and national law will interpret the obligations in an identical manner.

**B. Articles II (1) and (2) arbitration agreement in writing**

The 1958 New York Convention was written long before e-mail and electronic commerce had developed. So the “agreement in writing” provision of Articles II (1) and (2) could be construed as a barrier to arbitration agreements being New York Convention arbitration agreements when such electronic means are used. The solution of amending the New York Convention raised too many risks, so the approach has been for UNCITRAL to make an interpretation that suggests that the Article II(1) and (2) are not limiting and that local law can expand the description of what “agreement in writing” means. In a rare country like Germany an oral agreement to arbitrate might be enforceable under German arbitration law in a setting of that being a trade custom. Would such an oral clause be considered a Convention arbitration agreement? How far a given jurisdiction is willing to stretch the idea of agreement in writing is also a measure of how accepting they are of electronic commerce and electronic means of contracting.

**C. Confirmation under FAA Chapter 2, Section 207**

Unlike the one year time-limit for confirmation in the FAA Chapter 1, FAA Chapter 2 sets a three year time-limit. A non-confirmed award for which such time limit has expired raises an interesting issue of whether the award retains its effect and, if not, whether the arbitration clause has now been exhausted for those claims. Would a court proceeding be required at this point if the claims were sought to be resolved? It is a point that is open to interpretation.

**D. Place of arbitration and FAA Chapter 2, Section 206**

In each state in the world, international commercial arbitration is given more or less autonomy vis-à-vis the local courts. Yet, at the end of the day, the place of arbitration courts are the typical place where a dissatisfied party might seek to attack (the proper term is set aside while in the US the term might be more vacatur) an arbitral award. Thus, it is imperative to have some sense of the arbitration friendliness of the country where one situates the place of arbitration. This could relate not only to the treaty and national law, but also how that national law respects what arbitral institutions rules provide or what parties’ arbitration clauses provide.

Under FAA Chapter 2, Section 206 it is possible for a US district court to compel arbitration under an arbitration agreement that will reach arbitrations that are to be conducted outside the United States. But, what if there are quirks in the local law in a foreign country that make the arbitration clause unenforceable? One example might be

the need for an institution to be designated in the arbitration clause (not just a set of rules) as has been the case in China. What if the arbitration clause does not specify an institution and consequently arbitration is likely to be considered void or voidable in Chinese law where the place of arbitration is in China and the parties did not pick another law being applicable? These are the kinds of things one must worry about in that US federal or state district court proceeding when confronted with a motion to compel arbitration which would require arbitration abroad.

Another concern for an American court with compelling arbitration abroad is whether the American party would be able to vindicate rights similar to those they would have in the United States. So if there would be contractual and statutory claims in the United States, is the law in the foreign jurisdiction sufficiently broad to allow the vindication of similar types of claims under that law and remedies? The approach abroad does not need to be identical, but sufficiently broad. See for example, *Roby V. Corporation of Lloyd's*, 996 F. 2d. 1353 (2d Cir. 1993).

#### E. Separability and Kompetenz-Kompetenz

In the international arena, separability and kompetenz-kompetenz are important as each country has its approach to determining whether the court decides an issue or the issue is left to the arbitrators. One has to research what would be the reaction of the relevant courts in your country, the other parties' courts, and at the place of arbitration and maybe even at the place where the arbitral institution is located that sets in motion the arbitration at an initial stage of the arbitration or later on if a problem arises.

i. Key Issues: Who decides?: Separability of the Arbitration Clause/Kompetenz Kompetenz of the Arbitrators (or the arbitrators jurisdiction to decide on their own jurisdiction)

Figure 2. Container Contract and Arbitration Clause in that Container Contract



**The arbitration clause is both a clause in a contract and a mechanism for an adjudicatory procedure. What happens when a party to the contract containing the arbitration clause (the container contract) asserts to a court that there was some type of bargaining misconduct in getting them to enter into the container contract (and thus they do not wish to be held to arbitrate)?**

**A key question that has to be addressed was who decides these kinds of gateway questions of arbitrability. If arbitrability was to be decided by the court, then the assertion of such a defense in any court proceeding to oppose the compelling of arbitration would tend to have a court process precede the arbitration process – creating delay that is inimical to arbitration. On the other hand, if these matters were left to the arbitral tribunal to decide, there was a chance of significant resources being spent in an arbitration over which – at the end of the day – it might turn out there was no basis for the arbitration.**

**The United States solution – in the context of arbitration being available for a wide range of contractual disputes – balanced these matters in our own way.**

**In *Prima Paint (1967)*, the Supreme Court decided that under FAA Chapter 1, Section 4, “with respect to a matter within the jurisdiction of the federal court save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.” The question thus focused on whether the attack was on the contract as a whole (the container contract in figure 2) or specifically on the arbitration clause. If, for example, the defense being asserted was fraud in the inducement of the contract as a whole, but not fraud in the inducement into the arbitration clause, the courts were to send the parties to arbitration where the arbitrator would hear all matters under the contract. If there was a defense asserted against the arbitration clause, absent other language, it was for the court to decide the question before the arbitration went forward.**

**In *First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d. 985 (1995)*, the Court went farther. Here the Court focused on whether the parties had agreed to have arbitrability decided by the arbitrators. If the parties clearly and unmistakably agreed to submit the question of arbitrability to arbitration, then even if there is a defense**

of inarbitrability asserted against the arbitration clause, it would be for the arbitral tribunal to decide this kind of gateway question of arbitrability – not the court.

Progressing farther, in *Rent-A-Center, West, Inc. v. Jackson* 561 U.S. \_\_\_, 130 S. Ct. 2772 (2010), the container contract was in fact only the lengthy arbitration agreement. In that arbitration agreement was a clause delegating the gateway issues of arbitrability to the arbitrator. Defenses were made to the entire arbitration clause which was also the container contract. The logic of *Prima Paint* and *First Options* was extended. As the defenses were not to the delegation provision of the arbitration clause but to the arbitration clause (that was in fact the entire container contract), it was left to the arbitrators to decide these issues that the parties had clearly delegated to them.

In sum, the arbitration clause has been found to be separable from the underlying contract (called the separability doctrine) and, provided the parties so provide, gateway issues of arbitrability can be addressed by the arbitral tribunal rather than the courts.

A related concept to this is the question of who decides the arbitrators' jurisdiction (the arbitrators or the court). On the international level this idea is described as *kompetenz-kompetenz* (jurisdiction to decide one's own jurisdiction) and comes from the legal rule (really from public international law) that it is in the essence of a tribunal to have jurisdiction to decide on its own jurisdiction. *Kompetenz-Kompetenz* is in turn broken into both negative and positive *kompetenz-kompetenz*. Negative *kompetenz-kompetenz* focuses on the denying of courts the power to decide the arbitrators' jurisdiction. Positive *kompetenz-kompetenz* focuses on the grant of power to the arbitrators to decide their own jurisdiction. Each country balances these questions in their own manner with common law courts like the United States having a broader role for the courts in these settings than civil law courts. So we can see that the drafting of the arbitration clause in the United States is particularly important in deciding the ambit of the court's role in getting the arbitration started. The more the contract language clearly gives to the arbitrators to decide, the more likely the American court will limit its gateway review. While drafting and the role of the courts in other common law countries vary in importance, those courts coming from the civil law tradition might be less dependent on the vagaries of the arbitration clause's drafting to allow matters at these early stages to be heard by the arbitrator rather than the courts.

#### F. Arbitrability

In the international arena, the United States international commercial arbitration Supreme Court decisional law has had influence in the world (and received influence from other countries courts' approaches) and in its effect on US domestic arbitration in terms of having a broad vision of subject matter arbitrability including contractual and statutory claims. The United States – as does every state - has the power under the 1958 New York Convention to have broader subject-matter inarbitrability. Other countries do not as a

matter of public policy allow certain matters to be subject matter of arbitration. The full *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) *Mitsubishi v/ Soler* decision) gives an apt description of the debate in the United States and highlights the specific concerns of the US Supreme Court with respect to international arbitration especially about the arbitrability of statutory claims (antitrust in that case)

The discussion of courts' reaction to contractual arbitrability and gateway arbitrability is echoed in every country in the world with arbitration friendly countries tending to have a more minimal court scrutiny prior to the matter being sent to the arbitrators than arbitration unfriendly countries.

Several sections of the FAA Chapter 1 have been made applicable as federal substantive law in both state and federal courts. As noted above, whether a court or arbitral tribunal addresses the issue first together with separability of the arbitration clause and *kompetenz-kompetenz* are ever present concerns in arbitration.

A key term that permeates the discussions of arbitration is whether a given dispute is considered arbitrable or not: meaning is it something that the arbitrators are empowered by the arbitration clause or background law to address. This concept of arbitrability covers a number of different topics that merit a bit of explanation.

**Subject matter (in) arbitrability:** Subject matter arbitrability describes the types of disputes that the background law permit to be resolved through arbitration. At the first level, as arbitration clauses are inserted into contracts for the most part, the question is what types of contracts are considered capable of being addressed through arbitration. The Federal Arbitration Act does not provide any guidance as to what types of subject matter is arbitrable in this sense. Some parameters have developed through the Supreme Court decisional law that merit highlighting.

First, **contractual disputes** (including tort disputes related to the contract): virtually any type of contractual dispute in any type of contract is considered arbitrable in the United States. This broad subject matter arbitrability distinguishes the United States from many other developed countries. For example, employment contract disputes are considered arbitrable in the United States. In several countries (France as an example) there are labor courts which have exclusive jurisdiction over employment and labor disputes. Unlike in the United States, in such countries an employer and an employee (for the most part except in very limited cases of high-level managers like CEO's and even then not so sure) cannot agree to go to arbitration over potential employment disputes. In those countries, such an arbitration clause would be void. In that sense, employment is a subject matter that is inarbitrable in those countries. Why do countries differ? Each country's decision about what is or is not arbitrable is derived from the individual history of each country in developing its legal regime for arbitration.

**Second, statutory claims - whether federal or state: are generally arbitrable in the United States. On the federal level, the statute must have extremely clear language that excludes arbitration and I am not aware of such a statute having been found to make such an exclusion. On the state law level, to the extent such a statute is seen as placing a burden focused on arbitration it will be preempted through Chapter 1, Section 2 of the FAA. Thus, if we think of statutory law such as discrimination law, disability law, or securities law in which individuals are given certain rights to bring claims (possibly as private attorneys general), if there is an arbitration clause in the contract between the parties, that subject matter of that statutory claim will be arbitrable.**

The best example of the evolution in the Supreme Court decisional law toward a narrow subject-matter inarbitrability defense is in the securities law field. In *Wilko v. Swan*, 346 U.S. 427 (1953), statutory claims under the Securities Act of 1933 were considered inarbitrable due to the federal policy concerns underlying that act. An arbitration clause was seen as a “condition, stipulation or provision binding any persons acquiring any security to waive compliance with any provision” and therefore “void.” Steadily the power of the *Wilko* doctrine was eroded. In *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974), *Wilko* was distinguished with respect to the Securities Exchange Act of 1934 (which had essentially identical voiding language to the Securities Act of 1933) in the context of an international contract. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d. 185 (1987), the subject matter arbitrability recognized for Securities Exchange Act of 1934 statutory claims in the international arbitration context of *Scherk* was extended to domestic arbitrations – further weakening *Wilko*. Finally, in *Rodriguez de Quijas v/ Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L.Ed. 2d 526 (1989), the Supreme Court overruled *Wilko* and made Securities Act of 1933 (whether in domestic or international arbitration) arbitrable.

The actual text of the federal statutes did not change one iota over those years. What changed was the Supreme Court’s view of how best to vindicate the pro-arbitration federal policy it had developed in its decisional law. A similar path occurred for statutory claims in the employment setting in *Gilmer v/ Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d. 26 (1991) which held a federal statutory employment claim under the Age Discrimination in Employment Act of 1967 (ADEA) arbitrable.

**Third, even within the text of Chapter 1 of the FAA, exceptions to arbitration were narrowly construed over time. Thus, Chapter 1, Section 1 of the FAA ends with a carve-out seeming to exclude employment contracts from arbitration (the employment contract exclusion) with the phrase:**

“but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

Moreover, it is very doubtful that at the time of the passing of the FAA Chapter 1, that Congress contemplated that employment contracts would be considered arbitrable.

But, the Supreme Court evolved over time again. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d. (2001), possibly responding to the settled expectations post-Gilmer of employers throughout the economy with respect to employment agreements with arbitration clauses, the Supreme Court held that the above exclusion (the employment contract exclusion) applies only to the employment contracts of workers directly involved in the interstate transport of goods and services. Everyone else could be required by employers to submit to arbitration.

My personal view is that with the acceptance of the arbitrability of statutory claims in the international arbitration part of arbitration (FAA Chapter 2), it seemed increasingly artificial for the Court to consider a distinction should be made between what happened in international arbitration and domestic arbitration. The principal case that accelerated this process I believe is *Mitsubishi Motors Corp. v/ Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d. 444 (1985). In that case, the Supreme Court accepted the arbitrability of statutory anti-trust disputes in international arbitration. The timing of *Mitsubishi* in 1985 and references to it in later domestic cases suggests *Mitsubishi* was the moment when the court considered statutory claims absolutely fair game for resolution in the arbitral process as opposed to exclusively in courts.

**Contractual (in)arbitrability:** In contrast to subject matter arbitrability, it is possible for the parties to exclude certain claims from being addressed or powers for the arbitrators in the way they write their arbitration clause. In such a setting, it is by the will of the parties – not some background public policy in some statute – that a given claim is not considered submitted to arbitration or type of relief possibly to be granted. One must remember that arbitration is a creature of consent and so if the arbitration clause does not express consent to something being addressed, then it is not arbitrable. From this idea is derived the concept of contractual inarbitrability.

In general, if one does not clearly exclude a type of claim or remedy in the arbitration clause, it will be considered included within the scope of the arbitration clause (Adage: if you do not exclude it, we will include it). The breadth of this idea is demonstrated in the case of *Mastrobuono v/ Shearson Lehman Hutton, Inc*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1996) in which the New York law chosen by the parties in their agreement allowed courts but not arbitrators to award punitive damages. The arbitrators under the broad arbitration clause decided to grant punitive damages and the agreement to New York law was not seen by the court as a sufficiently clear exclusion of the power of the arbitrators to grant such damages. So, significant pressure is placed on arbitration clause drafters who seek to exclude a type of claim or remedy to specify clearly the exclusion.

**Gateway arbitrability (procedural and substantive arbitrability):** Somewhat related to the issue of who decides is the issue of gateway issues. As discussed in *Howsam v/ Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d. 491 (2002) the court has sought to see what type of issues parties would expect the court to decide and what kind of issues they would expect the arbitrator to decide. Thus, issues such as whether the parties are bound by a given arbitration clause or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy were seen by the court as gateway issues to be decided by the court. “Procedural” questions not about is there an arbitration agreement between the parties but which grow out of the dispute and bear on the final disposition (waiver, delay or a like defense to arbitrability), time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate were seen by the court as for the arbitrator to decide. In sum, in the absence of an agreement to the contrary, issues of substantive arbitrability are for the courts to decide. But, notice that the parties by agreement can narrow the scope of what is for the courts to decide. Thus a substantive arbitrability question over the jurisdiction of the arbitrators might be made to be something to be heard by the arbitrators and not the court by the parties’ clear and unmistakable agreement in the arbitration clause.

#### **G. The Arbitration Clause**

In light of the prior sections and especially the arbitrability discussion, I hope it is clear that the arbitration clause is essential to the arbitration regime. The drafting of the clause is left up to the parties to the contract and there is great freedom. However, untoward drafting may lead to problems in putting the arbitration in place (lesser or greater pathology in the arbitration clause).

A former Secretary General of the ICC International Court of Arbitration named Frederic Eisemann suggested that arbitration clauses may suffer from pathologies. He determined for the international context that there were four criteria for an arbitration clause.

- (1) The first, which is common to all agreements, is to produce mandatory consequences for the parties,
- (2) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award,
- (3) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties,
- (4) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and

**rapidity to the rendering of an award that is susceptible of judicial enforcement.**

**Examples of various types of pathology in arbitration clauses are discussed in the attached article (Pathological Clauses:Frederic Eisemann's Still Vital Criteria) I did some years ago about pathological arbitration clauses.**

**Arbitral institutions bring together arbitration experts to help them draft their model arbitration clauses. No one is required to use the model arbitration clause of an institution to have that institution’s rules apply to their arbitration, but the model arbitration clauses that the institutions suggest reveal what entities in the arbitration business think is essential to have an effective arbitration clause. Here are two examples.**

- 1) An example of a model arbitration clause suggested by an arbitral institution for international arbitration is presented in the ICC Model International Arbitration Clause.**

**ICC Model International Arbitration Clause**

**Arbitration**

**“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”**

**<https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>**

- 2) An example of a model arbitration clause suggested by an arbitral institution for a domestic arbitration is presented in the American Arbitration Association Model Arbitration Clause.**

**“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”**

**<https://www.adr.org/Clauses>**

**Do not let the apparent simplicity of these clauses deceive you. They have been the subject of intense discussion by very experienced international arbitration experts – both as counsel and as arbitrators. These clauses do the best to meet Eisemann’s four requirements.**

**But, each situation is different and so additional matters have to be thought about. Alternatively, if the situation before the court is one where the clause is not well drafted or does not include the kinds of additional matters that are suggested, the court can know where some of the problems are going to arise.**

**An example of the kinds of things that can be addressed even with the broadest model arbitration clause are described at the above ICC website, to wit:**

**Parties are free to adapt the clause to their particular circumstances. For instance, they may wish to stipulate the number of arbitrators given that the ICC Arbitration Rules contain a presumption in favour of a sole arbitrator. Also, it may be desirable for them to stipulate the place and language of the arbitration and the law applicable to the merits. The ICC Arbitration Rules do not limit the parties' free choice of the place and language of the arbitration or the law governing the contract.**

**When adapting the clause, care must be taken to avoid any risk of ambiguity. Unclear wording in the clause will cause uncertainty and delay and can hinder or even compromise the dispute resolution process.**

**Parties should also take account of any factors that may affect the enforceability of the clause under applicable law. These include any mandatory requirements that may exist at the place of arbitration and the expected place or places of enforcement.**

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### **ICC Arbitration without Emergency Arbitrator**

**If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, they must expressly opt out by adding the following wording to the clause above:**

**The Emergency Arbitrator Provisions shall not apply.**

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### **Expedited Arbitration**

**The ICC Arbitration Rules provide for use of an expedited procedure in lower-value cases. If parties wish to exclude the application of the Expedited Procedure Provisions, they must**

**expressly opt out by adding the following wording to the clause above:**

**The Expedited Procedure Provisions shall not apply.**

**Parties wishing to avail themselves of the expedited procedure in higher-value cases should expressly opt in by adding the following wording to the clause above:**

**The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute.**

**If parties wish the ceiling for the application of the Expedited Procedure Rules to be higher than that specified in those Rules, the following wording should be added to the clause above:**

**The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply, provided the amount in dispute does not exceed US\$ [specify amount] at the time of the communication referred to in Article 1(3) of the Expedited Procedure Rules.**

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### **Multi-tiered Clauses**

**ICC Arbitration may be used as the forum for final determination of a dispute following an attempt at settlement by other means such as mediation. Parties wishing to include in their contracts a tiered dispute resolution clause combining ICC Arbitration with ICC Mediation should refer to the standard clauses relating to the ICC Mediation Rules.**

**Other combinations of services are also possible. For instance, arbitration may be used as a fallback to expertise or dispute boards. Also, parties who resort to ICC Arbitration may wish to provide for recourse to the ICC International Centre for ADR for the proposal of an expert if an expert opinion is required in the course of the arbitration.**

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### **Other recommendations**

The parties may also wish to stipulate in the arbitration clause:

- the law governing the contract;
- the number of arbitrators;
- the place of arbitration; and/or
- the language of the arbitration.

The standard clause can be modified in order to take account of the requirements of national laws and any other special requirements that the parties may have. In particular, parties should always check for any mandatory arbitration. For example, it is prudent for parties wishing to have an ICC Arbitration in Mainland China to include in their arbitration clause an explicit reference to the ICC International Court of Arbitration.

The following language is suggested for this purpose:

“All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

**Make special arrangements where the contract or transaction involves more than two parties. (Emphasis added)**

**<https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>**

I have emphasized the last line from that website because if it is a contract with more than two parties, the process of constituting the arbitral tribunal can get very complicated. There are a series of rules in the ICC Rules to address the different permutations that the institution may be confronted with in setting in motion the arbitration.

These complexities are one of the reasons for international commercial arbitration it is generally preferable that parties look carefully at the model arbitration clauses of the institutions and not try to draft an arbitration clause on their own. By inserting the arbitration clause of an institution in their contract, they should also be inserting the appropriate rules of that institution. Just like the arbitration clauses, the rules have been developed with a fine-toothed comb by international commercial arbitration experts to make sure they cover the various points that at a minimum have to be provided to help ensure the enforceability of any award rendered under their auspices.

**Contrast this with a more domestic consumer setting. Here is an example of an arbitration clause drafted by Verizon in a consumer wireless contract.**

**HOW DO I RESOLVE DISPUTES WITH VERIZON WIRELESS?**

**WE HOPE TO MAKE YOU A HAPPY CUSTOMER, BUT IF THERE'S AN ISSUE THAT NEEDS TO BE RESOLVED, THIS SECTION OUTLINES WHAT'S EXPECTED OF BOTH OF US.**

**YOU AND VERIZON WIRELESS BOTH AGREE TO RESOLVE DISPUTES ONLY BY ARBITRATION OR IN SMALL CLAIMS COURT. YOU UNDERSTAND THAT BY THIS AGREEMENT YOU ARE GIVING UP THE RIGHT TO BRING A CLAIM IN COURT OR IN FRONT OF A JURY. WHILE THE PROCEDURES MAY BE DIFFERENT, AN ARBITRATOR CAN AWARD YOU THE SAME DAMAGES AND RELIEF, AND MUST HONOR THE SAME TERMS IN THIS AGREEMENT, AS A COURT WOULD. IF THE LAW ALLOWS FOR AN AWARD OF ATTORNEYS' FEES, AN ARBITRATOR CAN AWARD THEM TOO. WE ALSO BOTH AGREE THAT:**

**(1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT. EXCEPT FOR SMALL CLAIMS COURT CASES THAT QUALIFY, ANY DISPUTE THAT IN ANY WAY RELATES TO OR ARISES OUT OF THIS AGREEMENT OR FROM**

ANY EQUIPMENT, PRODUCTS AND SERVICES YOU RECEIVE FROM US (OR FROM ANY ADVERTISING FOR ANY SUCH PRODUCTS OR SERVICES), INCLUDING ANY DISPUTES YOU HAVE WITH OUR EMPLOYEES OR AGENTS, WILL BE RESOLVED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR BETTER BUSINESS BUREAU ("BBB"). YOU CAN ALSO BRING ANY ISSUES YOU MAY HAVE TO THE ATTENTION OF FEDERAL, STATE, OR LOCAL GOVERNMENT AGENCIES, AND IF THE LAW ALLOWS, THEY CAN SEEK RELIEF AGAINST US FOR YOU.

(2) UNLESS YOU AND VERIZON WIRELESS AGREE OTHERWISE, THE ARBITRATION WILL TAKE PLACE IN THE COUNTY OF YOUR BILLING ADDRESS. FOR CLAIMS OVER \$10,000, THE AAA'S WIRELESS INDUSTRY ARBITRATION ("WIA") RULES WILL APPLY. IN SUCH CASES, THE LOSER CAN ASK FOR A PANEL OF THREE NEW ARBITRATORS TO REVIEW THE AWARD. FOR CLAIMS OF \$10,000 OR LESS, THE PARTY BRINGING THE CLAIM CAN CHOOSE EITHER THE AAA'S RULES FOR CONSUMER DISPUTES OR THE BBB'S RULES FOR BINDING ARBITRATION OR, ALTERNATIVELY, CAN BRING AN INDIVIDUAL ACTION IN SMALL CLAIMS COURT. YOU CAN GET PROCEDURES, RULES

AND FEE INFORMATION FROM THE AAA (WWW.ADR.ORG), THE BBB (WWW.BBB.ORG) OR FROM US. FOR CLAIMS OF \$10,000 OR LESS, YOU CAN CHOOSE WHETHER YOU'D LIKE THE ARBITRATION CARRIED OUT BASED ONLY ON DOCUMENTS SUBMITTED TO THE ARBITRATOR, OR BY A HEARING IN PERSON OR BY PHONE.

**(3) THIS AGREEMENT DOESN'T ALLOW CLASS OR COLLECTIVE ARBITRATIONS EVEN IF THE AAA OR BBB PROCEDURES OR RULES WOULD. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, THE ARBITRATOR MAY AWARD MONEY OR INJUNCTIVE RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL CLAIM. NO CLASS OR REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL THEORIES OF LIABILITY OR PRAYERS FOR RELIEF MAY BE MAINTAINED IN ANY ARBITRATION HELD UNDER THIS AGREEMENT. ANY QUESTION REGARDING THE ENFORCEABILITY OR INTERPRETATION OF THIS PARAGRAPH SHALL BE DECIDED BY A COURT AND NOT THE ARBITRATOR.**

(4) IF EITHER OF US INTENDS TO SEEK ARBITRATION UNDER THIS AGREEMENT, THE

PARTY SEEKING ARBITRATION MUST FIRST NOTIFY THE OTHER PARTY OF THE DISPUTE IN WRITING AT LEAST 30 DAYS IN ADVANCE OF INITIATING THE ARBITRATION. NOTICE TO VERIZON WIRELESS SHOULD BE SENT TO VERIZON WIRELESS DISPUTE RESOLUTION MANAGER, ONE VERIZON WAY, VC52N061, BASKING RIDGE, NJ 07920. THE NOTICE MUST DESCRIBE THE NATURE OF THE CLAIM AND THE RELIEF BEING SOUGHT. IF WE ARE UNABLE TO RESOLVE OUR DISPUTE WITHIN 30 DAYS, EITHER PARTY MAY THEN PROCEED TO FILE A CLAIM FOR ARBITRATION. WE'LL PAY ANY FILING FEE THAT THE AAA OR BBB CHARGES YOU FOR ARBITRATION OF THE DISPUTE. IF YOU PROVIDE US WITH SIGNED WRITTEN NOTICE THAT YOU CANNOT PAY THE FILING FEE, VERIZON WIRELESS WILL PAY THE FEE DIRECTLY TO THE AAA OR BBB. IF THAT ARBITRATION PROCEEDS, WE'LL ALSO PAY ANY ADMINISTRATIVE AND ARBITRATOR FEES CHARGED LATER, AS WELL AS FOR ANY APPEAL TO A PANEL OF THREE NEW ARBITRATORS (IF THE ARBITRATION AWARD IS APPEALABLE UNDER THIS AGREEMENT).

(5) WE ALSO OFFER CUSTOMERS THE OPTION OF PARTICIPATING IN A FREE INTERNAL MEDIATION PROGRAM. THIS PROGRAM IS ENTIRELY VOLUNTARY AND DOES NOT

AFFECT EITHER PARTY'S RIGHTS IN ANY OTHER ASPECT OF THESE DISPUTE RESOLUTION PROCEDURES. IN OUR VOLUNTARY MEDIATION PROGRAM, WE WILL ASSIGN AN EMPLOYEE WHO'S NOT DIRECTLY INVOLVED IN THE DISPUTE TO HELP BOTH SIDES REACH AN AGREEMENT. THAT PERSON HAS ALL THE RIGHTS AND PROTECTIONS OF A MEDIATOR AND THE PROCESS HAS ALL OF THE PROTECTIONS ASSOCIATED WITH MEDIATION. FOR EXAMPLE, NOTHING SAID IN THE MEDIATION CAN BE USED LATER IN AN ARBITRATION OR LAWSUIT. IF YOU'D LIKE TO KNOW MORE, PLEASE CONTACT US AT **VERIZONWIRELESS.COM** OR THROUGH CUSTOMER SERVICE. IF YOU'D LIKE TO START THE MEDIATION PROCESS, PLEASE GO TO **VERIZONWIRELESS.COM** OR CALL CUSTOMER SERVICE FOR A NOTICE OF DISPUTE FORM TO FILL OUT, AND MAIL, FAX OR EMAIL IT TO US ACCORDING TO THE DIRECTIONS ON THE FORM.

(6) WE MAY, BUT ARE NOT OBLIGATED TO, MAKE A WRITTEN SETTLEMENT OFFER ANYTIME BEFORE ARBITRATION BEGINS. THE AMOUNT OR TERMS OF ANY SETTLEMENT OFFER MAY NOT BE DISCLOSED TO THE ARBITRATOR UNTIL AFTER THE ARBITRATOR ISSUES AN AWARD ON THE

CLAIM. IF YOU DON'T ACCEPT THE OFFER AND THE ARBITRATOR AWARDS YOU AN AMOUNT OF MONEY THAT'S MORE THAN OUR OFFER BUT LESS THAN \$5,000, OR IF WE DON'T MAKE YOU AN OFFER, AND THE ARBITRATOR AWARDS YOU ANY AMOUNT OF MONEY BUT LESS THAN \$5,000, THEN WE AGREE TO PAY YOU \$5,000 INSTEAD OF THE AMOUNT AWARDED. IN THAT CASE WE ALSO AGREE TO PAY ANY REASONABLE ATTORNEYS' FEES AND EXPENSES, REGARDLESS OF WHETHER THE LAW REQUIRES IT FOR YOUR CASE. IF THE ARBITRATOR AWARDS YOU MORE THAN \$5,000, THEN WE WILL PAY YOU THAT AMOUNT.

(7) AN ARBITRATION AWARD AND ANY JUDGMENT CONFIRMING IT APPLY ONLY TO THAT SPECIFIC CASE; IT CAN'T BE USED IN ANY OTHER CASE EXCEPT TO ENFORCE THE AWARD ITSELF.

**(8) IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS SET FORTH IN SUBSECTION (3) CANNOT BE ENFORCED, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY.**

**(9) IF FOR ANY REASON A CLAIM PROCEEDS IN COURT RATHER THAN THROUGH ARBITRATION, YOU AND VERIZON WIRELESS AGREE THAT THERE WILL NOT**

**BE A JURY TRIAL. YOU AND VERIZON WIRELESS UNCONDITIONALLY WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT IN ANY WAY. IN THE EVENT OF LITIGATION, THIS PARAGRAPH MAY BE FILED TO SHOW A WRITTEN CONSENT TO A TRIAL BY THE COURT.**

- Copied from:

<http://www.verizonwireless.com/b2c/support/customer-agreement>

Compare this domestic consumer wireless contract clause with the model clauses above. Think about the approaches of the institutions in a commercial setting and the company in a consumer technology setting. What is trying to be done through the arbitration clause. Is it more neutral dispute resolution or more limitation of liability?

As arbitration clauses are a specialized form of forum selection clause, contrast the arbitration clauses with this international forum selection clause that is from a Wild Apricot app that provides webhosting services.

#### **Dispute Resolution**

Except for any disputes relating to intellectual property rights or obligations, or any infringement claims, all of which shall be governed by Canadian federal law, any dispute between you and Wild Apricot and its agents, employees, officers, directors, principals, successors, assigns, subsidiaries or affiliates arising from or relating to this Agreement and the interpretation or the breach, termination or validity thereof, shall be governed by and construed and enforced in accordance with the laws of Ontario, Canada and resolved in a court of competent subject matter jurisdiction in Toronto, Ontario, Canada, regardless of your country of origin or where you access the Sites, and notwithstanding any conflicts of law principles. Wild Apricot will provide notice of any such lawsuit by email to the email address you provided when you created your account or by

email to an email address you have otherwise provided to Wild Apricot; and you must provide notice of any such suit to Wild Apricot by email at [wa.privacy@personifycorp.com](mailto:wa.privacy@personifycorp.com).

You and Wild Apricot agree that each may bring claims against the other only on an individual basis and not as a plaintiff or class member in any purported class or representative action or proceeding.

Regardless of any statute or law to the contrary, notice on any claim arising from or related to this Agreement must be made within one (1) year after such claim arose or be forever barred.

Under this forum selection clause, anyone in the world (including me sitting here in Toledo) as a consumer is agreeing to the jurisdiction of the Toronto, Ontario courts and that the laws of Ontario would apply to any disputes I might have with this Wild Apricot app company. How is it possible for a small business or a consumer to be able to properly have access to justice where the clause requires me to be in the courts of Ontario – no matter how neutral they are? These are some of the issues that confront courts in thinking about such clauses. The difference with the arbitration clause however is that there is both treaty (the New York Convention) and statutory (Federal Arbitration Act, Ohio Arbitration Act, and Ohio International Commercial Arbitration Act) that support arbitration.

Keep also in mind in international commercial arbitration, the importance of the place of arbitration. Requirements, if any and to what extent, of the law at the place of arbitration and for places of enforcement are very important to think about as part of the drafting. Issues like the applicable law (to the contract and/or to the arbitration clause), the language of the arbitration, and the place of arbitration. These issues have more importance in the international settings where there is a blend of legal and business cultures.

#### **H. The Arbitral Tribunal**

There is a preference for independence and impartiality in international commercial arbitration over the domestic US declining party-arbitrator as advocate model. Yet, I cannot emphasize enough the differences in legal and business cultures in the world about such concepts as independence and impartiality. When one is in a contract with a government, one can imagine a national of that country being proposed as a coarbitrator who may fear for his/her life or that of his family if he/she were to decide against the government. Would you want them to be on the panel or not?

The kind of problem that one can get into with respect to such matters of non-disclosure by arbitrators early in the arbitration are highlighted in the extract of a case I attach called *AT&T Corporation and Another v/ Saudi Cable Co, Court of Appeal, Mar. 20, 21, 22; May 15,*

2000 [2000] 2 Lloyd's Rep. 127. A more arbitration unfriendly court might have set aside the award.

Even such basic issues as the compensation of the arbitrators have to be thought through. All the worries about making the financial arrangements clear and transparent at the beginning are valid. Institutions have rules as to how compensation of the arbitrators will be done. Familiarity with such rules is essential to avoid a situation where some local approach to compensation of arbitrators leads to a terrible result of an award being vacated or set aside. There is a horrible case *K/S Norjarl A/S v/ Hyundai Heavy Industries Co. Ltd., Queen's Bench Division (Commercial Court), 1990, 1 Lloyd's Law Rep 260 (1991)* that describes the problem of arbitrators in ad hoc arbitration seeking commitment fees later in the arbitration that might have risen to misconduct in an arbitration unfriendly environment. In another case, it was only when the costs submissions came out that it was learned that counsel on one side had provided a commitment fee at the beginning to one of the arbitrators in a case where the rules provided that the compensation would be decided by the institution – no separate fee arrangements between the party and the co-arbitrator are permitted. The winning party saw its award vacated (or set aside) because of this arrangement and the winning party in turn sued the lawfirm that had followed a local rule for malpractice and was successful in getting the total amount of the arbitration award paid by their lawfirm.

The problem of multiparty arbitration (more than one party on each side) can make the constitution of the arbitral tribunal very complicated particularly in countries (such as France) where the courts have held that each party has the right to propose an arbitrator (*Siemens AG and BKMI Industrieanlagen GmbH v/ Dutco Construction Co. Ltd., Cour de cassation (Supreme Court of France) Civ. I, 7 January 1992, Bull Civ. I no 2r. 7 Mealey's International Arbitration Report B-3 (1992)*). The solution when an institution has been selected is for the arbitral institution to name all arbitrators.

Where arbitral institutions are given the power to evaluate challenges and do replacements of arbitrators, those arbitral institution decisions are most likely seen as administrative (as opposed to jurisdictional) but courts that review may want to make sure that there were reasons for the decision of the arbitral institution (*Equipco v. Clark, Supreme Court of Switzerland, (1987)*). Thus, again this is why it is important to have an experienced institution involved.

### **I. The Arbitral Procedure**

The arbitral procedure covers the process from the initiation of the arbitration through the award. The important concept is that all of the procedure rules that one becomes accustomed to in law school, state or federal courts, pleading rules that are specific to

certain courts or certain judges, and/or rules of evidence that one carefully learns are NOT likely to be applicable in arbitration.

**Initiation of the arbitration:** How does an international commercial arbitration start? The short answer is: it depends on what regime the arbitration is under. In ad hoc arbitration, a common form is for the Claimant/Plaintiff to send a notice of arbitration to the Respondent/Defendant. The content of such a notice may depend on the dispute but also on questions related to any local law that might apply at the place of arbitration. One solution to such a question that parties use is to specify a set of institutional rules. One of the benefits of such rules is to prescribe the type of submission and how one goes about making such a submission to initiate an arbitration. For example, the ICC Rules of Arbitration provides a list of information that a Request for Arbitration is to contain, describes where the Request for Arbitration is to be filed, set an advance on administrative expenses for the institution and describes how the Request for Arbitration will be sent to the Respondent/Defendant. Further, said Rules describe how much time a Respondent/Defendant has to respond to the Request for Arbitration, how to measure time-limits under the rules, what is required to seek an extension of time, what should be provided in an Answer and/or a Counterclaim, what types of Reply to the Counterclaim are permitted. Without these types of institutional rules, and as the FAA is completely silent on these types of matters, the parties have to look to what is acceptable local practice in the place of arbitration and/or industry. Thus, the institutional rules provide a backbone to help the arbitration get started.

When both (or all in a multiparty setting) parties are acting reasonably, the institutional rules should provide them the flexibility to fashion the arbitration in a manner that is appropriate for their disputes. But, when the parties are not acting reasonably, the institutional rules provide a structure for how the arbitration can proceed notwithstanding the recalcitrance of one party or another.

**Constitution of the Arbitral Tribunal:** Above we discussed the Arbitral Tribunal and some of the issues with its constitution. Institutional rules provide a process with fallback mechanisms to assure that an arbitral tribunal can be appointed to hear the case.

**Transmission of the File and Terms of Reference:** Once the arbitral tribunal is constituted, the file containing whatever notices or pleadings up to that point in the arbitral process is sent to the arbitral tribunal (by the parties or by the institution). At this early point and given the great flexibility in arbitration, it becomes a task of the arbitral tribunal to organize the proceedings. One manner of doing this is through the drafting of an arbitrators' Terms of Reference. Drafted by the arbitrators and the parties, this document helps with clarifying what are the claims that the parties wish addressed, what defenses are in place, and acknowledging any agreement on fundamental matters (what is the applicable law, what will be the procedure, what languages will be used) if that has been reached in

the arbitration clause or in the exchanges of the parties council. Another term for the Terms of Reference which is somewhat peculiar to the ICC Arbitration process is a note of the arbitrators that sets out the ground rules for the arbitration.

**Arbitral Procedure:** Each arbitration is different and so each arbitral procedure is different. If a party were to say that the “usual” rules apply, please note that **THERE ARE NO USUAL RULES**. Five typical questions are 1) do the arbitrators have jurisdiction, 2) what is the law to be applied, 3) what result on the merits for liability, 4) if liability, what result on the merits for quantum or remedies and 5) what determination on costs.

In general parties are free to agree on a procedure (party autonomy) and the arbitral tribunal has flexibility in designing the procedure (arbitral discretion) within the contours of any due process requirements of the place of arbitration or places of potential enforcement that might be applicable. Keep in mind though that even the words of due process are culturally loaded. In France, for example, the term “rights of the defense” might be used. In the United Kingdom, the term “principles of natural justice” might be used. The contours of what those terms mean may be similar to American due process but may not. Another complexity in the international commercial setting.

To get a sense of the wide range of questions that arbitrators may have to think about and address in organizing the procedure take a look at the UNCITRAL Notes on Organizing Arbitral Proceedings available at <https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

Questions that might be raised would be whether there will be further pleadings and what happens after any Answer? Will there be a rebuttal and/or surrebuttal? Who submits first on a particular issue? Will the tribunal appoint an expert? And on and on.

There are no usual rules for arbitration so it is important for parties and arbitrators to think carefully through the procedure that each desires to see to make sure the parties can present their respective cases. Thus, if a party wants to put on a witness who is a very strong one, they might insist on having direct examination before cross-examination rather than just a witness statement – or maybe they might prefer to do this the other way. There are no clear answers on what is the best procedure other than each side attempts to have procedural rules set that are sufficiently fair but also allow them to put their client’s best foot forward. The arbitral tribunal will work with the parties on designing the procedure, and, if the parties do not agree, step in with decisions on procedural matters. It has seemed sometimes in my experience that much of the arbitration was won or lost on the determination of the procedure that would be used to conduct the arbitration.

One source of procedural rules may be in the arbitration clause. Strict compliance with any such rules is important to avoid an attack on the arbitral award. Deviations must be

carefully agreed by both parties in clear language to avoid creating any fragility for the award.

Keep in mind that there is much flexibility in international commercial arbitration. But, at the place of arbitration or potential places of enforcement, there will be concern with whether due process has occurred. Around the world, the concept of due process might be expressed in different ways. For example, as noted above, in England the courts might think in terms of the “principles of natural justice” or in France the term would be phrased as the “rights of the defense.” Whatever the way it is phrased, the contours of the courts concerns with such procedure will be important to understand at the place of arbitration and any potential places of enforcement.

An example might be with regard to a site visit by an expert. Does the presence of the Chair of the arbitral tribunal turn such a site visit into a hearing at which both parties should be present? It might not be considered a hearing. Once such an expert of the arbitral tribunal rendered their expert report, giving each party time to comment on the report prior to any award might be essential in order to avoid weakening the enforceability of the arbitral award.

On a cultural level, some arbitrators come from cultures in which the goal of the arbitration is not so much to render an arbitral award but to get the parties to a settlement. This cultural approach should have been known in the selection of the arbitrator and also if that approach might be found in the arbitral institutional rules that were selected. It is important to realize what the objectives of the arbitrators for the arbitration are.

#### **J. Applicable law(s)**

The parties in their contract may specify an applicable law. That choice of applicable law to the contract may be fundamental in helping to understand/interpret each parties’ obligations. The choice of applicable law can also be specifically to the arbitration clause.

In the absence of such a choice in the contract by the parties, unless the parties agree in the course of the arbitration, it will be for the arbitrators to determine the applicable law. On that question the arbitrators might take several approaches (Which choice of Law Rules?): Those of 1) the place of arbitration (what the courts at the place of arbitration would use), 2) pick one national conflict of law rule, 3) take a Cumulative approach and look at all the potential laws (each party’s national choice of law rules) to see if they lead in the same direction ( and what if they do not?), 4) Direct approach of the arbitrator dispensing with a choice of law analysis and picking directly the law (and is that permitted by the local law and the arbitration institution rules), or 5) International Principles (trade usages) or *lex mercatoria*? How will the courts at the place of arbitration and the places of potential enforcement look at the approach taken by the arbitrators is a great concern for the parties and the arbitrators.

Even if the parties have chosen a law or one has been found by the arbitrator, there is the question of mandatory rules. For example, could there be competition/anti-trust law rules that would normally apply to each of the parties but the parties have put the arbitration in a place of arbitration that does not have those mandatory laws? Should the arbitrator be sensitive to the parties having attempted to extract their contract from otherwise applicable mandatory law and ensure those otherwise applicable mandatory laws are considered in the arbitration?

What is substantive law and procedural law? For example, in some countries' courts, statutes of limitations are considered substantive law while other countries' courts see them as procedural matters. If there is a party choice of substantive law and the place of arbitration is in a place where statutes of limitations are considered substantive then that may mean the party choice of substantive law would apply on the question of statutes of limitations applicable. But, what if the place of arbitration considers statutes of limitations as procedural and subject of the local procedural law? These kinds of differences might dramatically affect the arbitration process.

How does a party choice of law intersect with what the parties do in courts related to the arbitration? If a party seeks a permanent injunction in a court in a far country what are the implications of seeking such a permanent injunction for the arbitral tribunal sitting in another country? It could be that seeking such a permanent injunction would be considered a waiver of the arbitration clause while seeking some type of temporary restraining type order would not entail the court entering on the merits (and not be a waiver).

#### **K. The Arbitral Award**

The international norm on arbitral awards is embodied in the UNCITRAL Model Law and includes an expectation that the award of the arbitral tribunal will state reasons. Formal requirements for what an award must contain might even include a copy of the arbitration clause (Egypt) and the incorporation by reference of such a clause from another partial award would not be considered sufficient. Complying with national formal requirements might be the difference between an award being enforceable or not.

There may be requirements for deposit of the award by an arbitrator or the parties depending on how arbitration unfriendly the law is in a given country. So complying with those types of requirements as to steps to be taken are essential. The United States does not require awards state reasons, but what might pass muster if a place of arbitration was in the United States might face a hurdle in a foreign country (not saying it would not be enforced, but it would take some argumentation for enforcement).

#### **L. Enforcement of the Arbitral Award**

As noted above the period for confirmation is three years for a Convention award under FAA Chapter 2 as opposed to FAA Chapter 1.

Usually at the place of arbitration a party can seek to set aside an award (vacatur in the FAA Chapter 1 parlance but not used abroad in international arbitration). While the grounds in the UNCITRAL Model Law track with the New York Convention grounds, one must keep in mind three things. First, while the UNCITRAL Model Law is an international consensus, that does not mean that all countries have adopted its language. For example there is the English Arbitration Act or the French Arbitration Act which are very different from the UNCITRAL Model Law in many ways. Second, even if the UNCITRAL Model Law has been adopted, countries have modified it for local concerns that may mean that the substantive provisions deviate from the Model Law language. Third, the courts in each country will interpret the provisions consistent with their local legal regime and legal culture which can be a further source of divergence.

The level of deference of a court to the award of the arbitrator may relate to the type of award. For example, an arbitral award on jurisdiction might be given great deference in one country while in another the courts would essentially do a *de novo* review. On the other hand, on the merits of the claims courts that do *de novo* review on jurisdiction may be more deferential to the arbitrators. The United States courts tend to be very deferential to the arbitrators in international arbitration.

Alternatively to setting aside would be the process for recognition and enforcement of a foreign arbitral award. This procedure is the manner in which a foreign arbitral award is made part of the legal regime of another state by being recognized (the court is saying yes we see this as an arbitral award) and enforced (yes we will have this arbitration award have effect in our country).

Similar to setting aside, in the recognition and enforcement of foreign arbitral awards, the level of deference to the arbitrators may vary. In addition, the level of comity shown the actions of courts at the place of arbitration (did they set aside the award?) may also vary from country to country.

Even if a ground for set aside or a ground for non-recognition and enforcement is made out by the party opposing the arbitral award, the general rule is that the court retains discretion to go ahead and enforce the arbitral award. Of course, a more arbitration friendly court would tend to be more deferential than a less friendly one but there are limits. For example, with *Hall v/ Mattel*, the concept of the parties agreeing in the arbitration clause for courts to do heightened scrutiny to that foreseen in statute has been rejected. Trying to impose such heightened scrutiny on a court in France in an arbitration clause in France might lead to the entire arbitration clause being made void!

The narrowness of the US approach to the grounds in the New York Convention might best be shown by the case of *Parsons v. Whittemore Overseas Co., Inc. v/ Societe Generale de l'Industrie du Papier (Rakta)* 508 F. 2d. 969 (2d Cir. 1974). Another example is *National Oil Corporation v/ Libyan Sun Oil Co.*, 733 F. Supp. 800 (D. Del. 1990) when a state-owned company is involved and the award of a Libyan state-owned company was sought to be recognized and enforced in the United States.

An example when the actions of the arbitral institution become part of the review of the award is presented in *Compagnie des Bauxites de Guinee v/ Hammermills, Inc., United States District Court, District of Columbia* 1992 WL 122712.

#### L. Miscellaneous

As mentioned above, there are other levels of arbitration such as investor-state (sometimes called investment-treaty arbitration) in which a state agrees to foreign investors being able to arbitrate with that state disputes about the compliance of that state with their obligations under the relevant investment treaty. The Washington Convention is an example of that as is NAFTA (but not the US-Mexico-Canada Treaty overriding NAFTA has severely limited this kind of investor-state arbitration). Many of these cases get addressed to the International Center for the Settlement of Investment Disputes of the World Bank in Washington, D.C. in the various facilities open there. They may also be heard in ad hoc proceedings or under other arbitral institution rules.

Similarly, such as at the World Trade Organization, state to state public international law disputes may be resolved in a process of decision and enforcement that operates at a treaty level. Thus, a series of trade treaties on goods, services, intellectual property and other topics have been entered into by countries under which they undertake obligations with respect to how they are going to operate in the trade regime for the world (national treatment, most favored nation are two concepts). If a country (usually as the result of complaints of its local industry) is of the view some trade-distortion is occurring due to another country's actions, they may avail themselves of these procedures for resolving the disputes. At present, there is a problem in this WTO dispute resolution as since December 2019, there are insufficient appointments of persons to its Appellate Body. This problem may be resolved by the time of this conference, or it may not.

#### IV, Summary: the key to international arbitration

The key to dealing with an international arbitration is the ability to do legal and cultural gymnastics. The most important thing I can leave you with about international commercial arbitration is to encourage an even greater flexibility of spirit than in domestic arbitration due to the variety of approaches of parties, arbitrators, and courts around the world under the relevant diversity of national laws and treaties potentially applicable. It is that variety

**that makes that work tremendously important and fun as a way to solve disputes in a peaceful manner.**

# Pathological Clauses: Frédéric Eisemann's Still Vital Criteria

by BENJAMIN G. DAVIS<sup>1</sup>

WHEN preparing this article, my office was being renovated. In the course of the informal 'inspections' of the Works by other members of the Secretariat, one of the assistants who has been with the ICC for over 25 years advised me that I was working in the former office of Frederic Eisemann. Frederic Eisemann, who coined the phrase 'pathological clauses' or 'clauses pathologiques' had a long and distinguished career at the ICC as Secretary-General of the then Court of Arbitration (now, the 'International Court of Arbitration'). In his seminal 1974 article,<sup>2</sup> Eisemann presented and analyzed a series of arbitration clauses (he called them 'pearls'), tainted with various pathologies, that he had taken from his 'dark museum' of arbitration.

What with dark museums and pearls, I was stimulated to make a thorough search of the premises. Who could know what riches might be found? I did not find the dark museum, but I did find some pearls from international arbitration which have surfaced since Eisemann's time.

## I. EISEMANN'S CRITERIA

When the topic of pathological arbitration clauses is examined, it is useful at the beginning to set out Eisemann's criteria as to the essential functions of an arbitration clause. These are four, translated into English from the original French:<sup>3</sup>

<sup>1</sup> Counsel, International Chamber of Commerce Secretariat of the International Court of Arbitration. These comments were first presented at the International Bar Association's 23rd Biennial Conference, 19-23 September 1990, New York. The author wishes to express thanks for the helpful comments of the other counsel (Jean-Jacques Arnaldez, Christophe Imhoos, Eric Schaeffer and Herman Verbist) at the Secretariat as well as for the aid of his assistant Irène Ezratty, former secretary Cynthia Scharff, present secretary Michèle Clergeaud, and editor Dr. Christina Davis. All comments are the author's own opinions and in no manner engage the International Court of Arbitration.

<sup>2</sup> F. Eisemann, *La clause d'arbitrage pathologique*, Commercial Arbitration Essays in Memoriam Eugenio Minoli, U.T.E.T. 1974.

<sup>3</sup> (1) 'la première, commune à toutes les conventions est de produire des effets obligatoires pour les parties,  
(2) la seconde est d'écarter l'intervention des tribunaux étatiques dans le règlement d'un différend, tout au moins avant le prononcé d'une sentence,  
(3) la troisième est de donner pouvoir à des arbitres de régler les litiges susceptibles d'opposer les parties,  
(4) la quatrième est de permettre la mise en place d'une procédure conduisant dans les meilleures conditions d'efficacité au prononcé d'une sentence susceptible d'exécution forcée.', Eisemann, supra Note 2, p. 130.

- (1) The first, which is common to all agreements, is to produce mandatory consequences for the parties,
- (2) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award,
- (3) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties,
- (4) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement.

These four interconnected criteria, as discussed more fully below, are as valid today as they were when Eisemann crystallized thinking on the subject.<sup>4</sup> In many ways, these formulations are the crown jewels of Eisemann's article. They are a synthesis of the four points any drafter<sup>5</sup> of arbitration clauses, whether for *ad hoc* or institutional arbitration, should have in mind as he<sup>6</sup> decides on each word of the text.

In the following sections, I examine sixteen arbitration clauses recently seen containing myriad pathologies with regard to the essential functions. It is fortunate that many of these clauses will seem unusual to readers: a credit to the efforts of arbitration clause drafters, either due to reflection or bitter experience, to keep in mind Eisemann's criteria. My intention is to provide a basis for further reflection as to what should be avoided in all circumstances in drafting the arbitration clause.

The next two sections examine arbitration clauses seen in the last two years which, to a lesser or greater extent have presented certain types of pathologies. The methodology I have followed is first to present the arbitration clause. Then, to the extent possible, I present the result in the State Court or before the Arbitral Tribunal. Finally, I return to Eisemann's criteria and highlight where the essential functions of the arbitration clause have not been respected.

<sup>4</sup> See discussion in the 1980's and 1990 in L. Kopelmanas, *La Rédaction des clauses d'arbitrage et le choix des arbitres*, Hommage A Frederic Eisemann, Liber Amicorum, ICC; H. Scalbert and L. Marville, *Les Clauses Compromissaires Pathologiques*, Revue de l'Arbitrage 1988 No. 1; Craig, Park and Paulsson, Part II Chapter 9, *International Chamber of Commerce Arbitration* 2nd Ed.(1990); E. Gaillard, *Quelques Observations sur la Redaction des Clauses d'Arbitrage* CIRDI, Recueil Penant 1987.

<sup>5</sup> As this presentation is essentially about how *not* to draft arbitration clauses, drafters' attention is drawn to the several publications on the subject of drafting arbitration clauses. See S. Bond, *How to Draft an Arbitration Clause (Revisited)*, International Court of Arbitration Bulletin, Vol. I, No. 2 (December 1990), N. Ulmer, *Drafting the International Arbitration Clause*, The International Lawyer, Vol. 20, No. 4 (1986), Craig, Park and Paulsson, *supra* Note 4.

<sup>6</sup> The masculine pronoun 'he' used in this discussion stands for 'he' and 'she' in recognition of the growing number of women serving as ICC arbitrators, acting as counsel, and drafting arbitration clauses.

## II. LESSER PATHOLOGY

(a) *What a difference a 'may' makes*

A slight pathology is presented in the following clause:

Any dispute of whatever nature arising out of or in any way relating to the Agreement or to its construction or fulfillments may be referred to arbitration. Such arbitration shall take place in USA and shall proceed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

The above clause is, on the one hand, definitive with regard to the place of arbitration and the applicability of the ICC Rules ('shall') while, on the other hand, the actual reference to arbitration ('may be referred') is less certain. In the case of a recalcitrant party, such indefiniteness in the reference to arbitration raises two concerns.

First, faced with an objection to jurisdiction, the Arbitral Tribunal constituted in the matter might have to determine what the intention of the parties was in using the 'may'. The use of 'may' could suggest something other than mandatory arbitration. Thus, the essential function — to produce mandatory consequences for the parties — is missing on the face of the clause. One can imagine that numerous submissions on this point, and thus costs for the parties and the need for a partial, interim, or final award, would appear likely where there was a recalcitrant party.

Second, a party is encouraged by the indefiniteness to seek a decision of a local court to interpret the arbitration clause either with the intent to resist or compel arbitration. In such a case, depending on the attitude towards arbitration of the law as applied by the local court, a party could find itself with a preliminary injunction preventing it from proceeding with the arbitration sought. Recently, a US District Court<sup>7</sup> was faced with this language and determined that such a clause provides for permissive arbitration until one of the parties chooses to invoke the arbitration clause. When such an election is made by a party, in the US District Court's view, then the arbitration becomes mandatory for the parties. In the actual ICC arbitration, the party raising the jurisdictional objection withdrew it after this decision.

Would such a decision, which is in line with the strong US federal policy in favour of arbitration, be made by another local court in another country? Without going into a comparison of jurisprudence in other settings, it is still useful to raise that question for it brings into relief the fact that the use of 'may' weakens the arbitration clause's ability to function. Further, the fact that the clause stated is considered permissive, *until election* of arbitration, by a court in a country with a strong federal policy in favour of arbitration, raises

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<sup>7</sup> *Cravat Coal Export Company, Inc. v. Taiwan Power Company*, USDC Eastern District of Kentucky, Civil Action No. 90-11, (March 5, 1990).

the concern that part of the usually dissuasive characteristics of an arbitration clause on the comportment of the parties in their contractual relations in the period prior to institution of arbitral proceedings was dissipated in this drafting. An unnecessary element of uncertainty was introduced.

To return to Eisemann's four essential functions, the clause is particularly disfunctional with regard to the first and second of the essential functions as to producing mandatory consequences for the parties in the absence of state court intervention. The wording almost incites a recalcitrant party to seek state court intervention, thus not leading to the best conditions of efficiency and rapidity for the rendering of the award (Eisemann's fourth function).

(b) *Where is the ICC?*

The International Court of Arbitration is frequently seised with arbitration clauses that state 'International Chamber of Commerce' 'in Zurich', 'in London', 'in Geneva', 'in New York' as the case may be. These are cases of clauses with a minor pathology where it is usually clear that the parties have sought ICC arbitration but have not stated the exact location of the ICC. Occasionally, a party has argued in vain to the Arbitral Tribunal that the local arbitration institution in Zurich, for example, was intended.

There is only one ICC and it is located in Paris with National Committees spread around the world. In these cases, therefore, in order to have a consistent practice to assure that a significance is attributed to the place mentioned, the International Court of Arbitration, pursuant to Article 12 of the ICC Rules with regard to fixing of the place of arbitration (The place of arbitration shall be fixed by the International Court of Arbitration, unless agreed upon by the parties'), has a practice of interpreting a reference to a place other than the location of the ICC to mean that the parties have agreed for the place of arbitration to be in Zurich or London or Geneva or New York as the case may be. Similarly, a reference to Paris (i.e. the ICC, Paris') in the absence of other specifications as to the place of arbitration leads the Court to conclude that Paris is the chosen place of arbitration. (An exception has been made where France had no treaty of recognition or enforcement with one of the countries of a party.) These interpretations appear to be the only reasonable ones to be made in the presence of such an arbitration clause.<sup>8</sup> They have been accepted in the arbitral jurisprudence.<sup>9</sup>

It can only be regretted that contract drafters did not take additional time to verify the point before drafting to avoid providing an opening to a recalcitrant party to argue that ICC arbitration was not what was envisaged as the ICC is not located in the city mentioned. Again, such imprecision leads to an expenditure of time and money for the parties and the arbitrators prior to addressing the merits.

<sup>8</sup> See Bond, *supra*, Note 5.

<sup>9</sup> See Clunet 1978:981; 1981:939; 1984:947, 951; Scalbert and Marville, *supra*, Note 4.

Viewed against Eisemann's four essential functions, this imprecision causes a disfunction with regard to the fourth essential function, as the presence of such language does not lead in the best conditions of efficiency and rapidity to the rendering of an award. An opening is provided to a recalcitrant party to raise a preliminary point that could have been avoided by better drafting.

(c) *Common will of the parties and prima facie interpretation of the arbitration clause*

There are certain arbitration clauses in which, unlike those described above, there is a substantial imprecision in the designation of the *institution* by the parties. Below, one of these cases is discussed. The second case in this section, on the point of the number of arbitrators, focuses attention on a non-obvious imprecision.

The first case is one where the word 'official' replaces 'International':

Both parties, in recognition of good faith and mutual understanding in which this agreement has been executed, relinquish their right to have a dispute litigated in their respective jurisdiction.

In the event any disputes fail to be settled amicably, both parties agree to arbitrate their difference before the official Chamber of Commerce in Paris, France, and to apply Arkansas, USA law . . .

Faced with such a clause, a recalcitrant defendant could and would argue that the International Chamber of Commerce is not the competent institution. The claimant ran the risk that it could have found itself being advised under Article 7 of the ICC Rules that the arbitration sought under the ICC Rules could not proceed.<sup>10</sup> Further, whenever the claimant sought to bring arbitration at another institution in search of the 'official' Chamber of Commerce (such as the *Chambre Arbitrale de Paris* or the *Chambre Officielle Franco-Allemande*), the same argument might be run the other way to attempt to exclude the jurisdiction of the other arbitration centre. There is no 'official' Chamber of Commerce in Paris. This imprecision could have been disastrous.

The claimant, early on in the procedure, felt it had to have the point clarified by introducing, prior to submission of its Request for Arbitration, a procedure on urgent matters ('*Ordonnance de Référé*') before the *Tribunal de Grande Instance* of Paris.<sup>11</sup> The judge of the French court sitting on the urgent matter held that, in the above clause, the parties had designated the International Chamber of Commerce. The judge's reasoning (translated from the original French) is instructive:

Whereas the parties, by the clause in dispute, have unequivocally manifested their will to have recourse to arbitration to settle all the difficulties arising from the performance of their agreements.

That if there does not exist in Paris an 'Official Chamber of Commerce' the International Chamber of Commerce, a private organization, manifestly constitutes the arbitration centre

<sup>10</sup> Article 7 of the ICC Rules states: 'Where there is no *prima facie* agreement between the parties to arbitrate or where there is an agreement but it does not specify the International Chamber of Commerce, and if the Defendant does not file an Answer within the period of 30 days provided by paragraph 1 of Article 4 or refuses arbitration by the International Chamber of Commerce, the Claimant shall be informed that the arbitration cannot proceed.'

<sup>11</sup> *Société Asland c/Société European Energy Corporation*, TGI de Paris, reprinted in *Revue de l'Arbitrage*, 1990 No. 2.

recognized in Paris in the practice of international relations, in France and overseas, to organize the procedures for resolving disputes by arbitration, whatever may be the nature of the disputes, the nationality of the parties in dispute or the applicable law to the dispute.

Whereas in agreeing to submit their disputes to 'arbitration before the Official Chamber of Commerce in Paris', the parties have clearly in their common intention designated the International Chamber of Commerce of Paris as the centre to organize the arbitration procedure.<sup>12</sup>

The judge invited the claimant to continue the arbitration before the ICC.<sup>13</sup> Thus, the arbitration was able to proceed with this assistance from a national court. However, the question is open as to what would have been the consequences if another state's courts had been called on to decide the point. Again, imprecision in the arbitration clause should, in all circumstances, be avoided if the arbitration clause is to accomplish its essential functions.

In relation to Eisemann's essential functions, the above clause is dis-functional with regard to (i) the first function, as it does not clearly create mandatory consequences for the parties due to the lack of specificity as to the arbitral institution, (ii) the second essential function, as state court intervention prior to the award was needed to cause the matter to proceed, and (iii) the fourth function, because the best conditions of efficiency and rapidity for the rendering of the award were not put in place with such an imprecision.

A second type of clause contains a non-obvious substantial imprecision:

Any dispute arising out of the execution of this contract which the contracting parties fail to settle in an amicable way shall be settled by the arbitration court of the International Chamber of Commerce in Paris in accordance with the rules of the arbitration.

Decision of the arbitrator is final and binding for both parties.

Leaving aside the restriction of arbitration to problems of execution of the contract, a subject that could be of great concern if the dispute arose about validity of the contract,<sup>14</sup> the point at hand is the reference to 'arbitrator'. The defendant argued that 'arbitrator' could mean a three-member Arbitral Tribunal. The claimant in this case sought that the matter be heard by a sole arbitrator to be chosen by the parties pursuant to the clause. In accordance with this reading of the clause and Article 2.3 of the ICC Rules the parties have a 30 day opportunity to select the sole arbitrator. Article 2.3 states that:

<sup>12</sup> Original French states: 'Attendu que les parties, par la clause litigieuse, ont manifesté sans équivoque leur volonté de recourir à l'arbitrage pour régler toutes les difficultés nées de l'exécution de leurs conventions;

Que s'il n'existe à Paris, une 'Chambre de Commerce officielle', la Chambre de Commerce Internationale, organisme de droit privé, constitue manifestement le centre d'arbitrage reconnu à Paris par la pratique des relations internationales, tant en France qu'à l'étranger, pour organiser les procédures de règlements des différends par la voie arbitrale, quelles que soient la nature du litige, la nationalité des parties en cause ou la loi applicable au litige;

Attendu qu'en convenant de soumettre leur différend à l'arbitrage devant la Chambre de commerce officielle à Paris', les parties ont à l'évidence, dans leur commune volonté, désigné la Chambre de commerce internationale à Paris, comme centre organisateur de leur procédure d'arbitrage;' *Ibid.*

<sup>13</sup> For the mission of cooperation of the state judge discussing this and other cases, see also G. Pluyette, *Le point de vue du juge*, *Revue de l'Arbitrage*, 1990, No. 2.

<sup>14</sup> On scope of clauses, see Bond, *supra*, Note 5, and Craig, Park and Paulsson, *supra*, Note 4, at Part II Chapter 6.

Where the parties have agreed that the disputes shall be settled by a sole arbitrator, they may, by agreement, nominate him for confirmation by the Court. If the parties fail so to nominate a sole arbitrator within 30 days from the date when the Claimant's Request for Arbitration has been communicated to the other party, the sole arbitrator shall be appointed by the Court.'

In this case, the defendant rejected claimant's proposals to try to agree on the sole arbitrator and asserted that the word 'arbitrator' was used in the same manner as it is used in Article 2.2 of the ICC Rules. Article 2.2 states:

The dispute may be settled by a sole arbitrator or by three arbitrators. In the following Articles the word 'arbitrator' denotes a single arbitrator or three arbitrators as the case may be.

The International Court of Arbitration, faced with the dispute as to the number of arbitrators raised after the introduction of the Request for Arbitration, had to look first at Article 2.1 of the ICC Rules which states in relevant part:

The Court of Arbitration does not itself settle disputes. *Insofar as the parties shall not have provided otherwise*, it appoints, or confirms the appointments of, arbitrators in accordance with the provisions of this Article (Emphasis added).

Article 2.1 provides that the parties are free to determine the number and choice of arbitrators to hear the case. In the above clause, the use of 'arbitrator' would make it very difficult for the International Court of Arbitration to see its way to organizing an arbitration with a three-member Arbitral Tribunal. The common will of the parties as expressed in the arbitration clause appears to opt specifically for an arbitrator in the singular. The conflict between what the defendant may have intended by including such language in its arbitration clause and what a neutral institution could understand by its wording leads to a situation where the defendant's stated assumption about what the clause meant was not the interrelation placed on it by the institution. The International Court of Arbitration would be unlikely to graft on to the clause the interpretation sought by the defendant – an exercise in incorporation by reference which went against the apparent plain meaning of the clause, which prevails. If the claimant thought it had somehow slipped a point past the defendant at the time of the negotiation of the contract, one might wonder if a state court would or would not follow this view. If 'sole' or 'one' had been added, this apparent misunderstanding might have been avoided for the ICC in administering the arbitration or for the state court at the time of enforcement of the award. If 'one or more' had been added, the flexibility sought by the defendant would have been apparent on the face of the clause.

This clause is particularly dysfunctional as to the fourth Eisemann function, since it leaves room for a dispute as to the number of arbitrators and could lead to another interpretation by a state court at the time of enforcement of the award.<sup>15</sup>

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<sup>15</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, Article V(1)(d).

(d) *In what language(s) is(are) the contract and translation?*

It appears that, together with the number of drafts negotiated in the period up to the signing of the contract, the additional complication of the contract being drafted in two languages can create a geometrical increase in associated problems.

Thus, there are a group of clauses which state, taken from the original French 'place of arbitration will be *Barcelona* if (*Party A*) is the *Claimant* and *Paris* if (*Party B*) is the *Claimant* (Emphasis added).<sup>16</sup> This in itself does not cause specific problems in terms of the setting in motion of the procedure. Depending on who is the claimant, the International Court of Arbitration confirms the related place of arbitration under Article 12 of the ICC Rules.<sup>17</sup> However, where such a contract is also drafted in a second language and signed by the same parties on the same day in the second language, the Spanish version as retranslated into English, might say, 'place of arbitration will be *Barcelona* if (*Party A*) is the *Defendant* and *Paris* if (*Party B*) is the *Defendant* (Emphasis added).<sup>18</sup> The confusion arises from the mistranslation, in one direction or the other, of the French 'demanderesse' (Claimant) and the Spanish 'demandada' (Defendant). Each party, relying on its version, might not see the problem that day and assume the close resemblance or 'faux amis' of the words was correct. But it will come up in the event of arbitration proceedings.

This situation has been seen at the International Court of Arbitration with, of course, no express provision as to which of the two versions of the contract controls. In such a case, the International Court of Arbitration is likely to fix a neutral site, in the absence of any clear agreement on the place of arbitration. If the Arbitral Tribunal were to decide the question, the place of arbitration would be changed accordingly. Thus, while the parties have tried to discourage rapid recourse to arbitration by foreseeing the other's home country as place of arbitration they have instead totally vitiated their efforts through an unfortunate slip of the word processor.

This clause is particularly vulnerable on the first Eisemann function (mandatory consequences) as the place of arbitration is not set as sought by the parties. In the context of an *ad hoc* arbitration, one could wonder where such an arbitration would be fixed.<sup>19</sup> The clause is also vulnerable on the fourth function as to efficiency and rapidity leading to the rendering of an

<sup>16</sup> Original French: 'L'arbitrage se déroulera à Barcelona si la partie demanderesse est (Partie A) et à Paris si la partie demanderesse est (Partie B).'

<sup>17</sup> Article 12 states: 'The place of arbitration shall be fixed by the International Court of Arbitration, unless agreed upon by the parties.'

<sup>18</sup> Original Spanish: 'El arbitraje se desarrollara en Barcelona si la parte demandada es (Parte A) y en Paris si la parte demandada es (Parte B).'

<sup>19</sup> In an East-West setting (or European now), the mechanism in the European Convention on International Commercial Arbitration of 1961 at Article IV(3) might be used. See D. Hascher, *European Convention on International Commercial Arbitration of 1961, Commentary*, Yearbook Commercial Arbitration (1990), Vol. XV, pgs. 635-639. Otherwise, presumably the Arbitral Tribunal would determine the place of arbitration.

award, since the contradictory language makes any place of arbitration selected not in conformity with one or both arbitration clauses.<sup>20</sup>

(e) *Ad hoc and institutional arbitration in the same clause, or not?*

Another example of pathology is where the definition of the disputes to be referred to arbitration leads to alternative laws being applied and, even, different places of arbitration. Such a definition of the disputes may also lead to a question as to whether the arbitration should proceed under the auspices of an institution or through *ad hoc* arbitration.

For example, Sellers (A) and Buyer (B) entered a contract with the following arbitration clause:

All differences resulting from the present Contract for FOB-related disputes shall be settled according to the arbitration and legal provisions governing the seller's FOB contract from its supplier for the cargo(s) in question. CIF related disputes shall be settled in Japan according to Japanese law.<sup>1</sup>

The Sellers (A) and Supplier (C) had the following arbitration clause (translated into English):

All differences resulting from the present Contract shall be finally settled in Geneva according to the rules of conciliation and arbitration of the International Chamber of Commerce by three arbitrators in accordance with the said rules. The applicable law will be the law in force in Algeria.<sup>21</sup>

One can understand the good intentions of the drafters of the contract arbitration clause between the Sellers and the Buyer who were trying to tie the disputes, the applicable law, the place of arbitration, and the institution together in two related but discrete packages in the same clause. Yet, these good intentions do not lead to helpful results.

First of all, when a Request for Arbitration under the first clause is introduced at the ICC— the claimant asserting, of course, the disputes are FOB-related — the defendant has a number of choices: (i) it can contest that these are FOB-related disputes and thus plead that the ICC does not have jurisdiction, (ii) it can contest that these are FOB-related disputes but agree to the ICC having jurisdiction *provided* the place of arbitration is in Japan, (iii) if defendant is the Buyer, it can agree these are FOB-related disputes and that, as a consequence, the disputes should be settled between the Sellers and

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<sup>20</sup> Another point seen, which is a warning to the lawyer who comes into the dispute at the time of initiation of the arbitration proceedings, is the translation of the contract given by the client. It is useful to verify several times that the client has provided the right contract and the right translation. Translators sometimes forget little phrases such as 'in Zurich' which, in the context of the arbitration clause, can change the location of the arbitration and the local public policy under which the arbitration goes forward. If not caught prior to the final award, the whole procedure can be for nought as not having been conducted in conformity with the arbitration agreement. This is particularly of concern with a defaulting Defendant.

<sup>21</sup> Original French: 'Tous différends découlant du présent Contract (sic) seront tranchés définitivement à Genève suivant le règlement de conciliation et d'arbitrage de la Chambre de Commerce Internationale par trois arbitres conformément à ce règlement. Le droit applicable sera le droit en vigueur en Algérie.'

the Supplier, the Buyer being the wrong Defendant. No doubt additional positions that could be brought in defence can be imagined.

The International Court of Arbitration, whose function is to 'provide for the settlement by arbitration of business disputes of an international character in accordance with these Rules'<sup>22</sup> would set in motion an arbitration based on the above stated clause between the Sellers and Buyer due to the incorporation by reference of the clause in the Sellers and Supplier's contract specifying ICC arbitration. However, the International Court of Arbitration then would be faced with questions as to the number of arbitrators and the place of arbitration.

As to the number of arbitrators, as detailed at Article 2.5 of the ICC Rules<sup>23</sup>, it is only when there is no agreement of the parties as to the number of arbitrators (either in the arbitration clause or after submission of the request for arbitration), that the Court decides on the number of arbitrators. In the present case, there is 'clear' agreement to three arbitrators in the case of FOB-related disputes, but none, apparently for CIF-related disputes. We can imagine, under any of the hypothetical positions presented above, that the claimant requests three arbitrators and the defendant requests the matter be heard by a sole arbitrator. The International Court of Arbitration, in the face of the disagreement of the parties as to the nature of the disputes presented and differing positions as to the number of arbitrators, would probably conclude for three arbitrators. This would be done so as to prevent, irrespective of the decision of the arbitral tribunal once constituted, one party from attacking any award due to an irregularity in the constitution of the Arbitral Tribunal in the event the disputes are found to be FOB-related.

That being done, there is still the question of the place of arbitration. Under Article 12 of the ICC Rules, the place of arbitration shall be fixed by the Court, unless agreed upon by the parties. In the present circumstances, the choice, even administratively by the International Court of Arbitration, of one of the two places of arbitration would, implicitly, characterize the disputes as being FOB or CIF. In such a setting, the Court would typically fix a third, neutral setting provisionally. This would leave the question open, pending the arbitrators' decision characterizing the disputes. Such decision will surely be sought to be a preliminary point decided in the arbitration.

After the clause had limped through these above steps, the Arbitral Tribunal would then have to address the point as to the characterization of the disputes. Parties would possibly have a common interest in this point being addressed early in the procedure so that they can know whether the arbitrators have jurisdiction to proceed to the merits. In the case of the defendant accepting the jurisdiction of the Arbitral Tribunal constituted

<sup>22</sup> Article 1.1, ICC Rules of Arbitration (1988).

<sup>23</sup> Article 2.5 states: 'Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such a case the parties shall each have a period of 30 days within which to nominate an arbitrator.'

under the ICC Rules but still contesting the disputes as being FOB-related, both parties could also seek such a partial/interim award by the arbitral tribunal so that they could know in which law (Algerian or Japanese) to brief the merits as opposed to briefing in both laws.

While it may, finally, be in the common interest of the parties to have the question decided early, the Arbitral Tribunal may find this possibility very difficult. Based on the submissions of the parties, the Arbitral Tribunal may find that the characterization of the disputes is so intimately related to the review of the merits that it is nearly impossible to have the case proceed in such a bifurcated manner. Moreover, a recalcitrant party might shape its submissions to encourage this view by the arbitrators. Thus, the parties may find themselves proceeding through the entire procedure, presenting facts and law under the hypothesis that either of two laws will apply. The party with the least 'deep pockets' could find itself strained financially in this setting, leading to an earlier, but less than optimal, settlement. (One is tempted to try and imagine a dispute (i.e. 'force majeure') that is equally FOB- and CIF-related and guess what would be determined by the arbitrators in such a setting. This would be especially of interest if the two laws cited led to contradictory results.)

In this matter, the International Court of Arbitration set the arbitration in motion with three arbitrators and provisionally fixed Brussels as place of arbitration. The Arbitral Tribunal made an interim award characterizing the disputes as FOB-related (hence the place of arbitration was changed to Geneva and Algerian law applied to the merits) and the parties settled after the interim award.

The uncertainties presented in the above clause, and only partially enumerated here, undermine the essential functions 1, 3, and 4 described by Eisemann. The mandatory consequences are reduced, because of argument as to the characterization of the disputes. The powers of any arbitrators appointed are limited to only a portion of the disputes likely to arise between the parties.<sup>24</sup> These weaknesses do not make for the best conditions of efficiency and rapidity for the rendering of the award. One could also easily imagine one party in this setting applying to a local court for a preliminary injunction to stop the arbitration proceeding due to a clause so fraught with uncertainties. Again, whether this suit would be brought in Japan, Switzerland, or Paris (location of the ICC) would be an open question as would be the attitude of the local Court seised. If this had been an *ad hoc* arbitration clause, the difficulties would appear insurmountable.

(f) *Reference to both arbitral and local court jurisdiction. One way election provision.*

In the arbitration clauses, so far considered, we have seen cases where the nature of the dispute determined where the arbitration was to occur, what law was applicable, and the institution which could set in motion the arbitration.

<sup>24</sup> See on this point articles cited, *supra*, Note 14.

We also saw the consequences of an election provision as to place of arbitration in a situation of incompatible versions in two languages of the arbitration clause.

The next clause has a combination of these difficulties at the sole discretion of one party, 'the Company':

All claims, disputes and other matters in question between the Contractor and the Company arising out of, or relating to, the Contract documents or the breach thereof, shall at the sole discretion of the Company be decided either under applicable Saudi Arabia law and procedure or by arbitration in accordance with the Rules of Arbitration and Conciliation then obtaining of the International Chamber of Commerce. In the event the Company chooses arbitration, the arbitrator(s) shall apply the substantive laws of the Commonwealth of Virginia, USA, in interpretation of the Contract. The Contractor shall carry on the Works and maintain its progress during any arbitration proceedings, and the Company shall continue to make payments to the Contractor in accordance with the Contract.

Arbitration shall be held in Paris, France.

The language of the arbitration proceedings shall be English.'

I would only note that a US Court was seised with the above clause by the Contractor in a breach of contract action or alternatively an action to compel arbitration pursuant to the Federal Arbitration Act 9 USC 4.<sup>25</sup> Interestingly, the US Court concluded that the parties agreed to resolve all substantive disputes, other than those involving local matters to be governed by Saudi law, by arbitration under the rules of the International Chamber of Commerce. To reach such a decision, the US Court had to hear parole evidence on the clause, not a procedure generally adopted for an arbitration clause. Whether a state court with a less strong federal policy in favour of arbitration would decide the same way or go only so far is a question that should concern all drafters envisaging such language.

To return to Eisemann's essential functions, the clause is dis-functional on three counts as mandatory consequences are not clear, state court intervention prior to the award was likely and necessary, and efficiency and rapidity are undermined.

(g) *Reference to arbitration?*

The next clause presents a further difficulty of imprecision. Translated into English from the original German it states:

The present contract is governed by the laws of Luxembourg. Possible disputes will in all cases be submitted to the Committee for Conciliation of the International Chamber of Commerce in Paris (France).<sup>26</sup>

I can only note that a Luxembourg Court, originally seised with a claim for damages, was presented with the defence of lack of jurisdiction based on the

<sup>25</sup> *Ballast Nedam Group, N.V. v. Computer Sciences Corporation*, USDC Eastern District of Virginia, Civil Action No. 86.0880-A (December 23, 1988) (unpublished).

<sup>26</sup> In the original German: 'Dieser Vertrag unterliegt dem Luxemburger Gesetz. Eventuelle Unstimmigkeiten werden in jedem Falle dem Schlichtungsausschuss der Internationalen Handelskammer in Paris (Frankreich) unterbreitet.'

allegation that the clause was an arbitration clause. The Luxembourg Court held that the clause was an arbitration clause, stating:

Such a clause constitutes an arbitration clause defined as an agreement by which the parties to a contract undertake, prior to disputes arising, to submit to arbitration the differences which arise between them under the contract.<sup>27</sup>

Turning to Eisemann's four essential functions, the clause is dis-functional on the first as to having mandatory consequences with regard to arbitration and second requiring the intervention of the state court prior to the issuance of the award.

(h) *Reference to two arbitral institutions in the same clause, or not?*

The next clause illustrates the risks of combining provisions referring to two arbitral institutions in the same clause:

'Any controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in Seoul, Republic of Korea before the Korean Commercial Arbitration Tribunal by a single arbitrator in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Judgment shall be final and binding on the parties.'

There are at least three views of the above clause and it is certain the parties would present at least these:

First, the reference to 'the Korean Commercial Arbitration Tribunal by a single arbitrator' could be viewed as the selection of an appointing authority for the nomination of the Sole Arbitrator for an arbitration under the auspices of the International Court of Arbitration of the ICC.

A second approach in argument, placing reliance on the use of 'before' in the clause, could be that the above arbitration clause is not limited to having a Korean Commercial Arbitration Tribunal as an appointing authority but rather that the parties intended to have a commercial arbitration under the auspices of the Korean Commercial Arbitration Tribunal with the ICC Rules somehow being used as a suppletive choice of procedural Rules. The reference to the ICC Rules would not, in this theory, be a reference to ICC arbitration.

A third approach could be that the ICC Rules, pursuant to Article 8.1 of the ICC Rules, state that 'Where the parties have agreed to submit to arbitration by the International Chamber of Commerce, they shall be deemed thereby to have submitted *ipso facto* to the present Rules.' Further to this argument, the roles of the International Court of Arbitration and the Secretariat defined in the ICC Rules as well as special features such as the Terms of Reference under Article 13 are incorporated by reference in the above clause. The arbitration would thus be in all respects an ICC arbitration subject to said Rules and the references to Korean Commercial Arbitration

<sup>27</sup> *Meissner c/ I. Planet S.A. 2. Para Press S.A.*, Tribunal d'Arrondissement de Luxembourg, Jugt. Comm. No. 186/88 (April 29, 1988). Original French: 'Pareille clause constitue une clause compromissoire définie comme étant une convention par laquelle les parties au contrat s'engagent, avant toute contestation, à soumettre à l'arbitrage les différends qui viendraient à s'élever entre elles à l'occasion de ce contrat.'

Tribunal are merely localizing within Seoul the place where the arbitration should occur. Under this argument 'Korean Commercial Arbitration Tribunal' in no manner refers to an appointing authority.

Whatever the arguments presented, the sole arbitrator faced with such a clause, however appointed, has a difficult task for a partial/interim/or final award to determine his jurisdiction. In this matter, the sole arbitrator appointed under the ICC Rules held in an interim award that he had jurisdiction.

Probably all four of the essential functions of the arbitration clause are placed in jeopardy by such a hybrid clause. The mandatory consequences for the parties are unclear as to where they are mandatory. A state court's intervention with regard to the interpretation of the clause on appointment of the appropriate sole arbitrator appears likely.<sup>28</sup> The powers of any sole arbitrator appointed by whatever appointing authority could be significantly contested. Finally, the conditions for efficient and rapid rendering of the award are not the best and the enforcement of any award could be attacked on at least one of these grounds.

A last general point in the discussion of this clause is the use by parties of an appointing authority whether for institutional or *ad hoc* arbitration. When parties choose such an appointing authority, they must make sure that the appointing authority has the capability to make the appointment sought *and* the willingness to make such an appointment. If either of these characteristics is absent, the parties may find themselves either with an inappropriate appointment or no appointment at all. A party may have to seise a state court, possibly at the place of arbitration if also defined in the agreement, in order to get an appropriate appointment made. A difficulty that could have been avoided might create problems due to the lack of sufficient attention to this point in making the selection of the appointing authority.<sup>29</sup>

The above stated clause is particularly dis-functional on the third essential function, as whatever arbitrator named by whomever is faced with an extremely difficult preliminary point as to his powers.

(i) *The nonexistent institution*

A further clause presents the difficulty of a lack of research as to the institutions referred to. The clause, as translated from the original German, states:

For the settlement of all disputes resulting from the performance of this contract, the parties to this contract establish the following agreement:

- (a) If the Seller should bring an action against the Buyer, the parties will refer to the jurisdiction of the tribunal at the Chamber of Commerce in the city of the Buyer. If it

<sup>28</sup> See Bond, *supra*, Note 5, at p. 15, discussing the point that this clause also led to several Korean Court actions as well as the partial award.

<sup>29</sup> For parties who seek to name specific arbitrators in the contract arbitration clause, attention is drawn to a case where, at the time of the institution of the arbitration, one of the arbitrators so-named was dead and the other was actually being sued as a defendant.

does not exist, or if there exist several, the parties will refer to the jurisdiction of the Court of Arbitration of the ICC in Paris and take for the decision on the disputes the Rules of this Chamber of Commerce (38, Cours Albert 1er, Paris 8ème).

- (b) In the event that the Buyer should bring an action against the Seller, the parties will refer to the jurisdiction of a court of arbitration at the (country) Chamber of Commerce

...

With such a clause, there can be long debate as to whether there is a Chamber of Commerce in the city of the Buyer. If there is such a Chamber of Commerce, the question could arise as to whether such Chamber of Commerce has a tribunal which undertakes arbitration. In addition, in the event of several Chambers of Commerce in the city (presumably the city-limits) where only one has a tribunal, the question arises whether even that one Chamber of Commerce could have jurisdiction over the case in light of the language of the clause creating a default option where there is more than one Chamber of Commerce. One can imagine the above arguments being presented to any Chamber of Commerce in the city seised with the case, as well as to the International Court of Arbitration of the ICC. In any case, the arbitral tribunal seised with the case and the parties would probably expend substantial time on this preliminary point of jurisdiction flowing from the wording of the clause before having the opportunity to address the merits of the dispute.

In the present case, the International Court of Arbitration allowed the matter to proceed to the Arbitral Tribunal to determine its own jurisdiction.

The above stated clause is particularly dis-functional as regards the absence of mandatory consequences for the parties (the first essential function) and not providing the best conditions for an efficient and rapid rendering of the award (the fourth essential function).

(j) *Summary for the section*

Certain pathologies that have touched on some or all of the essential functions of the arbitration clause have been examined. Notwithstanding the severe defects of many of the clauses, the fortuitous – but unpredictable – assistance of state courts, able institutions, and imaginative arbitrators, could still make them work. My intention has been to show what pitfalls should be avoided, while yet noting that arbitration under these clauses could still proceed to a final award susceptible of enforcement. In the next section, the generally optimistic nature of the author was so severely tried as regretfully to conclude

<sup>30</sup> The original German reads: 'Zur regelung aller Rechtsstreitfragen die sich aus diesem kontrakt ergeben, treffen Vertragspartner folgende Vereinbarung:

(a) Falls Verkäufer den Käufer anklagt, unterwerfen sich beide Partner des ausschliesslichen Kompetenz des in der Hauptstadt des Käufers neben der Handelskammer tätigen Schiedsgerichtes.

Sollte es so eine nicht geben, oder sollten mehrere Schiedsgerichte zuständig sein, so unterwerfen sich die partner der Kompetenz des neben der Internationalen Handelskammer in Paris tätigen Schiedsgerichtes und nehmen zur Beurteilung des Rechtsstreites das Reglement dieser Handelskammer an. (38 Cours Albert 1er, Paris, 8ème.)

(b) Im Falle eines vom Käufer gegen Verkäufer eingeleiteten Verfahrens, unterwerfen sich beide parteien des Zuständigkeit des neben der (Country) Handelskammer tätigen Schiedsgerichtes . . .'

that certain clauses could not work. Any surgery by a state court appeared also to be terminal for the arbitration clause patient.

### III. GREATER PATHOLOGY

In this section, arbitration clauses that appear to have great difficulties – perhaps to the point of being insurmountable in their application – are presented.

#### (a) *Who names the arbitrators?*

In the following clause, two appointing authorities are referred to. Translated from the French the clause states:

In the event that a dispute is submitted to arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, the arbitration will be submitted to three arbitrators appointed in accordance with the said Rules and will take place in Swiss Romande: the arbitrators will be nominated by the Swiss Court of Geneva and Lausanne.<sup>31</sup>

One initial question is who contacts the Swiss Courts cited? Is it the Secretariat of the International Court of Arbitration or the parties? One can imagine a party arguing that any contact by the Secretariat is not foreseen in the arbitration clause and is therefore strictly limited. On the other hand, if a party contacts the Swiss Courts as the most diligent party, one can imagine that the other recalcitrant party would contest such procedure as not being in accordance with the arbitration clause. To remedy this difficulty, one could imagine the Secretariat advising the parties of its intention to contact the Swiss courts cited after the expiry of a deadline, and failing an objection within a period of time, proceeding. Alternatively, one can imagine the International Court of Arbitration, in the presence of no proposal of either party or one party, granting a period of time to each party to propose an arbitrator in accordance with the arbitration clause. An additional risk could be that, if a party proposed a co-arbitrator, the recalcitrant party who did not propose might resist the confirmation by the International Court of Arbitration of the arbitrator proposed by the 'diligent' party on the basis that such proposal was not made in accordance with the clause.

Another point to be noted is Article 2.4 of the ICC Rules read in conjunction with the above hypothetical arguments. Article 2.4 states:

Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request for Arbitration and the Answer thereto respectively one arbitrator for confirmation by the Court.'

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<sup>31</sup> The original French states: 'Dans le cas où un litige est soumis à l'arbitrage selon le Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, cet arbitrage sera soumis à trois arbitres nommés selon ledit Règlement et aura lieu en Suisse Romande; les arbitres seront nommés par les tribunaux suisses de GENEVE et LAUSANNE.'

The claimant, interpreting the clause to mean that the Secretariat is to contact the Swiss Courts, might not make a proposal with its Request for Arbitration and face a plea by the defendant as to the Request for Arbitration not being validly submitted. In this regard, the defendant would be relying on Article 3.2(d) which states that 'The Request for Arbitration shall *inter alia* contain the following information: . . . d) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Article 2 above.' Read with Article 2.1 of the ICC Rules ('*Insofar as the parties shall not have provided otherwise . . .* (emphasis added)), the recalcitrant defendant could construct a basis to attack any subsequent award.

The second major difficulty, assuming someone is in a position duly to contact the Swiss Courts in Geneva and Lausanne in accordance with the arbitration clause, is the question of which of the courts in Geneva and Lausanne are to be contacted.<sup>32</sup> Presumably, the Tribunal de Première Instance, pursuant to the provisions of the local procedural law in both places, would be contacted, but, again, a recalcitrant party might argue that the intention of the parties was for another court in Geneva and/or Lausanne (the Appeals Court?) to be contacted.

The third major difficulty, assuming the someone is now contacting the right Swiss Courts in Geneva and Lausanne, is how the Swiss Courts make the nomination, assuming the Courts would be willing to make such a nomination. If they can agree, are such courts free to choose any person that they want? Should the Courts take cognizance of the conditions imposed upon the International Court of Arbitration as to nationality prescribed in Article 2.6 of the ICC Rules in seeking to find its own nominees?<sup>33</sup> If the courts do take cognizance, are they capable of making an appropriate appointment? One can imagine a recalcitrant party finding several bases on which to attack any proposal that is made.

One could suppose that the International Court of Arbitration would contact the Swiss Courts and the Swiss Courts would determine the appropriate courts in Geneva and Lausanne to propose arbitrators or a group of

<sup>32</sup> An interesting relationship between Article 2.1 of the ICC Rules and Article 179 of the LDIP presents itself. Under the LDIP, in the absence of a clause or in the absence of an agreement of the parties on the name of arbitrators – or of coarbitrators for the choice of the president – each party can seize the judge of the place of arbitration who will designate the missing arbitrator or arbitrators. In the above clause, in an arbitration under the ICC Rules, pursuant to Article 2.1 of the ICC Rules ('*Insofar as the parties shall not have provided otherwise . . .*') the parties have agreed on a procedure for nomination by the Swiss courts of GENEVA and LAUSANNE. Thus, the judge at the place of arbitration would only intervene if the GENEVA and LAUSANNE judges refused to appoint arbitrators. The GENEVA and LAUSANNE judges might refuse to appoint due to the fact that there is another competent appointing authority (the other judge) present in the clause. In such case, however, the place of arbitration being SWISS ROMANDE, including several cantons, the question is presented as to which judge or judges a party should seize as the judge at the place of arbitration. See Lalive, Poudret et Reymond, *Le Droit de l'Arbitrage*, Editions Payot (1989) p. 328–330 on Article 179 of the LDIP and Bucher, *Le Nouvel Arbitrage International en Suisse*, Editions Helbing et Lichtenhahn (1988), pgs. 58–59.

<sup>33</sup> Accord, see Lalive, Poudret, Reymond, *supra*, Note 32, p. 330. See a pragmatic approach by analogy of Eisemann, *supra*, Note 2, pp. 134–135.

arbitrators of which three could be selected by the International Court of Arbitration. The choice by the Swiss Courts of the appropriate courts in each canton to make a proposal might weaken any attack of the regularity of constitution in such a setting.

Fortunately, this discussion is theoretical because, in the case, the parties discarded the language of the clause by each proposing a co-arbitrator and agreeing that the co-arbitrators would choose the Chairman of the Arbitral Tribunal. However, the clause presents unnecessary risks and its weakness with regard to the fourth essential function as to not having the best conditions of efficiency and rapidity for the putting in place of the procedure severely attenuates the effectiveness of the clause.

(b) *Court proceedings before arbitration*

The following clause contains a condition precedent that could be fatal to arbitration. The clause, translated from the German states:

This contract shall be governed by German law. place of performance is Berlin (West). Jurisdiction shall be one of Berlin (West). Subsidiarily, the parties agree that disputes arising in relation to this contract shall be settled by the Arbitral Tribunal of the International Chamber of Commerce. The arbitral proceedings shall take place in Bern/Switzerland. In the arbitral proceedings, German substantive and formal (*sic*) law shall be applied. The award of the Arbitral Tribunal is binding and final.<sup>34</sup>

The point for discussion is the choice of a state court forum and then, subsidiarily, arbitration.

One can envisage a recalcitrant defendant, being faced with a Request for Arbitration, contesting ICC jurisdiction *and* also instituting proceedings in the West Berlin Courts. If the arbitration was set in motion by the ICC, the question before the arbitrators would be as to whether they could assume jurisdiction. One can further envisage the defendant who institutes the West Berlin Court proceedings also delaying those proceedings as long as possible, thus wearing down the claimant in the two fora.

Another concern is what does 'subsidiarily' mean? Suppose that an Arbitral Tribunal is faced with determining that question. 'Subsidiarily' could mean that an attempt to institute proceedings in West Berlin Courts is a condition precedent to institution of arbitration. The Arbitral Tribunal might alternatively consider that it would have to wait until a German Court decision was rendered prior to deciding the merits of the case of which it was seised. If this were so, would it mean waiting until all appeals were exhausted, thus possibly further delaying a decision of the Arbitral Tribunal? Assuming the Arbitral Tribunal were able finally to enter on the merits after a German Court decision,

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<sup>34</sup> Original German reads: 'Auf diesen Vertrag findet deutsches Recht Anwendung. Erfüllungsort ist Berlin (West). Gerichtsstand soll Berlin (West) sein. Hilfsweise vereinbaren die Parteien, dass Streitigkeiten im Zusammenhang mit diesem Vertrag vom schiedsgericht der Internationalen Handelskammer Paris/Frankreich beigelegt werden sollen. Das Schiedsgerichtsverfahren soll stattfinden in Bern/Schweiz. Für das Schiedsgerichtsverfahren ist deutsches materielles und formelles Recht anzuwenden. Der Spruch des Schiedsgerichtes ist bindend und endgültig.'

the question would then arise as to what would be the effect of any decision of the Arbitral Tribunal, particularly if it came to a different conclusion from the German Courts, given that one of the parties was German.

An Oregon Court was confronted with the above-stated clause in a breach of contract, fraud and declaratory judgment action and, pursuant to a motion to dismiss based on the clause, held that the agreement provided *both* for arbitration *and* for choice of forum. The court held the arbitration clause to be enforceable, not finding evidence that the Agreement should be revoked. The Oregon judge also held the choice of forum provision to be enforceable, finding the law did not support the plaintiffs' contention that its enforcement would be unreasonable and unjust. The Court held that the plaintiffs had produced no evidence to support a claim that litigation in Europe would be so gravely difficult and inconvenient that the plaintiffs would for all practical purposes be deprived of their day in court.<sup>35</sup> This ruling somewhat highlights the risk that recourse to a State Court to construe an arbitration clause may not lead to a clarification of the arbitration clause. The plaintiffs thus found themselves in Europe either in the Berlin Court or in arbitration. These matters were withdrawn from the International Court of Arbitration by the parties prior to constitution of the Arbitral Tribunal – apparently to proceed before the West Berlin Courts.

The first of Eisemann's essential functions is weakened as there appear to be few mandatory consequences for the parties with regard to subsidiary arbitration. The second essential function is potentially waived as the clause might require a preceding state-court intervention. The third essential function is made aleatory as the arbitrator's powers can be argued to be potentially eliminated at any time, rendering inoperative any hope of fulfilling the fourth essential function of efficiency and rapidity in rendering an enforceable award.

*(c) Conciliation and arbitration for different disputes pursuant to the same clause.*

Under clauses previously discussed in Section II the separate questions of the separation out of disputes and reference to conciliation were discussed. When these are combined in one clause, insurmountable problems are encountered. The following arbitration clause, translated from the French, states:

'In case of any dispute concerning the merchandise, the parties agree to have recourse to the procedure of conciliation foreseen in the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

<sup>35</sup> *Guenter Pauly and Jose Pena v Biotronik, GmbH, a German Corporation; Micro Systems Engineering, Inc., an Oregon Corporation; and Dr. Max Shaldach*, USDC Oregon, Civil No. 90-100-RE (May 24, 1990) (reprinted in the International Arbitration Report, Vol. 5, Issue 8, (August 1990)). As translated in the Oregon Court the clause reads:

'German law is to be applied to this contract. Place of performance is Berlin (West). Jurisdiction shall be Berlin (West). The parties agree that controversies in connection with this contract shall be settled by a court of arbitration of the International Chamber of Commerce Paris/France. The proceedings of the court of arbitration shall take place in Bern/Switzerland. German substantive and procedural law is to be applied for the proceedings of the court of arbitration. The decree of the court of arbitration is binding and final.'

Disputes other than those cited above will be finally settled according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with these Rules.<sup>36</sup>

In the above clause, the previous comments with regard to the possible consequences of separating out disputes into two distinct procedures remain generally applicable. A recalcitrant defendant could argue persuasively that the words 'disputes concerning the merchandise' refer to its delivery, packaging, price, quality, and conformity with specifications, if not more. It could go on to argue that any dispute presented by claimant pursuant to the second paragraph is in fact a first paragraph dispute. Moreover, suppose that a state court judge is seised with a request to interpret the clause. With the added twist of the distinction between the disputes, one could find it hard to conceive that the state court judge would simply ignore the distinction made by the parties. If a judge took a decision interpreting what falls under what part of the arbitration clause, one could immediately see the defendant arguing that the disputes actually referred to arbitration fall under the interpretation as to what was included in the first paragraph.

Suppose, further, that an arbitrator (either with or without the assistance of an interpretation of a state court) is faced with submissions as to his jurisdiction. The issues presented being so fine, the case would likely have to be argued all the way through the merits for the arbitrator to be able to decide whether he has jurisdiction.

Turning to Eisemann's essential functions, the first essential function is destroyed in relation to the first paragraph of the clause, since these disputes do not lead to mandatory consequences. The third essential function is weakened as the arbitrators' powers are so circumscribed. Finally, the conditions are far from optimal for the rendering of an enforceable award, touching on the heart of the fourth essential function.

(d) *Dual attribution of jurisdiction or not?*

The following *ad hoc* arbitration clause is translated from the original French:

Attribution of jurisdiction: in case of contestation, the parties agree to seek recourse to the arbitration of the French Advertising Federation. In case of disputes, only the Seine Court will have jurisdiction.<sup>37</sup>

<sup>36</sup> Original French reads: 'En cas de différend quelconque concernant la marchandise, les parties décident de recourir à la procédure de conciliation prévue au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale.

Les litiges autres que ceux énoncés précédemment seront tranchés définitivement suivant le Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale par un ou plusieurs arbitres nommés conformément à ce Règlement.'

<sup>37</sup> The original French text reads: 'Attributions de juridiction: en cas de contestation, les parties s'engagent à faire appel à l'arbitrage de la Fédération Française de la Publicité. En cas de litige, le Tribunal de la Seine serait seul compétent.' This clause is also discussed at Craig, Park, and Paulsson, *supra*, Note 4, Part II, Chapter 9, p. 159 with 'contestation' translated as 'dispute' and 'litige' as 'litigation'. The different translations highlight the further ambiguity of the clause.

The difficulty as to what is a 'contestation' as opposed to a 'dispute' is dramatic in this clause. One could see a contestation as being an element of a dispute. Such a view, however, would destroy the meaning of the first part of the clause. Alternatively, the arbitrator or the state court judge (as the case may be) risks having to make a detailed investigation of just what the common intention of the parties was in making such a fine distinction, or a distinction without meaning, before reaching the merits. Moreover, if there is not a full-fledged dispute, but a contestation or protest only, there may be a risk as to whether arbitration leading to an award can occur in any event.

Here, the first essential function of mandatory consequences is so severely unfulfilled as to frustrate the hope for any arbitration in the absence of a reasonable solution by the parties.

(e) *The floating arbitration*

A further *ad hoc* arbitration clause that has been noted states, as translated from the French:

Any disputes arising from the interpretation of the present contract will be settled by an arbitral tribunal sitting in a country other than that of each of the parties.<sup>38</sup>

This clause, though short, presents two major defects. First, there is the question of the Arbitral Tribunal. The clause provides for no mechanism to determine whether 'Arbitral Tribunal' means one or more than one arbitrator. If, for purposes of argument, it means three arbitrators, in the event a recalcitrant defendant did not propose a co-arbitrator, the Claimant would presumably have to seek the appointment of a co-arbitrator on behalf of the defendant by the state court of the country of the defendant. One would hope that the state court (but *which* state court?) would be amenable to making such an appointment promptly. Further, as there is no place of arbitration, permitting a reference to the state court at the place of arbitration, a mechanism would have to be developed to determine how the Chairman of the Arbitral Tribunal would be appointed. This could be by the parties, but there is no time-limit for such decision. If appointed by the co-arbitrators, the same problem of time limits would be present. Possibly, a competent state court (the same one as above in the defendant's country) could set such time limits. This same state court could also appoint the Chairman of the Arbitral Tribunal in the event of non-agreement of the parties or the co-arbitrators. The problem of having so much of the mechanism for putting in place of the arbitration dependent on the state courts is a glaring weakness.

Assuming the Arbitral Tribunal has been put in place, once it started to examine the matter, and presumably determined the place of arbitration, it would find that the parties have restricted its powers to 'interpretation' of the contract. It might be argued that the words of limitation in the clause prevent the arbitrators from making an award on damages. Presumably, asserting the

<sup>38</sup> The original French reads 'Tout litige découlant de l'interprétation du présent contrat sera tranché par un Tribunal arbitral siégeant dans un pays autre que celui dont ressort chacune des parties.'

Arbitral Tribunal's interpretation, the winning party might have to go to a state court to seek an award of damages. Again, the state court intervention is substantial and due to the drafting of the arbitration clause. (If there had been a reference to ICC arbitration in the clause, the difficulties as to the number of arbitrators and place of arbitration could be resolved through the default mechanisms of Article 2 and Article 12 of the ICC Rules.)

Turning to Eisemann's essential functions, this clause is so fraught with risks of delay for the first essential function that it does not provide mandatory consequences for the parties. The second essential function is defeated due to the need for so much 'technical assistance' from the state courts before and after the issuance of the award. These problems leave the other two functions (arbitrator's powers and efficiency and rapidity) floating.

(f) *Summary for the section*

As distinguished from the clauses presented in section II, the clauses cited above have included pathologies that appear, perhaps, incurable. These clauses are all relatively recent and show that pathology still is found, notwithstanding Eisemann's laudable efforts. One could hope, with great faith, that the parties to the contracts in question would perform their obligations to the satisfaction of all parties. It may be that knowledge of the pathology of their arbitration clauses would encourage this. In the event of arbitration, one would hope the parties could make a subsequent agreement to allow the arbitration to proceed or have very able arbitrators, eliminating the pathologies. These are, unfortunately, slim foundations for dispute resolution in the international context.

#### IV. SUMMARY

In the above sections II and III, there have been presented a series of more or less dramatic pathologies that have been seen in both *ad hoc* and institutional international arbitration clauses. We should learn from these examples that clauses should be avoided which require fortuitous state court intervention in interpretation, or which restrict the powers of arbitrators to some rather than all the parties' disputes, or which leave any ambiguity. To summarize, a few comments follow:

First, those who draft arbitration clauses should always keep in mind the four criteria of Eisemann. If any of the functions referred to by him is weakened in its fulfilment, the draft should be revised.

Second, any ambiguity or imprecision should be avoided. Neither too many nor too few words should be used.

Third, in any event, the arbitration clause, as Eisemann said, must be kept simple without being simplistic.<sup>39</sup>

Fourth, the choice of the place of arbitration can be crucial. On this point, there are several cases mentioned above where the local state court seised with a pathological clause has made it work somewhat haltingly. However, parties should not depend on the state court providing fortuitous surgery.<sup>40</sup>

Fifth, it is useful to be aware of the attitudes of all the contracting parties' state courts to which recourse might be made for necessary, but not sufficient, guidance. This may be particularly useful where there is uneven leverage between the parties in the negotiations to see if any correction can be achieved through fortuitous interpretation. Accepting an arbitration clause, in reliance on a hoped-for fortuitous intervention of such state court, however, is dangerous.

Sixth, the language of the clause should be tested against the worst case scenario a party can invent to see if the arbitration clause can operate even in such a hostile environment.<sup>41</sup>

Seventh, in *ad hoc* international arbitration clauses, examination of what is included in the model clauses of institutions and the rules of these institutions to see if the draft clause under discussion is complete (place of arbitration, provisions in case of failure to propose a coarbitrator, avoidance of time-limits for the arbitration award to be rendered, etc) should be made. In my personal view, in the international setting, institutional arbitration by an organization with proven experience in the domain provides more security to the parties in the case of an unforeseen event. While an event may be unforeseen by the parties, the institution may have faced similar questions on other occasions.<sup>42</sup>

Eighth, combining two or more types of arbitral procedures in the same clause should be avoided.

In order to allow the arbitrators to get to the merits rapidly, parties have a duty to create a clause that permits this result. Analogizing from the hortatory language heard in first-year Law School classes about a counsel being both a representative of the interests of his client and an officer of the Court, counsel should also not forget their role as 'officers of the institution of arbitration' in the broadest sense. In certain cases, reasonableness at the time of the introduction of the Request for Arbitration can solve the difficulties. This reasonableness, in the face of an increasing tendency to view arbitration as

<sup>39</sup> Eisemann, *supra*, Note 2, p. 160.

<sup>40</sup> See Craig, Park and Paulsson, *supra*, Note 4, Part II, Chapter 9, p. 159.

<sup>41</sup> Even as to the number of arbitrators, such an exercise can be useful. A contract for US\$ five hundred thousand with an arbitration clause requiring three arbitrators can make the procedure very expensive in comparison with the potential size of claims that can be presented. Moreover, in a large complex contract, the actual disputes can be of relatively small size making a three-member arbitral tribunal onerous if foreseen in the clause. The Secretariat does attempt to see if, in cases with low amounts in dispute, the parties can subsequently agree to a Sole Arbitrator, but this agreement is not always possible once relations between the parties have soured.

<sup>42</sup> See G. Aksent, *Ad Hoc Versus Institutional Arbitration*, International Court of Arbitration Bulletin, Vol. 2, No. 1 (June 1991).

'war' similar to state court litigation, is far from certain, but the author wishes to encourage it. Moreover, a party who thinks it is getting an advantage – through the other party's ignorance or lack of preparation, or its own overpowering negotiating leverage – by imposing pathologies on a 'weaker party' should be aware that it may be hoisted with its own petard with the pathologies working against it should it end up being the aggrieved party. Strength and weakness become very relative in such a setting.