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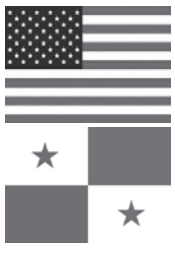
FOREWORD

By John Fellas and Rebeca E. Mosquera



To be great, be whole; exclude
Nothing, exaggerate nothing that is you.
Be whole in everything. Put all you are
Into the smallest thing you do.
The whole moon gleams in every pool,
It rides so high.
Ricardo Reis (Fernando Pessoa) (1933)

In the West of mainland Europe, facing the Atlantic Ocean, there is a city of pearly sidewalks, breathtaking architecture that is both rich in history and culture. The city is the capital of a country that was one of the first global empires — with bold pioneers who dared to cross dangerous seas for the sake of exploration, to reach places far from and beyond what the eye could see. During these navigations, these dauntless people accumulated a wealth of knowledge about new routes, adventure and the navigation of treacherous waters.

The city is Lisbon. The country is Portugal, – or *Portus Cale* from the Latinized version for "Port of Cale." Lisbon has one of the most vibrant international arbitration communities, with some of the most distinguished international arbitration practitioners from Portugal. When one of the founders and directors of Young Arbitration Review (YAR) asked that we write the foreword to the 24th edition of the YAR, we were both honored and humbled, because this journal is a testament to that pioneering, daring, and bold gene that characterizes this community. Whether you practice investment or commercial international arbitration in Europe, Asia, Africa or the Americas, this is a wonderful journal.

First, this publication is **unique**. It is the first under-40 Portuguese international arbitration review; it has opened unexplored paths to new generations of arbitration practitioners in Portugal and beyond. Its main goal is to inform the vast arbitration community of new developments in alternative dispute resolution, not only in Portugal, but across the world.

Second, this journal is **thorough**. Just like Fernando Pessoa stated in his Odes, "[t]o be great, be whole … in everything … you do …" and YAR has, and continues to, live up to the challenge. The last editions covered an array of hot topics in international arbitration: investment arbitration and guidelines to *third-party funding*, the duties of *independence and impartiality*

of arbitrators, the issues related to *the arbitrability of corruption claims*, issues arising out of the *concurrent powers between arbitral tribunals and state courts regarding interim measures*, among others.

Third, YAR is coy, with a modesty that is **alluring**. It has charmed and reached thousands of readers across the globe, with contributions from practitioners in top tier law firms, scholars, LL.M. and Ph.D. students, and professors. When we first heard about YAR, we wanted to get our hands on all 23 editions.

You too will be enchanted. In this 24th edition the readers will be illuminated by titles like *Philip Morris v. Uruguay: An Analysis of the Developments made and the Journey Ahead, Practical issues of cross-examination* and *cross-examination of experts*, *Reforming International Arbitration from the Inside – the Proactive Role of International Arbitrators*, *The Evaluation of Witness Evidence in Time-Limited Arbitral Proceedings: the Chess-Clock and the Rule in Browne v. Dunn*, *The Hague Convention on choice of Court Agreements and International Litigation: Enemies or Companions for the New York Convention and International Arbitration?*, *Third Party Funding – A new era?*, *Irrational expectations in the negotiation-arbitration spectrum*, *Alternative dispute resolution as a tool to overcome access to justice impediments and institutional dysfunction in Mexico* and, last but not least, *Counterclaims in Investor-State Disputes: Finding Balance in Investment Arbitration*.

Indeed, just as those adventurous sailors, with their navigation compasses tracing paths to never-before explored routes, YAR will continue to enlighten and engage the minds of the arbitration community around the world, shortening distances between one place and the other, and earning its place as a true international publication — unique, energetic, young, bold, and daring.

New York City, London and Marrakech
December 2016

John Fellas and Rebeca E. Mosquera

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PHILIP MORRIS V. URUGUAY: AN ANALYSIS OF THE DEVELOPMENTS MADE AND THE JOURNEY AHEAD

By Shivansh Jolly and Soma Hegdekatte

Abstract

The investment arbitration cases filed against Uruguay and Australia by Philip Morris over their respective plain packaging laws ignited a debate over the extent to which a State's right to regulate can be questioned by an investment tribunal. Apprehensions arose over how the forum is being misused and how such claims could impede the execution of policies on matters like public health. The recent verdict given in Philip Morris v Uruguay suitably clarified the stance taken by the investment arbitration community over the matter. The paper aims to assess the jurisprudential value and the contribution of the case to the general debate surrounding the matter. The paper analyses the relevant legal arguments put forth and the reasoning given in the verdict. The paper focuses on relevant aspects of Expropriation and Fair and Equitable Treatment- as contended in the case. The paper gives the jurisprudence on these treaty claims as they existed before the case, the developments to the claims that are attributable to the case and then, based on an analysis of the case and the previous jurisprudence, gives a suggested standard of review.

Philip Morris v. Uruguay: An Analysis of the Developments made and the Journey Ahead

February 15 2015: With the television turned on and the laptop screen open- the world awaited. It was time for the latest episode of 'Last week tonight with John Oliver'. This episode was called 'tobacco' and introduced the world to 'Jeff- the diseased lung'. As the world laughed along with Mr. Oliver, it was also appalled. Was a multinational tobacco company actually filing legal suits against countries to impede governments from making policies on public health?

The investment arbitration regime was born when the international community realized there was a need for a forum that would protect a foreign investor's rights in a host country. However, over the years concerns have arisen over the role of a foreign investor – a victim or a perpetrator?[1]

These concerns found their strongest corroboration when Philip Morris, a leading tobacco company filed cases against the government of Australia and the government of Uruguay (The Philip Morris Cases); challenging their respective legislations on tobacco control. Philip Morris did not succeed in either case. However, because of these disputes the debate on finding a balance between a State's 'right to regulate' and the commercial rights of an investor re-surfaced.

Investment arbitration, like any other forum of adjudication,

is susceptible to misuse. At the outset, the authors clarify that the paper does not delve into what constitutes as a misuse. The paper is, instead, concerned with limiting the possibilities of the forum being used as a means to infringe on a State's inherent right to formulate laws for its citizens.

The paper aims to analyse the verdict in the Philip Morris v. Uruguay case. This is done because the verdict covers the main legal aspects of the debate. The analysis aims to assess the degree of contribution of the case to the debate and to the jurisprudence of investment arbitration. Part I of the paper gives an introduction to the issue. Part II gives the factual background of the Uruguayan case and then analyses the claim of Expropriation and the Fair and Equitable Treatment claim in the case while Part III, a conclusion, examines the consequences of the verdict.

I. INTRODUCTION

Approximately 5 million deaths annually can be attributed to tobacco[2].It is currently the second largest cause of death[3]. It is estimated that by 2030, 70% of tobacco related deaths are going to occur in developing countries[4]. Reducing tobacco usage has thus become one of the prime concerns of several States around the world.

Professor Daniel Gervais describes plain packaging measures as *"Plain packaging measures under consideration for tobacco products typically involve a prohibition on the use of certain marks (e.g. logos, shape marks, colour marks and stylised marks) and requirements that word marks be used in a special form on packs, for example plain block letters"*[5]. Independent studies have shown that plain packaging reduces tobacco consumption[6]. Thus plain packaging is now being considered universally as an effective means to reduce tobacco consumption.

The main concern that surrounds the imposition of a plain packaging law is whether such a law infringes upon the trademark rights of an investor. Furthermore, all the legal arguments in the cases revolved around whether or not plain packaging measures are necessary and whether or not these measures violate a State's treaty obligations.

The World Health Organization (WHO) adopted the Framework Convention on Tobacco Control (FCTC) in 2003. The convention serves guidelines, obligations and requirements that countries can adopt on tobacco control. 180 countries have so far ratified the FCTC, including Australia and Uruguay[7]. Implementation of Plain Packaging laws is one of the obligations under the FCTC. The convention states, *inter alia*, that nothing in the convention shall prejudice the obligations a country has under bilateral and multilateral treaties *provided that* such an obligation is in consonance with the obligations under this convention[8].

As most countries have ratified the FCTC, there is a legally-binding international obligation that these countries have towards tobacco control. Question arises- should the tribunal take into account a country's FCTC obligations in a situation like the Philip Morris cases?

In 2012, Australia became the first country to come out with a plain packaging law- The Tobacco Plain Packaging Act (TPPA). In 2011, when the TPPA was still a bill, Philip Morris Asia (PMA) filed an investment arbitration case against Australia under the Australia-Hong Kong BIT for intellectual property right infringement. PMA owns 100% shares in Philip Morris Australia, which in turn owns 100% shares in Philip Morris Limited (PML). PML is the company which engages in the manufacture and distribution of tobacco in Australia[9]. There were three objections to jurisdiction by Australia – mainly revolving around the convoluted manner in which the dispute was brought under the Australia-Hong Kong BIT[10]. The case was dismissed on jurisdictional grounds in December 2015[11]. Thus the questions relating to the substantive issues of the dispute were never answered in the case; further increasing the importance of the Uruguayan case.

The concerns surrounding the Philip Morris cases are not confined to the legal aspects of the case alone. The apprehensions also include the journey to the final verdict. Lack of precedential value in investor-state disputes has only added to the unease.

One of the main concerns in such situations is the monetary burden cast by investment disputes. After a survey, the Organization for Economic Co-operation and Development (OECD) concluded that an investment arbitration dispute on an average could cost about $8 million, and in some cases could exceed $30 million[12]. A small country like Uruguay naturally finds it cumbersome to finance such a dispute. In fact, Uruguay's president almost settled the dispute with Philip Morris due to the same. Uruguay eventually fought the case with the help of external financial support[13]. The annual net worth of Philip Morris may be much higher than a lot of countries, thus easily creating an imbalance of power in such cases.

Another concern that the Philip Morris cases have evoked is the threat of a 'regulatory chill'. Many countries that had planned to implement plain packaging laws have been dissuaded from implementing the same due to fear of litigation[14]. The worry is more for developing countries that may not be in a situation to afford international litigations.

Thus, the role of a tribunal in such cases is not just to give a fair verdict, but to give a verdict harsh enough to dissuade the likelihood of such cases in the future. These concerns, the authors believe, have had a strong influence on the verdict given *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*[15] (The Philip Morris case). Thus, an analysis of the relevant legal arguments put forth and the reasoning behind the verdict given in the case is pertinent. The analysis has two aims; to assess the contribution of the case to the existing jurisprudence and to assess the extent to which the verdict contributes to assuaging the apprehensions around the whole debate.

II. PHILIP MORRIS v. URUGUAY

The government of Uruguay enacted new anti-tobacco laws in 2008-2009. These regulations came in the form of ordinances and a presidential decree. These laws state that 80% of a cigarette packet must be covered with images and textual warnings against

consumption of tobacco (80/80 regulation). The text must display that the product contains nicotine tar and carbon monoxide. Moreover, the brand name should be written in a standardized font, and each brand can only have a 'single representation', i.e. there will be no different varieties of the brand (Single Presentation Requirement (SPR))[16].

Three subsidiaries of Philip Morris International filed an investment arbitration case against the government of Uruguay in 2010 against these regulations. Pursuant to the Switzerland-Uruguay BIT, the dispute was filed under the **International Centre for Settlement of Investment Disputes (ICSID). Philip Morris, in this case, did not deny that the government had a right to make laws on public policy. However, the parties stated that the 80/80 regulation and the SPR regulation violated the company's trademark rights with their primary contention being, *inter alia*, that Article 3(2) (Fair and Equitable Treatment) and Article 5 (Expropriation) of the BIT had been violated**[17].

II.I. *Expropriation*

In customary international law, States have been allowed the regulatory space to expropriate foreign investments so far as the same is done: (i) for a public purpose; (ii) is non-discriminatory in nature; (iii) is done in compliance with due process of law; and (iv) if the same is followed with an adequate compensation to the investor for the loss of its investments.[18] Though the conventional definition of 'expropriation' reflects of no complexities as regards the concept itself, the determinative factors of expropriation still continue to be surrounded with constant ambiguities and uncertainty. To worsen the concern, varying arbitral findings as regards the approaches adopted and textual interpretations of the relevant investment instruments have added to the increasing ambivalence.[19] This section shall discuss such factors at length to reflect the position of law that had prevailed pre-Philip Morris Brands v. Oriental Republic of Uruguay (Philip Morris case), the clarity that the case brings to the jurisprudence of investment law and the standards suggested by the authors that may contribute in attaining some much needed uniformity in the determination of the present standard.

A. Measures amounting to Indirect Expropriation: Extent of Impact on Investments

(1) <u>Position pre-Philip Morris Case</u>

In most investment treaty texts, the test of determining a case of indirect expropriation is sourced from the words such as "*equivalent to*" or "*tantamount to*" or "*having the same nature*" or "*the same effect*".[20] The Tribunal in the case of *S.D. Myers v. Canada*[21] observed that the words "*tantamount to expropriation*" in Article 1110(1) of NAFTA are reflective of an instance "*equivalent to expropriation*" and stated: "*Both words require a tribunal to look at the substance of what has occurred and not only at form...It must look at the real interests involved and the purpose and effect of the government measure*". Therefore, similar phrases as mentioned above have been referred to by the concerned tribunals to determine the inclusion of indirect expropriation as a protected standard in an investment treaty.[22] Though this case allowed the adoption of a relatively flexible approach of examining the substance (the extent of impact on an investment) than the form (the manner of the impact on an investment) of a regulatory occurrence, sufficient ambiguity existed while determining as to when can indirect expropriation be said to have occurred while examining the threshold of the said extent of impact on a certain investment.

The same can be appreciated while examining the differing thresholds established in tribunal practice so far. The tribunal in the case of *Starrett Housing Corp. v. Government of Islamic Republic of Iran*[23] observed that a case of indirect expropriation could be established if the investors' "*rights are rendered so useless that they must be deemed to have been expropriated*."[24] In the case of *Pope & Talbot v. Canada,*[25] the tribunal observed that "*the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from its owner.*"[26] In *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*,[27] the tribunal found that indirect expropriation can be said to have occurred when an investor is *"radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto...had ceased to exist*."[28] And finally, to determine a case of compensable indirect expropriation, the test upheld in the case of *Iurii Bogdanov, Agurdino-Invest Ltd. v. Republic of Moldova*[29] was to find a deprivation of "*the totality or a substantial part of the investment.*"[30]

Considerable concerns have also been raised as regards the viability of the sole effects doctrine to determine a case of indirect expropriation, such that, whether the sole examination of the effect without taking into account the purpose of a regulatory measure would be an appropriate approach to examine a case of expropriation.[31] Therefore, a cursory examination of the tribunal practice reflects a heterogeneous approach for determination of indirect expropriation,[32] which thereby creates sufficient uncertainty and thus, a matter of grave concern for the stakeholders in the regime of investment law.

(2) <u>Developments made in the Philip Morris Case</u>

The Philip Morris case offers considerable clarity as regards the test for the determination of indirect expropriation. The tribunal observed that "*in order to be considered an indirect expropriation, the government's measures interference with the investor's rights must have a major adverse impact on the Claimants' investments.*"[33] The tribunal further observed that "*the State's measures should amount to a 'substantial deprivation' of its value, use or enjoyment, 'determinative factors' to that effect being 'the intensity and duration of the economic deprivation suffered by the investor as a result of such measures*.'"[34] While resorting to the test of '*substantial deprivation*', the tribunal relied upon established tribunal practice which has upheld the application of the said test.[35]

Although these observances were based on established treaty practice, the instant case offers a much needed break-through in understanding the treatment of a State measure aimed at regulating an intangible investment in the form of intellectual property. In order to determine the issue of expropriation challenging regulatory interference in the usage of the Claimants' investment (trademarks), the tribunal noted

that neither the Uruguayan law nor the relevant international conventions on intellectual property support a notion of an "*absolute right of use*" to an investor, free from any regulation in the manner of usage of such right. The tribunal held that an investment in the form of trademarks only enjoys protection to the extent of granting an "*exclusive right*" to a trademark holder to prevent third parties from infringing the rights of the investors, such that, legitimate cases of State regulation do not infringe upon the usage of such investments.[36]

In order to determine whether "*substantial deprivation*" of the value of the Claimant's investments had occurred to support a claim of indirect expropriation, the tribunal examined the economic profits that the Claimants' continued to earn for the years following the enactment of the challenged measures, though the range of profits could have been higher sans the enactment of the challenged measures.[37] To determine whether a case of indirect expropriation could thus be established, the tribunal observed that as per the standard adopted, a mere case of "*partial loss of the profits*" to an investor will not suffice to uphold a claim of expropriation.[38]

(3) Suggested Standard

A careful examination of the instant case shows a departure of the tribunal from the sole effects doctrine while determining the violation of the expropriation standard under Article 5 of the BIT. This can be fairly understood while noting that the tribunal examined and noted the circumstances surrounding and motivating the enactment of the impugned measures; a practice opposed to the idea of the sole effects doctrine wherein a tribunal limits itself solely in examining the effects of an impugned measure '*without taking into account the purpose sought by the expropriating authority*.'[39]

On the contrary, the tribunal made an analysis of the expropriation standard while taking into account the market strategy adopted by the Claimants following the adoption of the impugned measures,[40] profits which the Claimants continued to earn[41] and of the defence of police powers doctrine (or the purpose of the measure) as raised by the Respondent,[42] to determine whether the investments of the Claimants stood '*substantially deprived*'.

The authors argue that the sole effects doctrine is rather an archaic and an unpractical method for determining an allegedly expropriatory measure, as it guides a tribunal to limit itself to the effects of the impugned measure alone without making an examination of the purpose for which a measure is enacted. Moreover, a resort to the said doctrine would inevitably imply an outright ignorance of the relevance of the police powers doctrine in investment law jurisprudence **(a concern discussed in Section II.I (B)**, since the latter invites the focus of a tribunal towards the purpose of an impugned measure, as against the principles of the sole effects doctrine. Such that, given the nature of the doctrine, an analysis guided by the sole effects doctrine would be inherently prejudiced against a host State while being overly inclined in the favour of investors. It is to be noted that a heavy reliance on the sole effects doctrine and its viability has been questioned in practice and is hence consequently dismissed.[43]

As has been discussed, an interaction between the sole effects doctrine and the police powers doctrine deserves a careful analysis and hence attracts immense interest. It has been suggested by some authors that an adoption of the police powers doctrine as against the sole effects doctrine would tilt the odds in the favour of host States and consequently against investors at large, suggesting that the latter should thereby be adopted as the most

appropriate test for the determination of indirect expropriation.[44] It has further been suggested that the application of the sole effects doctrine would not deter the State's right to regulate as the threshold of interference required for the application of the said doctrine is significantly high.[45] The authors, on the contrary, argue that such an approach stays consistent only until a stringent but legally efficient measure is put to test against the sole effects doctrine. To illustrate the same, a measure uniformly mandating plain packaging of cigarette boxes[46] or a measure prohibiting the sale of a product posing significant threats to public health[47] would squarely fail the test of the sole effects doctrine, given the maximum possible interference as regards the investments that the impugned measures would cause. Consequently, States may either be onerously burdened to prove as to why a less restrictive measure could not have been adopted to meet the public welfare objectives sought to be achieved, or, the public welfare objectives would be rendered as simply irrelevant to declare the impugned measure as compensable and expropriatory.

Therefore, the authors argue that for the purposes of attaining uniformity, an appropriate standard to determine occurrence of indirect expropriation would be to examine whether a '*substantial deprivation*' of an investment has taken place, such that the investments are incapable of reaping any profits owing to the interference caused by a challenged measure. As established in tribunal practice,[48] economic losses cannot be the sole determinant of qualifying a claim of indirect expropriation. The said examination should be accompanied with an analysis of whether a measure is arbitrary or discriminatory in nature, while making an individual analysis of a measure's character and the regulatory purpose which motivated the enactment of the impugned measure by the host State.

B. Police Powers Doctrine and Right to Regulate

(1) Position pre-Philip Morris Case

One of the major challenges as regards the certainty surrounding the scope and application of the police powers doctrine arises out of non-existence of a uniform test for determining the cases where it could or could not be resorted to. Given the metaphorical universe of 2,953 BITs that exists today,[49] this concern tends to rather grow than attain any clarity at all. Interestingly, the uncertainty surrounding the said doctrine due to the heterogeneity of the BITs in existence has rather benefited the host States to enjoy a greater regulatory space with varying interpretations arising out of the diversity in treaty texts.[50] To add to the growing uncertainty surrounding the doctrine, out of a total of 2954 bilateral investment treaties signed inter-States (in force or not), 1582 of such treaties contain an express provision for a "just and adequate" compensation against an act of expropriation, or such deprivation of investment equivalent to or amounting to expropriation.[51] This, therefore, creates a dichotomous situation for a host State wherein on one hand, legitimate regulatory measures enacted in furtherance of "*public benefit*" such as public health or environment protection are allowed as apparent exceptions to expropriation, on the other hand, provision of an adequate compensation is supplanted in such treaties as a condition precedent for any expropriation to be considered as legal under the concerned BIT.[52]

To understand the character of police powers doctrine, a clear distinction between a legal expropriation, an illegal expropriation and a case where no expropriation occurs at all, must be made. An expropriation is regarded as legal to the extent that it satisfies the qualifying conditions that a BIT may enlist; such as the element of public benefit, non-discriminatory nature of the impugned measure, due process and compensation. Compensation as per the fair market value of the property expropriated is required to legalize an expropriatory act *qua* the investment treaty.[53] On the other hand, an expropriatory measure shall be regarded as illegal under an investment treaty if it is carried out without satisfying the illustrative preconditions as have been mentioned above. In such cases, damages are granted to the concerned investor in accordance with the Chorzow principle.[54]

Distinct from the two scenarios provided, a regulatory taking by a host State shall not qualify as expropriatory if the same is exercised in the justification of the police powers doctrine. Therefore, such a scenario would entirely excuse a host State from suffering the burden of paying compensation or damages. The difference between limitations on the applicability of a BIT to certain investments and the right to regulate must also be kept in mind.[55] While in the former case a tribunal would lack jurisdiction and an investor would thus be deprived of a locus standi to raise a claim, in the latter case, the onus would lie upon the State concerned to prove whether the impugned measure falls within the scope of the right to regulate.[56]

Even though the police powers doctrine is understood to have attained the status of customary international law,[57] the scope and extent to which it may be applied begs for clarity. Notably, certain codifications such as the 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens,[58] the Third Restatement of the Foreign Relations Law of the United States of 1987[59] and the OECD Working Paper[60] attempted to lay down the doctrine in a uniform textual format, however, limitations in the form of identifiable instances which would justify invocation of the police powers doctrine could not be established. Tribunals were, thus, unable to differentiate between a legitimate regulatory non-compensable measure and an expropriatory taking requiring compensation. Put simply, an effective differentiation between exercise by a State of its police powers and that of a compensable expropriation could not be uniformly understood.[61] The existence of this uncertainty was appreciably expressed by the tribunal in the case of *Saluka Investments BV v. Czech Republic*,[62] wherein the tribunal observed: "*international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, non-compensable*."[63]

To counter the growing uncertainty surrounding the applicability of the police powers doctrine, a visible change in treaty texts was gradually noticed. In order to attain greater certainty upon the fate of a regulatory measure and the consequent treatment of the same by tribunals in the event of a dispute, States began to inculcate clarifications to exclude certain regulatory actions from the scope of indirect expropriation.[64] However, usage

of generic terms as "*public benefit*", "*public interest*", "*internal needs*", "*public necessity*",[65] coupled with the fact that such provisions are generally inclusive in nature than exclusive or exhaustive, raises doubts over the true extent and scope of the police powers doctrine vis-à-vis the right to regulate of host States.

Although tribunal practice began to eventually recognize the doctrine of police powers while allowing leverage to States' right to regulate, varied and open-ended definitions provided therein made no contribution to the achievement of a disciplined right to regulate. In *Methanex v. USA*, the tribunal observed that a non-discriminatory measure motivated by a public purpose "*is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.*"[66] The tribunal in *Saluka Investments v. Czech Republic* observed that "*[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.*"[67]

Another formulation for determining occurrence of a compensable expropriation can be seem in the *Tecmed* case wherein the tribunal adopted the proportionality analysis while seeking a balance between the public welfare purpose sought by the State with its effect on the investor.[68] The Tribunal observed that no compensable expropriation can be said to have occurred if the effect of a measure on the investor is proportional to the public interest sought to be protected.[69] However, criticism as regards the legal viability of resorting to the proportionality analysis under the expropriation standard has been raised to question the approach adopted by the *Tecmed* tribunal.[70]

On a careful analysis of the abovementioned cases, it can be noted that common and generic factors such as a non-discriminatory measure, exercise of regulatory powers, public purpose/benefit/welfare and compliance with due process, though not always fairly achievable, reflect an absolute flexibility in the favour of host States to justify impugned measures under a seemingly unrestricted doctrine of police powers. This, in turn, might heavily tilt the balance of the odds in favour of host States; a troublesome scenario which may question the viability of the regime at large.

(2) Developments made in the Philip Morris Case

In the midst of ever growing uncertainty as regards the limitations of the police powers doctrine and criticisms against its undue inclination in the favour of host States, the Philip Morris case comes timely to dispel at least a few, if not all, of the prevailing issues. The tribunal began its analysis of the applicability of the doctrine while noting that Article 5 of the BIT must be interpreted in consonance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, such that, relevant rules of international law inclusive of customary international law must be resorted to for interpreting the scope of Article 5.[71] It was thus noted by the tribunal that protection of "*public health has since long been recognized as an essential manifestation of the State's police power, as indicated also by Article 2(1) of the BIT which permits contracting States to refuse to admit investments 'for reasons of public security and order, public health and morality.'*"[72]

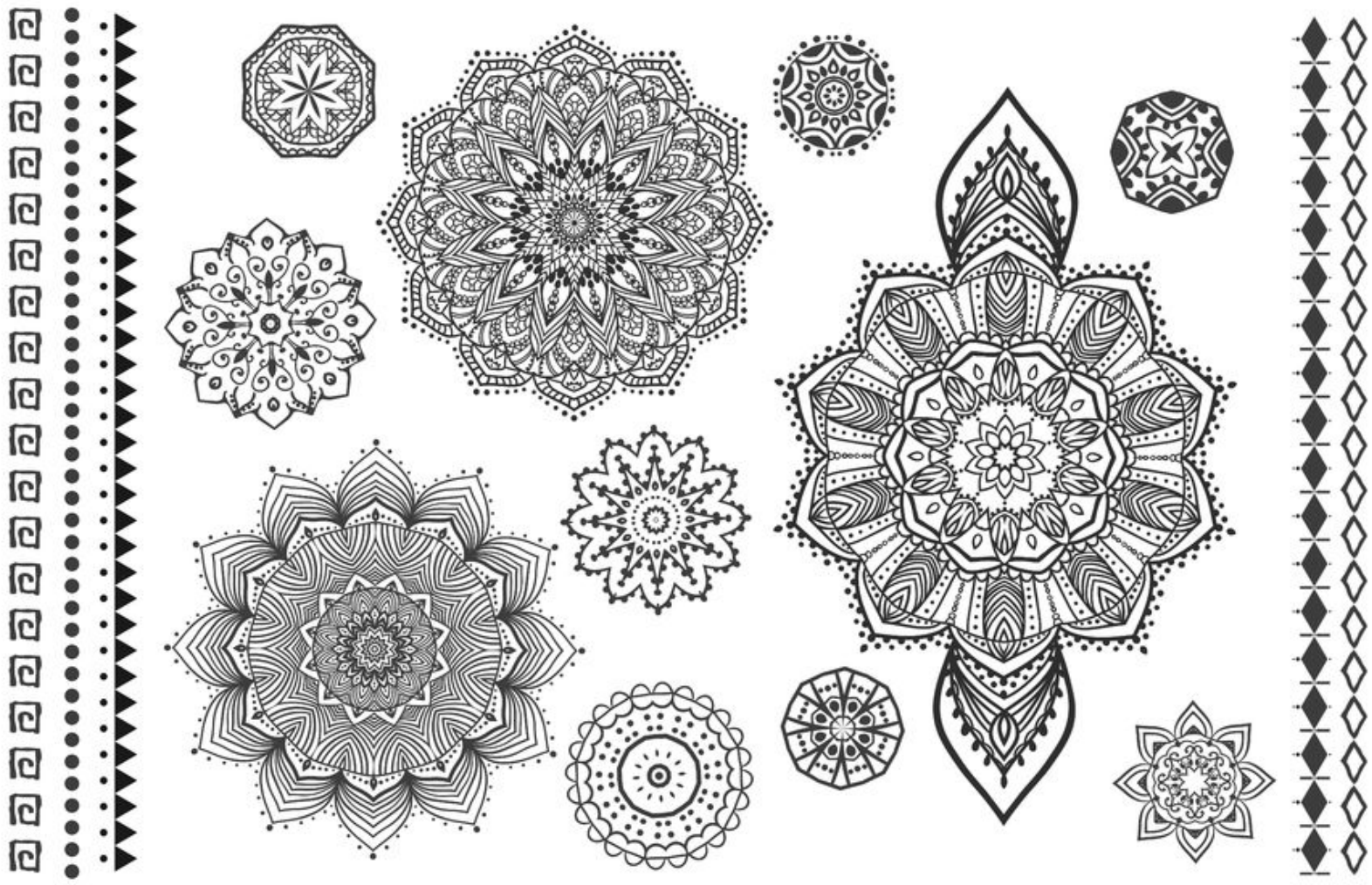
While appreciating the recognition of the police powers doctrine in international law, the tribunal went on to take note of the 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens, the Third Restatement of the Foreign Relations Law of the United States of 1987 and the OECD Working paper of 2004.[73] Notably, the tribunal recognized the distinction between the exercise of police powers doctrine and that of a compensable expropriatory measure while placing reliance on tribunal practice,[74] such that, a distinction can be established while examining the "*nature and purpose of the State's actions*."[75]

An interesting leap which the tribunal took while affirming the relevance of the police powers doctrine in international law was while noting a gradual change in treaty texts which reflects exceptions to indirect expropriation. The tribunal noted that the 2004 and 2012 Model BITs of the United States of America and that of Canada provide for such exceptions which would allow these States to exercise regulatory freedom guided by the police powers doctrine.[76] A possible criticism against a reference to such BITs which expressly contain exceptions to indirect expropriation is that reliance upon such texts cannot be made while a tribunal is to determine a question of indirect expropriation as regards a BIT in which such exceptions are absent, such as the Switzerland-Uruguay BIT in the instant case. In an anticipated counter to such criticisms, the tribunal boldly noted that "*these provisions [exceptions], whether or not induced ex abundanti cautela, reflect position under general international law*."[77]

This observation of the tribunal clarifies two significant concerns: (i) non-discriminatory measures adopted by host States in furtherance of public benefit shall not lead to a finding of indirect expropriation; and (ii) States are entitled to resort to the police powers doctrine irrespective of whether the concerned BIT contains express exceptions to what may amount to indirect expropriation. Therefore, the tribunal in the instant case, while making the abovementioned observation, relied upon principles of customary international law which support the notion of exempting non-discriminatory measures motivated by legitimate public welfare objectives from falling foul with the standard of expropriation.[78]

The tribunal also noted that the impugned measures were enacted in furtherance of the Respondent's national and international obligations of protecting public health.[79] Importantly, the tribunal imparted significant relevance to the Respondent's obligations under the FCTC to ensure protection of public health.[80] The reliance on the FCTC regulations clarifies the concern of reconciling international obligations of a State with its obligations arising out of an investment treaty. Such an approach of the tribunal in the instant case would allow the future tribunals to unflinchingly align a State's right to regulate with the relevant international obligations which the State may owe to the international community.

Another determinant to justify the exercise of police powers doctrine seems to have been established by the instant case as the tribunal refers to the effectiveness or the capability of the impugned measures to serve the purpose which they



sought to achieve. Relying on the amicus briefs presented by the World Health Organization and the FCTC Secretariat, the tribunal observed that "*the Challenged Measures were not 'arbitrary and unnecessary' but rather were potentially 'effective means to protecting public health'*."[81] Although it is not clearly stated whether effectiveness of an impugned measure is an added test that a tribunal may examine to justify invocation of the police powers doctrine, it would be best if the future tribunals do not regard this as a necessary precondition which a host State must be expected to satisfy as the onus to prove the immediate effects and utility of such measures would be onerous and unreasonable. This can be understood while noting the observation of the tribunal in the instant case to the effect that "*it is difficult and may be impossible to demonstrate the individual impact of measures such as the SPR and the 80/80 Regulation in isolation*."[82]

Although the instant case still leaves certain questions unanswered (as will be discussed in the next section), it does provide significant clarity as regards the manner in which the police powers doctrine may be applied to justify a regulatory measure. Consequently, this case also upholds the sanctity of a State's right to regulate its internal concerns while dismissing the anxiety of international community concerning any undue leverage which investors may command in protecting their investments.

(3) Suggested Standard

One of the major criticisms of the police powers doctrine which remains unsettled and, unfortunately, found no clarification in the Philip Morris Case concerns determining "*what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, non-compensable*."[83] Therefore, the authors make an attempt at putting forth a viable solution which could be uniformly applied to dispel the long existent uncertainty as regards the police powers doctrine.

It is an established position in international law to grant actions undertaken by States a presumption of validity; such that, the elements of good faith and non-discrimination are presumed to have been followed.[84] Although this may seemingly put onerous burden of proof upon investors to establish a case of expropriation, the authors contend that a prima facie determination of its own case must be made by the concerned host State.

As regards this determination, States must satisfy the following prerequisites to qualify an impugned measure as falling within the scope of the police powers doctrine: (1) it must be shown by a State that the challenged measure seeks a public welfare objective, however, that alone should not be enough to put down the challenge; (2) it must be shown that the measure sought has a *potential* to achieve the objectives it seeks, such that, since immediate effects of certain measures may not be visible, an examination of a mere potential or capability of a measure to attain its objectives should suffice;[85] (3) the measure must be capable of directly benefiting the policy objective and an isolated or a far-fetched impact should not suffice; (4) the measure must not be discriminatory in nature, and must comply with the due process principles recognized in general international law; (5) a State may also contend that the challenged measure complies with its domestic legal framework and also reflects the international obligations owed by itself through multilateral treaties or conventions that it may be a signatory to. Although such factors may seem to pose a heavy burden of proof upon States, it has been suggested that given the absolute information as regards the impugned measure States are expected to possess, such a burden stands justified.[86]

When the enumerated factors have been prima facie

established by a State, the burden of proof should thereby shift upon an investor to justify the expropriatory nature of the impugned measure. In order to do the same, the following factors are suggested to have been proved by investors: (1) it must be proved that the measure challenged has been enacted by a mala fide exercise of regulatory power, such that, the measure is not motivated by a genuine policy objective;[87] (2) an investor must show that a measure does not comply with the due process requirement and/or is discriminatory in nature; (3) it may be shown that the challenged measure is not backed by sufficient evidentiary research, which may thereby raise doubts upon the bona fide nature or the effectiveness of the measure to achieve the policy objectives sought; (4) wherever possible, an investor may also endeavour to prove that an impugned measure runs contrary to the international obligations owed by a State in the form of multilateral treaties or relevant conventions.

It should be noted that compelling jurisprudence in tribunal practice and doctrinal opinions already exists which supports the States' right to regulate without being subjected to the burden of compensatory consequences which may undermine the sovereign powers of nations at large.[88] Consequently, the authority of States to regulate its internal affairs must be protected and allowed its due regulatory space and freedom in order to allow sovereign nations to fulfil their obligations towards its subjects.[89] Furthermore, the States' right to regulate must be safeguarded against undue investor interference in order to avoid an effect of regulatory chill which may consequently drive States away from investor-State dispute settlement mechanisms by adopting treaties excluding such mechanisms.[90]

II.II. FAIR AND EQUITABLE TREATMENT

The relationship between the treaty provision 'fair and equitable treatment (FET)' and general international law is a matter that has been discussed consistently over the years. With relation to the Philip Morris case, identifying the same becomes pertinent to adjudge the relevance of the 'Margin of Appreciation' doctrine and the FCTC regulations in investment arbitration. Moreover, the case helps in further analysis of the relation between a state's right to regulate and its FET obligations.

Measures amounting to Fair and Equitable Treatment

(1) *Position pre-Philip Morris Case*

The terms 'just' and 'equitable' were first used with reference to foreign investments in the 1948 Havana Charter for International Trade Organization[91]. Today, majority of the investment treaties provide a clause according FET to foreign investments. In ordinary meaning, the terms refer to 'just', 'even-handed', 'unbiased' and 'legitimate' treatment to foreign investments in host states[92]**.** The standard can be described as abstract and subjective with broad connotations[93]. From denial of justice by the courts of the host state to arbitrary decision making by the administration of the host state, any behaviour which can be termed as unfair or without good reason can be considered a violation of an FET provision.

When the *Neer*[94] claims first discussed Minimum Standard of Treatment for Aliens, the threshold for proving a breach was high; only an act that was 'outrageous' would be considered a breach. Modern FET standard has its roots in Minimum Standard of Treatment for Aliens. The applicability of the *Neer* standard to present day FET clauses is heavily debated, tilting more towards a lower threshold[95].

Instances have been seen where both tribunals that have upheld the *Neer* threshold and tribunals that have advocated a lower threshold have elucidated that states are entitled to a certain degree of deference. In *Eastern Sugar v Czech Republic*, it was stated that every time a law is flawed or is not implemented properly, a breach is not constituted. A host state is permitted some amount of inefficiency and imperfection[96]. Additionally in *Glamis Gold*, the tribunal stated that the role of an international tribunal was not to '*delve into the details of and justifications for domestic law*'[97].

The term 'Margin of Appreciation' refers to the degree of deference given to states. The principal was made popular by the European Court of Human Rights (ECtHR). In the context of ECtHR, the doctrine gives States the 'space to manoeuvre[98]' its human rights obligations in order to meet its necessary collective goals. Investment arbitration tribunals have borrowed this doctrine, as witnessed in the following excerpt;

'*This objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight*'[99]

However, a careful examination of the previous cases where the doctrine has been quoted shows that doctrine has been loosely used; without any kind of analysis. The standard is merely used as a pseudo-standard with the contours of the term neither being defined nor discussed[100]. For example, in the *Electrabel* case the tribunal accorded a 'reasonable Margin of Appreciation' to the state for one issue and for the other issue accorded a 'modest margin of appreciation'[101]. Neither of the terms was explained individually nor was there any insight given into what the difference between 'modest' and 'reasonable' was in this context.

There are arguments disfavouring the use of this doctrine in investment arbitration as well. The main argument is that in the context of ECtHR the doctrine decides if a certain human right violation is permissible, while in investment arbitration the doctrine is used to assess if the measure of a host state is just[102]. When used in the context of ECtHR the assessment is more individualistic and micro, while in investment arbitration the assessment is on a macro level. Thus the two are innately different and a direct import may not be feasible.

(2) *Developments made in the Philip Morris Case*

With respect to the claims of FET violations, our focus is restricted to essentially two contentions by the claimants- the regulations were arbitrary and were imposed without sufficient research and that the legitimate expectations of the claimants were undermined

by the regulations[103]. The Tribunal's finding on the same are important because they contribute to the fiery debate that the Philip Morris cases ignited.

The claimants chiefly argued that both the SPR regulation and the 80/80 regulation were not based on scientific evidence and that there was no international requirement for the imposition of such harsh measures. The respondents, on the other hand, argued that as far as there is a rational relationship between the measure and the objective, a measure cannot be termed as arbitrary.

The tribunal first established that investment arbitration had moved beyond the *Neer* standard[104], thus favouring a lower threshold. The tribunal proceeded to give a general analysis and then to separately looked into both the measures. On general character, the tribunal stated that the 'Margin of Appreciation' doctrine is applicable to claims under bilateral treaties, especially in matters such as protection of public health[105].

On the SPR regulation, the tribunal concluded that there was no detailed research administered. However, the tribunal further stated that whether the measure was required or not, whether it would succeed in changing public perceptions or not, is not what the tribunal can comment on. As far as the measures are reasonable and address a legitimate public concern, there would be no breach of the FET clause in a treaty[106]. A similar verdict was given with respect to the 80/80 regulation with the tribunal categorically stating *'The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal'[107].*

On the claim of legitimate expectations, the tribunal affirmed that an FET standard is violated only if the regulatory framework is altered outside of "*the acceptable margin of change*"[108]. The tribunal further added that manufacturers of harmful products especially cannot expect regulations to not become more stringent[109].

The respondents heavily relied upon the FCTC regulations to support its measures. What is interesting is that Uruguay's obligation to comply with the FCTC regulations was not contested by the claimants. Moreover, the tribunal categorically stated the "*FCTC is a point of reference on the basis of which to determine the reasonableness of the two measures*"[110].

In the dissenting opinion given by Gary Born, he rejects the usage of the Margin of Appreciation doctrine as he states; *'I also do not believe that the "margin of appreciation" adopted by the Tribunal is either mandated or permitted by the BIT or applicable international law. The "margin of appreciation" is a specific legal rule, developed and applied in a particular context that cannot properly be transplanted to the BIT"[111].*

(3) <u>*Suggested Standard*</u>

The tribunal established the reliance on international law by investment arbitration through two accounts; the import of the 'Margin of Appreciation' doctrine and the reference to FCTC regulations. The importance of relying on the FCTC regulations, as mentioned previously, recapitulates the tribunal's stance on finding a balance between a State's international obligations and the commercial rights of an investor.

A treaty standard, it has been stated in the past, is not a *self-contained regime[112]*. It cannot and does not exist in isolation[113]. And the authors believe that the same is imperative because reliance on general international law encourages uniformity. The only way there is some form of uniformity in investment arbitration- a system which doesn't indulge precedents, is if the basis of the analysis is the same[114]. This is especially important in a situation like the Philip Morris debate. Since the major concern around the debate was the problem of 'regulatory chill', an impression of uniformity will help countries to freely implement tobacco control measures.

However, as stated by Mr. Gary Born, question arises if an ECtHR doctrine comes under the purview of customary international law[115]. The authors argue that it does and quote the following paragraph from the ILC fragmentation report for the same-

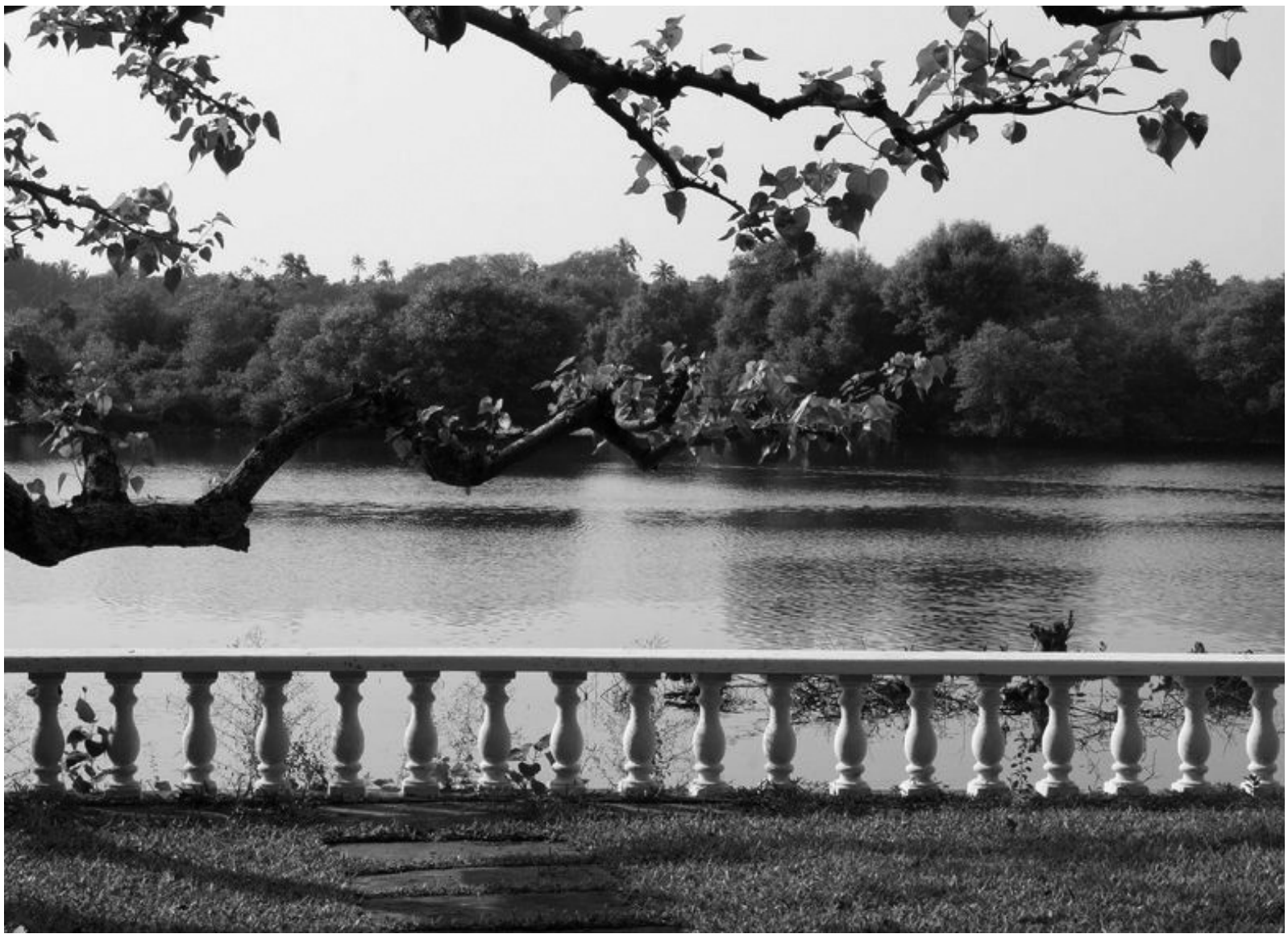
"fragmentation takes place against the background and often by express reference to not only the VCLT but to something called 'general international law'. However, there is no well-articulated or uniform understanding of what this might mean. 'General international law' clearly refers to general customary law as well as 'general principles of law recognized by civilized nations'. . . But it might also refer to principles of international law proper . . . In the practice of international tribunals . . . reference is constantly made to various kinds of 'principles' sometimes drawn from domestic law, sometimes from international practice but often in a way that leaves their authority unspecified[116]"

This question, however, has not been sufficiently analysed by investment arbitration tribunals; giving Mr Born's dissent considerable credibility. The authors do believe that tribunals must invest in defining the scope of the Margin of Appreciation doctrine. A mere import without keeping the landscape of investment arbitration in mind will leave the doctrine as a mere tool to rationalize or validate the reasoning of the tribunal. This negates the very point of relying on principals of general international law. Even the Philip Morris case merely affirmed the usage of the doctrine but did not add to the jurisprudence behind why or how the doctrine must be used. Thus, while the authors do not believe an ECtHR doctrine cannot be imported, accustoming the doctrine to investment arbitration is suggested.

The tribunal gave a high degree of deference to states to regulate matters of public health. This stance taken by the tribunal- that states should be given a margin of appreciation in matters of public health even if the measure is based on questionable evidence- is the suggested standard by the authors. Only such a high degree of deference will prevent parties from bringing similar claims in other jurisdictions.

III. CONCLUSION

The conclusion of this paper aims to round off the consequences of the Philip Morris cases and the manner in which



they have contributed to the jurisprudence of investment law. Also, it is relevant to discuss the effect these cases would have on the prevailing debates as regards the legitimacy, viability, and sustainability of the regime of investment arbitration. At the outset, the authors attempt to clarify that this paper does not make an inherent inclination in the favour of State regulation to consequently propose a suggestion demotivating investments in foreign States at large. On the contrary, the contribution of the paper by suggesting certain viable standards which could be appreciated and adopted by future tribunals is an indication that the prevailing state of affairs in investment jurisprudence needs to be revamped.

As a consequence of the Philip Morris cases, certain arguments may be raised to discredit the argument of regulatory chill since both the cases resulted in the favour of the host States, thus allowing the prevalence of the regulatory measures challenged. However, it must be kept in mind that the Philip Morris cases cannot be conveniently assumed as the pillars of precedents to establish a result which each investment claim must result into. On the contrary, the paper suggests that given the need for further clarity on the expropriation and fair and equitable standards, the result of such future claims could fall on either side of the line.

Another concern which the Philip Morris cases have raised is that of exponentially broadening the scope of the police powers doctrine by suggesting no apparent limits to the applicability of the said doctrine. It is admitted that the concern is indeed legitimate, and hence the authors have made an attempt to suggest certain limits that the future tribunals may wish to consider before applying the doctrine. A greater concern that arises is that of maintaining a balance between the freedom of a State to regulate and the anti-

investor circumstances that may follow on one hand, and that of the sustainability of the regime of investment arbitration on the other. To address the concern succinctly, to challenge the viability of the regime on the basis of standalone examples (the Philip Morris cases) would be an extremist approach to take. Although it is suggested that the regime needs some important clarifications on the point, it would be unfair to suggest that the regime has failed already for the mere reason of some unaddressed ambiguities in the instant cases. While there are instances where the forum has been used unjustly, that however does not mean the forum itself is not essential.

The primary apprehensions that concerned the stakeholders in investment arbitration were, as mentioned before, the journey to the verdict. The tribunal has tried its level-best to assuage these apprehensions. Somewhere, the tribunal has decided more on the grounds of morality than on the facts of the case. This also seems to be Mr. Born's problem with the verdict. However, keeping aside the usage of the Margin of Appreciation doctrine, the rest of the verdict on the FET claim, the authors believe, was needed. If the tribunal had decided otherwise, it would have led to a situation where any kind of legislation made by a host state could be and would be questioned[117]. The role of a tribunal is not to question a national law, but it is to question if the law adversely affects the investor in question to an unacceptable extent. There is a fine line of difference between the two and the tribunal had to accord a high degree of deference to host states in order to establish the same.

On a positive note, the Uruguayan verdict is a huge step forward. To a great extent, the verdict has managed to quieten criticism against investment arbitration. As the claimants were asked to pay for most of the legal costs borne by the respondents,

the tribunal has tried to level the field even in monetary terms[118].

On a concluding note, the authors believe that Mr. Paulsson's prophetic words from the '*Arbitration of Privity*', though given in a different context which adhered to the problems faced by investment arbitration during its nascent years, still in essence holds relevance to the present era and the present day problems -

"Arbitration without privity is a delicate mechanism. A single incident of an adventurist arbitrator going beyond his proper scope of his jurisdiction may be sufficient to generate a backlash. But if the mechanism is applied judiciously, it will help fill a void that now exists in the absence of compulsory jurisdiction, and thus contribute to enhancing the legal security of international economic life." [119]

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PRACTICAL ISSUES OF CROSS EXAMINATIONS IN INVESTMENT ARBITRATIONS

By Nicolás J. Caffo

Even though cross examination of witnesses could be considered the most important part of an investment arbitration hearing, examining a witness is an art not taught at universities but learnt by practice.

It is a complex art since attorneys manage to cause witnesses say or let others infer from their testimonies arguments contrary to their interests or to their written statements. Thus, in order to understand the mechanism of international arbitration examination it is important to develop a number of skills beyond the boundaries of law.

Cross examination permits building and confirming one's client's case. Precise and determined conclusions must be obtained from different cross examinations, having a crushing effect on the plausibility of the testimony of the party and on the credibility of the witness as well. However, due to its relevance, cross examination becomes a double-edged sword, since if the attorney makes incorrect statements or permits the witness to provide a reply at its convenience, it may jeopardize his client's case. Therefore, attorneys should control the examination and bear in mind the objective of each examination, what we want the witness to say.

In Latin America, the region has historically adopted the civil law system and "cross-examination was developed in the common law system, which relies heavily on the oral evidence of witnesses presented a hearing".[1] In terms of Henri Alvarez, "cross-examination is, generally, unknown in the civil law which places much greater emphasis on detailed, narrative pleadings and documentary evidence. Usually, the questioning of witnesses at a hearing is conducted by the judge who may accept suggestions from counsel as to which questions should be put to a witness".[2] However, as it is stated in the present article, Latin America lawyers during the last twenty years have acquired enough experience in investment arbitration to assume that nowadays there is no such a difference.

In this sense, Francis L- Wellman says "[t]here is no short cut, no royal road to proficiency, in the art of advocacy. It

is experience, and one might almost say experience alone, that brings success".[3]

In order to make a correct cross examination, we should take different issues into account from the beginning of the arbitration to the end of the hearing. Below is a description of the different stages of an effective examination in international arbitration.

1) First Stage: Procedural Orders

The first procedural orders issued by the tribunal are essential for the examination. They generally specify the location of proceedings, the language, the tribunal's fees, the time limits, the formalities for written filings, if hearings and examinations will be held and when, etc.

Therefore, from the beginning of the arbitration proceeding one should know in detail the most effective form of examination, as procedural orders specify the procedures to be followed. Then, procedural orders should be thoroughly negotiated by the attorneys for the parties, and if any difference arises, attorneys should be prepared to defend their strategic position before the tribunal.

To sum up, below is a list of the most important issues to take into account in procedural orders in connection with witness examination:

i) Parties to the interrogatories

The procedural order which regulates the proceedings generally indicates the manner in which the interrogatories will be carried out, including the limitations of each of the party's representatives to make questions and the documents that the parties may use in the proceedings.

Once the written memorials are filed, the tribunal issues a procedural order indicating all the details of the hearing. The tribunal will specify the date, the language and the location of proceedings, and the date on which the parties will provide the names of witnesses to be examined. Further, if not specified in the first procedural orders of the case, by means of such procedural order, the tribunal must regulate the procedure applicable to the examinations, which usually is as follows:

1. **Sworn Statement**: The witness is required to provide his/her testimony under oath;

2. **Direct Examination**: The witness is examined by the attorneys for the party proposing such witness. In this stage, no new issues other than the issues covered in the parties' testimonies or expert reports may be discussed, except for those points related with new issues included in the Rejoinder Memorial;

3. **Cross Examination**: The witness is then examined by the attorneys for the other party;

4. **Re-Direct Examination**: Finally, the witness is again examined by the attorneys for the party submitting such witness, limiting their questions to the issues arisen in the cross examination.

It is generally provided that the questions of the parties be limited to the issues covered in the testimonies of witnesses. This tends to be a controversial issue at hearings and give rise to objections of any kind during examinations.

On this regard, some legal scholars have pointed out that "Latin American counsel may not be sufficiently familiar with cross-examination to know when to object to questions put in cross-examination".[4] Even though it is true that Latin American legal system is different from the common law and that Latin American civil and commercial proceedings do not contemplate these examinations, it is undeniable that this difference is not observed in international practice nowadays. In effect, top international law firms engaged in international arbitration have a considerable number of Latin American attorneys. This is mainly because, in the last decades, most legal actions at the ICSID were brought against Latin American governments, and attorneys of the region have forged a strong expertise in investment arbitration and, consequently, in cross-examination. The Attorney General of the Argentine Republic, for example, together with its staff of attorneys have represented Argentina in more than twenty ICSID (International Centre for Settlement of Investment Disputes) cases, being the most sued government until some years ago. In fact, today most of these attorneys are working in the best arbitration law firms of the world because of their experience in Argentine cases.

Moreover, in arbitrations involving parties of Latin America, a Latin American attorney usually understands witness' reasoning better in cross examination, being able to make relevant questions or to know if the witness is eluding the question –a difficult task for attorneys from other cultures.

ii) Time limit for each examination

It is important to take into account that the time allocated to witness examination is limited. Usually it may be limited by the tribunal in the relevant procedural order in two ways:

a) A certain time may be allocated for each questioning, for example, a total of 60 minutes, including direct examination, cross examination and re-direct examination, or

b) Under a *chess clock* system, where each of the parties has a total time for all the witnesses and may administer such time at its discretion. For example, it may assign 10 minutes to a witness which is not very relevant and reserve more time for the main witness of the case.

This issue is crucial and should be analysed in each case, since if, for example, our party has only two witnesses and the other party has eight witnesses, the chess clock option would certainly be more convenient to have time for each witness and, on the contrary, if we have more witnesses than the other party, we should protect the interest of our party and request that the time

assigned to each of the parties be the same but proportional to the number of witnesses.

iii) Impeachment Documents

Impeachment documents are documents added to the records to be used during the examination at the hearing, in order to challenge the credibility of the witness or expert, to clarify the disputed issues of the case and/or to make certain documents unknown by the other party valid.

Some authors consider that "[t]he purpose of impeachment may be to establish the truth of a proposition rather than simply to diminish the credibility of an opponent's witnesses".[5] If the objective is attained, the tribunal will not take such testimony into account to give its award.

Attorneys tend to be cautious in the selection of documents to be used as impeachment documents, since "the risk is that an unsuccessful cross-examination will allow a witness to explain away or diminish the significance of this evidence".[6]

Parties are generally allowed to submit impeachment documents until few days before the hearing. During the arbitration, they should negotiate if there will be impeachment documents and the final decision rests on the tribunal.

If the tribunal did not allow the parties to add impeachment documents before the hearing, a strategy commonly used to overcome this hurdle is to incorporate such documents as exhibits in the last memorial of each of the parties. In this way, the document incorporated in the form of an exhibit may be used at any time during the hearing.

iv) Restrictions on contacting the witness or expert. Sequestration.

Even though procedural orders usually provide that the attorneys for the parties may meet with the witnesses in order to establish the facts, assist them in the preparation of their oral examinations or testimonies, this does not mean attorneys are free to order or may indicate witnesses what to testify. In effect, procedural orders generally provide that fact witnesses may not be present at the hearing, discuss about the testimony of any other witness who has already testified or read the transcript of the hearing until providing his/her testimony. This is of outmost importance since if the witness is present during the whole hearing, his/her testimony would inevitably be affected by the position of the parties and/or by version of the facts of the other witnesses, and lose its objectiveness.

This limitation does not generally apply to experts, since their testimonies do not consist in a retelling of the facts of the case, but in their qualified experience in a certain matter.

Also, it is convenient to provide for the sequestration of witnesses in the procedural order if an examination starts in a hearing but cannot be completed in the same day. So, witnesses under examination may not communicate with any of the parties outside the hearing until completing their examination, in order to comply with the equality of arms principle of any arbitration procedure. Though this seems to be a basic and simple issue, in most international arbitration proceedings the arbitration is carried out in a country different from that of both parties. Therefore, temptation is huge, since it is common practice that the parties and their own witnesses and experts stay at the same hotel, near the hearing location.

2) Second Stage: Analysis of the case and of the testimonies

Preparing a witness examination is a time-consuming task. It does not consist in making some questions on the basis of the

witness testimony but to make the witness lose credibility and confirm the issues that favour our case. To that effect, it is essential to know the case in detail.

The apparently less dangerous questions for the witnesses and the most basic details sometimes prove that the witness is hiding some information, so any question should be discarded and a thorough knowledge of the case is essential for a good examination.

The analysis should not be limited to the filings on record but cover all the issues related with the case. In this regard, Dr. Kent has stated that "one of the most important skills in cross-examination in international arbitration is the ability to adapt one´s approach to the tribunal".[7] This means that the background and history of all the members of the tribunal should be analyzed.

It has been said that "[i]n international arbitration, the examiner should be conscious of the culture witness and the tribunal. Since many cultures prefer to avoid direct confrontation, it could prove troublesome if an examiner did not know that the witness came from such a culture".[8] For instance, if the members of the tribunal are from Latin America, such as any Caribbean, aggressive examinations may be shocking for them (it is anyway not advisable in general to make aggressive examinations).

An exhaustive investigation of the witness or expert to be examined should be made. For a good examination, it is necessary to know the life of the expert or witness, how he/she thinks, if he/she was involved in other arbitration or legal cases and his/her testimonies, how he/she knew the parties, his/her personality, etc. For instance, it is important to know the language spoken by the witness or expert to decide the language in which the examination will be carried out.

It is also essential to investigate other public statements or the professional activity of the witness. A witness, for example, may give his/her opinion about if a certain machine worked and complied with market production standards and, however, never operated such machine or has started operating it few days before the hearing. Then, knowing this type of information is relevant to undermine the credibility of the witness. As far as experts are concerned, it is important to know their testimonies in other cases and, if any, find any contradictions or highlight those issues not contemplated in the expert report.

3) <u>Third Stage</u>: Strategic planning of examinations

Once the case and the witness has been thoroughly studied, the examination should be planned. It is crucial to know what we want to get from the testimony and how it can be found in the transcript of the hearing when concluded. Most practitioners prepare a list of questions to be used as a basis for the examinations. It is important to point out that the questions of such list should be adapted to the course of examination.

The "'[t]en Commandments of Cross-Examination' of Professor Irving Younger in *The Art of Cross-Examination*"[9] should be taken into account in the preparation of the examination:

1) Be brief, short and succinct

Attorneys like talking. However, during examinations, one should be as concise as possible, since a concise attorney, in terms of Professor Younger, has less chances of screwing everything up. Also, attorneys have limited time for each examination and hearings usually last several days, so the best way of keeping the tribunal attention is being concise and dealing with most complex issues of the case in the simplest way. The best way to ensure that the jury will follow and remember the key points you want to convey is to be brief.[10]

2) Use plain words

In addition to be concise, it is essential to use plain language. The tribunal and the witness and/or expert should clearly understand the questions.

One has to bear in mind that what one says is generally interpreted into, at least, two languages and transcribed at the same time. So, if complex structures are used, it is probable that translators doubt about the meaning and stenographers commit mistakes in drafting the transcript.

3) Ask leading questions

A basic premise of international arbitration is making leading questions not to lose control of the hearing. We can define "leading questions" as "a question that suggests the answer that that the questioner expects. Leading questions are the opposite of open-ended questions, which require a witness to provide a more expansive answer".[11] Basically, it consists in saying what we want the witness to say and then, if the witness simply confirms one's sayings, the statements are deemed to be made by the witness.

Open ended questions are Who? What? When? or Why? questions, "those are not leading questions and will allow the witness to explain her/his side of the story".[12]

It is essential to use leading questions, since the examiner would be able to anticipate the answer of the witness. If leading questions are made, the witness or expert may only answer "yes" or "no", since the answer is provided by the person who makes the question. Thus, if prepared, the examination may deal with the most convenient issues and if the witness answers evasively, the witness may firmly but respectfully be asked to limit to provide a "yes" or "no" answer for clarity purposes. An example of leading question would be:

W: You were the Vicepresident of the Company, didn´t you?

A: Yes.

W: You appointed Mr. Gomez as Manager of the Company, right?

A: Yes, I did.

Considering that the time allocated to each examination is

limited, if the witness starts to provide explanations that do not answer the question made and are detrimental to the position of our party, the examiner may request the witness to limit himself/herself to answer the question made.

It is usual practice to make simple questions unrelated with the facts of the case and just to know how the witness is at the moment and to make him/her feel comfortable at the beginning and then to make unexpected questions which he/she is not willing to answer for being contrary to personal interests. Ideally, the examiner must keep the witness expecting, not allow him/her to feel confident and start avoiding answers or providing explanations which have nothing to do with the question.

4) On cross-examination, you should never ask a question to which you do not already know the answer

It is quite dangerous to think only in getting a favourable answer and set aside the list of questions previously prepared on the basis of the witness' testimonies. To be carried away by the belief that the witness would testify something different is a common mistake in the first hearings of an examiner, since temptation is huge. Such temptation should be controlled in order not to waste time and let the witness answer at will.

In order to remedy any witness error, it is necessary to have all the documents proving the witnesses' answers available. Knowing the answer to every question you ask is not enough. You must be prepared to prove up the statement in your question immediately if the witness gives wrong answer.[13]

5) Listen

No matter how prepared the examining attorney is, new things always come out, so the examiner should pay attention to the witness, including body language and tribunal's questions. Great cross-examination requires applying your full powers of observation as the courtroom drama unfolds. The cross-examiner must watch and listen so that the preparation can be put to its fullest use.[14] It is crucial to listen to a witness´s answer before asking your next question.[15]

If, for example, a question is made and the witness looks at his/her attorneys for confirmation, it means that he/she feels uncomfortable with the question and maybe he/she is hiding something. The examiner should take this opportunity to make emphasis on the question. Therefore, even though the general rule is to have a list of questions and not to separate from such list, in such exceptional circumstances, the attorney should be able to set the list aside and make questions on the basis of the unexpected answer of the witness. If the witness is questioned about issues not related with the testimonies, new issues not included in the documents of the case generally arise. In this regard, it is important to be sure that no answer may affect the most important points of our case.

If, at any time, the witness alleges something different from his/her written testimony which is essential for the case, the examiner should refer to the relevant part of the written testimony of the witness where the contradiction arises and ask the witness and the tribunal to read the part of the text where the witness expressly stated the opposite of what he has just said. Thus, we are certain that the tribunal took note of the contradiction and would not forget it. If the document is not available at the moment, it is not advisable to go forward with the contradiction but to keep the material for closing statements or the post hearing brief. Below, we will discuss about the relevance of the use of technology in these cases.

6) Do not quarrel

The purpose of an examination is not to confront with the witness but to make him/her lose his/her credibility. Many times one feels tempted to face up to the witness but that would only make the tribunal take pity for the witness. Then, if the witness answers evasively, the best solution is to re-question firmly and show that the witness is refusing to answer the question. One should never discuss what the witness said or did not say, and use leading questions instead.

7) Avoid repetition

Time is of the essence in witness examinations. Then, it is essential to avoid that the witness repeat any previous statement. There will be time in the closing statements, if any, or in post-hearing briefs to make emphasis on the most important issues confirmed by the witness. However, in line with other authors, "If the witness has given testimony on direct examination that is helpful to your case, you should reintroduce those gems to the jury as many times as the judge will allow".[16]

8) Disallow witness explanation

The basic rule of any examination is to keep the examination controlled, and one of the most complex points of the examination is when the witness answers evasively or, on the contrary, says he/she will answer and in fact explains something completely different from the question. In these cases, the examiner should interrupt the witness, thank him/her for the answer and continue with the examination without giving the opportunity to twist the examination, or ask the witness to limit to answer affirmatively or negatively to the question made.

9) Limit questioning

Upon the witness' confirmation of one good point for our case, it is advisable not to go on asking about that point and to continue with the examination, since the witness may rectify any of his/her statements.

10) Save for summation (i.e. closing submissions).

The examination is not an opportunity to link statements or to explain the relevance of the witness' arguments. The witness should neither be explained about the reasons for making a question or the aim of a question. The witness should answer and the attorney should then link the answers to the facts of the case in hearing briefs or closing statements of the hearing, and explain

the main conclusions of the examination.

4) Fourth Stage: Prepare the witness

The attorney should instruct the witness to answer only what he/she remembers and, if he/she remembers nothing, to say so and go forward to the new question. The witness should be prepared for that, since examinations may become intimidating. The witness should not be intimidated or answer what may hypothetically have happened. When preparing a witness, the attorney should tell him/her that "his answers must not be based on speculation, guesses, or assumptions".[17]

The witness should keep calm during the whole examination and is entitled to explain his/her answers. Even though the attorneys for the other party interrupt him/her and limit his/her answers on the basis that the examination time is limited, the witness should impose upon with the help of his/her attorneys and clarify his/her answer to avoid misinterpretations.

Witnesses usually assume the hearing would be a mere formality. However, after the first preparation hearings, this assumption fails. For that reason, it is essential to devote time to preparing witnesses, making mock hearings for the witness to feel confident, be coherent and reliable and to answer the questions correctly. If the parties are not prepared, the pressure at the hearing makes most witnesses answer the first thing that comes to their minds. Thus, in order for witnesses not to commit mistakes, they should think if they effectively understand the question, what the purpose of the question is and what happened. They should never answer quickly without thinking the answer. An unprepared witness may overthrow the case in full.

At mock hearings, legal authors specialised on this subject have stated that "the witness should have been confronted with every document with which his testimony may be challenged at the actual hearing. Every prior statement that could be thought to be inconsistent with his testimony should have been thrown at him … Ideally, the witness will be immunized against surprise at the hearing".[18]

The witness should be prepared to receive offensive, ambiguous or obscure questions of the other party, and not be surprised if the first questions are personal questions to the witness that have nothing to do with the case and are intended to make the witness vulnerable.

5) Fifth Stage: Hearing

The hearing is an opportunity to show our case to the tribunal and impress it. For this reason, it is important to think about every detail. As mentioned above, all what is said at the hearing is included in the transcript. We should think about this all the time. For example, every time we refer to a document, we should specify the exhibit number given to such document in the records -even if already mentioned-, because it is the only form the tribunal and the other party may follow our presentation and the hearing transcript reads easily.

A folder is usually given to the members of the tribunal, to the other party, to translators and stenographers. The documents to be used during the examination should be added to this folder.

Some attorneys decide not to include an index in such folder, so that the witness does not anticipate the questions.

Further, it is important to pay attention to stenographers' notes. The attorney should not only think in what is being said and how it is being said, but it should also follow the simultaneous transcripts generally made in Spanish and in English, and if any stenographer commits a mistake or misinterprets a word, the attorney should raise the point at that time and kindly request to correct the notes, since such mistake or misinterpretation may be decisive in the transcript.

Finally, the use of technology at the hearing should be considered. Using photos, images or even graphics to explain our point may be useful or even necessary for the tribunal and the witness in many cases. Philip Beck even confirms that "studies show that 70 percent or so of the information that we retain comes in visually, rather than through our ears".[19]

Visual material should be simple, not full of graphics or figures, so that attention may be kept on the oral and visual presentation. If the witness ignores any document of the records, the correct use of visual material may be extremely useful. In this case, one may project the exhibit ignored by the witness on the hearing screens and show witness' low credibility. For example, if we are examining the accountant of a firm and ask him/her if the company took a loan for USD 50 million, and the witness answers "no", it is sufficient to show on the screens the relevant section of the balance sheet of the company where the loan has been reflected to prove that the expert or witness is lying.

A common characteristic of Latin American attorneys is to make the witness admit a disputed issue during the examination. However, this is not the purpose of the examination. It is to convince the tribunal. It is not necessary and it is not common as well that the witness accepts he/she was wrong. In the example above, even if the witness said that the company did not have a loan for USD 50 million, words are no longer necessary since the tribunal saw such loan on extract of the balance sheet on the screen. The purpose has been attained.

In conclusion, we can affirm that an effective examination in international investment arbitration is the most complex and important challenge for an attorney, but also a rewarding experience if the examination is prepared correctly. There are no perfect testimonies because even the best witness contradicts himself/herself.

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ARTICLE ON THE CROSS-EXAMINATION OF EXPERTS

By Juliette Fortin

In this article, I present my personal experience of cross-examination as a quantum expert. Some aspects might be similar to the ones experienced by experts in fields other than accounting, finance and economics (for example, technical experts). However, I do not express any views on the role of those experts.

I first give a brief overview of the expert's role in international arbitration proceedings; I then highlight the goal and importance of the cross-examination portion of those proceedings and present the various types of cross-examination. Having described the process, I subsequently discuss in detail the key success factors for a good cross-examination exercise, from my perspective as quantum expert.

The expert's role in an international arbitration proceeding

During an international arbitration proceeding, it is common for expert witnesses to be appointed by the respective parties to provide an expert opinion. The expert witnesses can also be appointed by the tribunal, but I have come across this less often. The nature of the involvement of an expert during the proceedings varies from one arbitration case to the other.

Although systematic intervention does not occur during the entire procedure, the services rendered by the expert can generally be summarised in three main steps.

In the first step, the expert who has been appointed by the Claimant usually reviews documents which are relevant from a financial perspective, and sets out an assessment of the quantum in an expert report. On the other side, the expert who has been appointed by the Respondent will typically review the Claimant-appointed expert's report, provide commentary and criticism and, if necessary, offer a counter-valuation of the quantum in a responding expert report.

In the next step, there is usually a second round of expert reports, in which the experts will provide additional comments and potentially update their valuations in light of points made by the other expert or any information made available since the issuance of their respective first reports.

In the last step, both experts can be asked to provide oral testimony during the hearings, in order to explain their perspectives and points of disagreements. The cross-examination phase occurs during this last step.

In international arbitration, it is also possible that expert witnesses who have submitted written reports are not called to provide oral testimony at the hearing. This may happen for various reasons, for example if the opposing party believes that it might not gain or it might even lose from the cross-examination of the opposing expert.

In my experience, quantum is usually an area of interest during the hearing phase, with quantum experts being called for oral testimony more often than not. This is particularly true as cases brought to international arbitration become more and more complex.

The goal and importance of the cross-examination of experts during the hearings

I understand that the main goals of the cross-examination are to confirm or clarify if needed the expert's position and assessment of losses, to test the expert's credibility and to determine if the expert testimony is truthful, free of mistake and independent; this is the reason why an American jurist and law expert once said that "*[c]ross-examination is the greatest legal engine ever invented for the discovery of truth*".[1] In this respect, the testimony of the expert during cross-examination is of prime importance, since it is the main opportunity for the tribunal to form an opinion on the expert, beyond reviewing the written evidence.

In my experience, it is true that the testimony of an expert can significantly influence the tribunal's understanding of the financial issues, and it can therefore have a large impact on the outcome of the decision. As the issues at stake in commercial and investment disputes become more and more complex, the parties tend to make increasing use of experts to assist them.

Methods of cross-examination

Rules that regulate cross-examination vary from jurisdiction to jurisdiction, and they are not always written.

The "traditional cross-examination"

In practice, the cross-examination process in international arbitration has begun to standardise. In my experience, the most common method of hearing oral testimony from each party's appointed expert is for the expert (i) to be questioned briefly by the counsel for the appointing party ('direct examination'); (ii) to be cross-examined by the examining counsel ('cross-examination'); (iii) possibly another short questioning by the counsel for the appointing party ('re-direct'); and finally (iv) to be questioned by the arbitrators.

In the direct examination, the questioning by the counsel for the appointing party is generally limited to a few questions introducing the expert and key points of the reports. This questioning can often be replaced and supplemented by a presentation by the expert of the key points of the written testimony.

The parties that question the expert do not share the same objectives and will therefore ask different questions. Further, each counsel has his or her own style and will set up a specific environment for the questioning, from the most friendly, to the most aggressive, passing by more neutral style. I will come back to the expert's attitude in facing those different counsel styles later in this article.

The tribunal will also generally ask questions to the expert. I have observed that the practice of questioning by the tribunal varies from one case to the other. In some cases, the tribunal is very active throughout the whole cross-examination session, interrupting the examining counsel if needed, in order to get answers to its own list of questions. In other cases, the tribunal is less engaged and asks very few, if any, questions, generally at the end of the expert's testimony.

In the recent cases I have been involved in, I have encountered a fairly significant involvement by the tribunal members in the examination [2]of quantum experts, the only exception being in a context where the tribunal had decided to appoint its own quantum expert and therefore did not engage in the quantum discussion during the hearing. I personally appreciate this involvement as it gives us, experts, the opportunity to address directly the tribunal's questions.

Witness conferencing

Although direct and cross-examinations still prevail, the examination of experts in international arbitration has gained more flexibility in recent years with "witness conferencing" (also known as "hot-tubbing"), in which both party-appointed experts are examined simultaneously.

This approach, if it occurs, generally occurs in addition to the traditional cross-examination. The counsel or tribunal question both (or more) experts at the same time. This system

allows the tribunal to hear both experts answering the same question, in turn. It is therefore much more interactive and dynamic than the traditional cross-examination.

I believe that there are three main advantages to this approach. First, experts tend to be more forthcoming when tribunal directly asks questions; they feel as if they were being asked to assist, rather than being attacked by the opposing counsel. In this respect, the tribunal can obtain more forthright answers. Second, this method allows the tribunal to easily understand areas of agreement or disagreement between the party-appointed experts. Third, questions in these sessions usually deal with main issues and it gives the experts the opportunity to explain their position in a constructive environment.

While this approach has its advantages, witness conferencing also presents important risks for the expert. This procedure may favour experts who have a robust experience and a strong ability to react, and when the experts do not have a similar level of seniority, their respective statuses can affect the way the hot tubbing proceeds.

My experience of hot-tubbing sessions is that it is a helpful and more interactive process, which brings the focus of the debate on key issues and when the tribunal members engage in the discussion, after a sometimes less helpful cross-examination potentially focused on marginal points aiming at discrediting the expert.

Key success factors for a cross-examination

An expert witness's testimony does more than repeat and dictate written conclusions of the submitted report. Rather, an expert's oral testimony should be seen as an opportunity to bring the written submission to life. If the expert makes a favourable impression, the testimony may even have an immediate persuasive impact on the tribunal.

In my view, making an effective presentation to the tribunal requires the expert to (i) show intrinsic qualities; (ii) be well prepared; and (iii) have an appropriate communication style.

Intrinsic qualities of an expert

Experts are expected to be independent

It is the primary duty of an expert to provide the tribunal with an independent and objective expertise at all stages of the procedure.

This duty is for example highlighted in the Preamble of the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, issued by the Chartered Institute of Arbitrators in 2007 (CIArb Protocol), according to which "*experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them*". Article 4 even declares that "*An expert that gives evidence in the Arbitration shall be independent of the Party which has appointed the expert to give such evidence*", that "*An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party*", that "*An expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced*".

Lawyers sometimes try to challenge the independence of an expert. A well-experienced expert must stick to the objective facts on the case and not be biased by possible arguments of the appointing party.

Credibility is the expert's strongest asset

My experience has been that we experts want to preserve our credibility and reputation. To do so, we adopt an independent position that we believe to be correct based on the facts, regardless of which party hired us. Losing credibility is the worst thing that can happen to an expert as it can ruin his or her career.

To be credible, an expert opinion must therefore provide an objective assessment. It must also take account of the facts, regardless of whether or not those are in favour of the appointing party.

In any case, it is counterproductive for an expert to defend the position of the appointing party at the expense of providing clear explanations to the tribunal on certain issues.

My experience has also been that lawyers appreciate the independence of experts. It gives them comfort that the positions adopted by the expert are robust, as they are reasonable and based on objective facts. This limits the risk that the expert's cross-examination by the opposing party negatively affects the outcome of the case.

I have personally experienced difficult discussions with clients who were passionate about the alleged damages and had difficulty understanding that the loss they suffered was lower than they had thought. In those cases, it is very important for an expert to discuss the issue with the client and appointing counsel as soon as possible and to remain independent, as pleasing the client by adopting a biased position is a dangerous short-termist attitude that does not take into account the expert's duty of independence to the tribunal and can destroy the expert's credibility for the long-term.

The expert must show relevant expertise and credentials

It seems an obvious requisite but is worth noting: an expert must show relevant expertise and credentials in light of the issues at stake in the case. For example, accounting issues should be dealt with by qualified chartered accountants. Where specific industry expertise is key to the determination of the quantum, then the expert should have the relevant industry knowledge or make sure such expertise is brought to the case by another expert.

An expert must be well prepared for cross-examination

Expert's cross-examination preparation

A single sentence from the expert can ruin that expert's evidence as it can be used adversely by the examining counsels in their closing statement to support one of their positions. To avoid doing so, expert preparation is paramount before going on the stand, as the process can easily put the expert under a lot of stress and pressure.

A good preparation starts by delineating the exact perimeter in which the expert was asked to provide an opinion. This will help the expert to remain in his or her area of expertise and clearly state when the question is out of the bounds of this expertise. By doing so, the expert will preserve credibility and will not harm the position of the instructing party.

Although this may seem to be the most obvious point, the expert must have a perfect knowledge of the entire submitted report, including the core report, its appendices and exhibits: where the information came from, how the figures were calculated, and why such conclusion was logically drawn.

In practice, the hearing phase usually takes place a few months or even a year after the last expert report was submitted. It is therefore very important for the expert to refresh his or her mind with the full case details.

Mock cross-examinations are a very good exercise for the expert to get prepared. Lawyers preparing the expert can usually anticipate a significant portion of the questions that will be asked during cross-examination. To be effective, these mock cross-examinations should be as realistic as possible.

Also, the expert should remember all the cases in which he or she has previously testified, as well as the positions adopted, as the opposing party may try to demonstrate inconsistency of positions by referring to a previous case or an article written by this expert.

Adverse party's cross-examination preparation

The preparation phase usually includes our expert assistance to the lawyers in their drafting of cross-examination questions for the other side expert. The expert is best placed to understand the main flaws of the other side's positions, as he or she has already performed an in-depth review of the reports of the other side's expert and is thus familiar with those.

The expert must have the appropriate communication style

Ability to explain complex issues clearly and concisely

An expert needs to be able to be extremely clear and concise in expounding upon analyses and conclusions to the arbitral tribunal. The expert should be able to convince the tribunal that his or her view is reasonable, accurate and unbiased.

Often, the issues dealt with by the expert are complex. It is therefore key that the expert has the sufficient communication skills to use a language that the tribunal understands in order to convey the key messages, whether those are very technical or not.

The inability to explain technicalities or complex issues may even trigger a misunderstanding from the tribunal and affect the outcome of the proceedings. In my view, if one cannot explain clearly his or her position, assessment, assumptions, this might well be due to the fact that those are not understood by the expert him/herself.

Having the right attitude

When on the stand, the expert's posture, attitude and words chosen is carefully observed by the tribunal. These elements influence the tribunal's perception of the reliability of the expert's testimony.

Although each expert has his or her own personal style,

I believe that being excessively self-confident might cast some doubt on the seriousness of the expert's work. One cannot hide behind experience – as large as it might be – to answer all clarification questions regarding analyses performed for the case. In my view, staying humble and explaining the logical process behind each choice, while recognising the limits inherent to the analysis, sends a positive signal to the tribunal, causing it to become more disposed to listen to the expert's arguments.

Some questions asked during cross-examination are aimed at destabilising the expert in order to undermine his or her credibility. In these kinds of situations, the expert should stay calm and look confident rather than overreact. It is paramount that the expert shows a sense of serenity.

By showing the correct attitude, the expert conveys the message that he or she is at the tribunal's disposal to help its members resolve the complex issues they have been appointed to rule on; the expert must also convey that the best efforts were taken to provide unbiased and reasonable conclusions.

I also think that the role of the expert is not to put too much emphasis on the disagreements between the parties. The expert should not hesitate to clearly recognise when his or her views are in accordance with the other expert. Again, by doing so, the expert sends a positive signal to the tribunal, showing that he or she aims at helping the tribunal identifying the divergence issues it should focus on.

The hearings are generally recorded in transcripts that the tribunal will review when finalising its award. In this context, the words used by the expert must be chosen with care as they will remain after the hearing. They must be in line with the overall message of objectivity that the expert should convey.

Oral skills

Cross-examination is first of all an oral exercise. Therefore, giving successful expert evidence requires mastering communication skills.

Fluency in the agreed language of the arbitration is almost always required; technical expertise could be particularly difficult to explain and the credibility of testimony could suffer if the expert is not fluent in the language of the testimony.

Moreover, as the entire cross-examination will be transcribed by a court reporter as explained above, it is important that the expert makes an effort to speak as slowly and clearly as possible. The expert should also bear in mind that physical movements, such as nodding, cannot be recorded on the transcript.

Answering questions

It is essential for the expert to fully understand the question asked before beginning a response. Some questions might be confusing, and the expert should not hesitate to ask the opposing counsel to rephrase if necessary.

The expert should answer the question succinctly – and only the question asked. However, in case the answer might be misleading taken on its own, I believe that the expert should not hesitate to briefly explain the context in which the answer should be understood. Doing so will avoid out of context answers that could be seen as contradictory to the expert's position.

The role of the expert during cross-examination is not to guess at the answer. The expert must be clear about the instances in which he or she is unsure about an answer or does not know the answer. Also, the expert should stick to his or her area of expertise and clearly state when the question asked does not fall in this area of expertise.

When the examining counsel is referring to a document, it is important to have the document in front of the expert. It is the only way for the expert to see the context, and to answer precisely the questions.

Conclusion

The cross-examination of experts is a key phase of the international arbitration proceedings, all the more so from the expert point of view. Whether it is done in the traditional way or through witness conferencing, the primary duty of the quantum expert is to assist the tribunal in determining the losses suffered, if any, by the claimant. Experts aim at being independent, credible, with relevant expertise for the case. They will prepare for the cross-examination, by reviewing their assessment of the losses and anticipating to the extent possible the questions they could be asked. During the cross-examination, key success factors will be their ability to orally convey clear messages out of complex issues and their right attitude towards answering questions. My sense is that the increasing familiarity of tribunal with experts' work and the professionalisation of experts serve the purpose of helping tribunals extract the most value from cross-examinations.

Juliette Fortin

1 John H. Wigmore, quoted in Lilly v. Virginia, 527 U.S. 116 (1999).

THE EVALUATION OF WITNESS EVIDENCE IN TIME-LIMITED ARBITRAL PROCEEDINGS: The Chess-Clock and the Rule in *Browne V. Dunn*

By Charlie Caher and John McMillan

Arbitral hearings frequently take place under severe time pressure. Among leading practitioners, the only disagreement is whether "[t]ime is ***a particularly precious commodity*** in international arbitral proceedings" or whether "[i]n reality, hearing time is ***the scarcest commodity*** in … arbitrations."[1] For the common lawyer, arbitral proceedings therefore tend to be shorter than court proceedings dealing with cases of equivalent complexity.[2]

The arbitral solution to this time pressure is to impose time-limits on counsel. One common method of imposing time-limits is the "chess-clock" or Böckstiegel method, where a party is given an overall allocation of hearing-time and is free to use that time as it chooses.[3] In a 2012 survey by Queen Mary, University of London, respondents reported that tribunals adopted the "chess clock" method in 36% of arbitrations, with a further 31% of tribunals allocating time-limits for each stage of the hearing.[4]

The adoption of shorter, time-limited hearings has significant consequences for the conduct of arbitral proceedings. The purpose of this article is to consider the implications of the chess-clock method on cross-examination, the part of arbitral hearings that generally demands the most time.

This article argues that the chess-clock system (or some form of time-limit for the presentation of evidence) is an unavoidable feature of modern international arbitration. However, its adoption requires arbitral tribunals to be flexible in their approach to the evaluation of evidence when a party does not have time to challenge all of the evidence presented by the other side in cross-examination. In particular, arbitral tribunals cannot adopt the common-law rule that all unchallenged evidence should be accepted unless it is inherently incredible.

The Chess-Clock System

As mentioned above, the chess-clock system is generally

understood to involve granting each party a certain allocation of time and permitting that party to use the time as it pleases.[5] For example, there might be an equal allocation of time between two parties to present their cases over a five-day hearing, with each party free to decide how it divides its time between opening submissions, examination-in-chief, cross-examination, re-examination, and closing submissions.

Although it is less usual, an arbitral tribunal might also impose a non-equal division of time, in circumstances where the parties are required to cross-examine different numbers of witnesses. Indeed, this is a variation on the chess-clock method that is recommended by Professor Böckstiegel himself.[6]

The potential implications of the chess-clock approach have been well summarized by Jan Paulsson:

> "[T]he tribunal leaves it to the advocates to devise their presentational strategy. If they have squandered the opportunity to present comprehensive and comprehensible arguments during the written phase, perhaps they will feel they must use much of their precious time during the hearings in 'providing clarifications'. ***If this turns out to be costly in terms of curtailing what otherwise might have been fruitful cross-examinations, they have no one to blame but themselves.*** They were on notice, and are in no position to make crestfallen pleas that they need accommodation. The Bockstiegel Method is for adults only, and they must be prepared to discharge their responsibilities professionally."[7]

The responsibility is therefore primarily on counsel to organise hearing-time effectively (although the arbitral tribunal plays an important role in controlling the evidence of witnesses and dismissing strategic or dilatory objections by counsel). If counsel fails to do so, their client will be disadvantaged and the tribunal only has limited tools to counteract that disadvantage (by, for instance, putting its own questions to witnesses that are not counted towards either party's time).

Advantages of the Chess-Clock System

The chess-clock system answers a commercial reality: parties have limited budgets and their counsel and arbitrators have limited time. It is in everyone's interest to limit the length of time allocated to arbitral hearings. International arbitration would be considerably less attractive if hearings had to be reconvened several months or a year later because one party's counsel failed to present its case fully in the allotted time.

The chess-clock system does not just respond to budgetary constraints: it can also have a positive influence on the conduct of proceedings. The chess-clock system can focus the submissions and evidence presented by counsel and help ensure the efficient use of hearing time. One arbitrator has gone so far as to say:

> "In every case in which I have been involved where a chess clock has been used, the time limit has forced the parties to present only material and relevant evidence, and it has avoided cumulative and unnecessary testimony. Never have I felt that important evidence was not able to be presented to the arbitral tribunal period."[8]

In addition, the chess-clock system can ensure equal treatment of the parties. The parties are notified in advance that they will be given equal time (or a different allocation of time, if the circumstances require it) and they are held to that time-limit. Many countries' arbitration legislation requires the parties to be granted equal treatment – and, in extreme cases, unequal treatment can be grounds for annulling or refusing recognition of an award.[9] Preserving equal treatment of the parties therefore forms part of the arbitral tribunal's duty to render an enforceable award.

The chess-clock – which gives the parties the freedom to decide for themselves how to spend their time during the hearing – is also an easy way for arbitral tribunals to navigate between different legal traditions. One practitioner defends the use of the chess-clock system, stating that:

> "In an international case where one party's counsel is from India and the other's from Germany, the former may expect 14 hours of opening statement over two days and the latter may content himself with 15 minutes, or with zero time at all. Again, if a chess clock method is used, each side will have the freedom and flexibility to allocate as it sees fit."[10]

(This reason for favouring the chess-clock method does, however, appear to conflict with the argument above that the chess-clock method improves the efficiency of the hearing. It is hard to imagine that an arbitral tribunal could be satisfied with the efficiency of the hearing in circumstances where one party gave a 14-hour opening statement and opposing counsel replied for 15 minutes. It is not efficient for the parties to talk past each other.)

The Implications of the Chess-Clock System on Cross-Examination

Cross-examination has its origins in the practices of common-law courts but is now standard in international arbitration, whether conducted by civil lawyers or common lawyers.[11] There are, however, significant differences between cross-examination in common-law courts and cross-examination in arbitration. One of the biggest differences is the relative scarcity of time in international arbitration.

As mentioned above, it is widely acknowledged that arbitral hearings tend to be shorter than common-law court hearings when dealing with cases of equivalent complexity.[12] Much of the arbitral community would argue that arbitral hearings should be shorter still. David Rivkin wrote in 2008 that: "I recently posited at an LCIA Symposium that virtually every case can be tried in two weeks or less. I was pleased to receive almost universal agreement on that point."[13] He recommended the chess-clock as one way of ensuring shorter hearings.[14]

But if the arbitral world is agreed that it would be beneficial for hearings to be shorter, it must also consider why common-law court hearings are longer, and what implications shorter, time-limited hearings have for the presentation and evaluation of evidence.

The Rule in Browne v. Dunn *in Court and in Arbitration*

One important reason why common-law court hearings tend to be longer is the rule in *Browne v. Dunn*, which exists in some form in most common-law jurisdictions.[15] The rule (derived from a 19th century English case) is that a party is required to challenge the evidence of any opposing witness if the party wishes to submit that the witness's evidence should not be accepted on a particular point. If unchallenged, the witness's evidence will be accepted.[16] There are limited exceptions to the rule, where the witness is put on notice of an allegation in advance and so has a fair opportunity to respond, and where the witness's evidence is inherently incredible.[17]

This rule is central to the purpose of cross-examination in common-law jurisdictions. In their article on the rule on *Browne v. Dunn* in arbitration, John Bellhouse and Poupak Anjomshoaa correctly state that:

> "Cross-examination is not merely a *right* for the benefit of the cross-examining party. In most common law jurisdictions, the process has also given rise to a positive *duty* to cross-examine or to put one's case to the witness if the cross-examining party intends to rely upon evidence or submit argument which contradicts that witness's testimony."[18]

The rule does not always lead to more enlightening cross-examination. Indeed, in court proceedings, common-lawyers may feel obliged to pedantically put every contention to the witness that they intend to make in their closing submissions, even where the witness can only be expected to give a bare denial.[19] This is time-consuming.

Arbitral practitioners differ wildly in how far they believe the rule in *Browne v. Dunn* does and should apply to arbitration. At one end of the spectrum, certain leading practitioners believe that the process of questioning witnesses in arbitration should not even be called cross-examination so as to emphasise that common-law rules of evidence do not apply.[20] Others state that the rule does not apply and, in any event, the policy aims of the rule are satisfied by the presentation of documents and submissions before a hearing.[21]

However, others believe that, even if the rule is not strictly applied in arbitration, it does and should apply to some extent.[22] Common-law arbitration practitioners have described compliance with the rule to be a matter of "procedural fairness"; and have described a failure to comply as "bad practice and improper conduct" and even "inconsistent with the basic human dignity of the witness."[23] Some practitioners warn that, before a common-law tribunal, "the failure to confront [a witness on a

contention] may put your plans at serious risk."[24]

The authors suggest that the differing approaches to the rule in *Browne v. Dunn* can be discerned from the differing length of arbitral hearings in common-law and civil-law arbitrations. In the 2012 survey by Queen Mary, University of London, 31% of respondents from civil law jurisdictions reported that the average duration of their hearings was 1-2 days, as compared with 9% of respondents from common-law jurisdictions. Conversely, 34% of respondents from common-law jurisdictions stated that the average duration of their hearings was 6-10 days, as compared with 12% of civil lawyers.[25]

The frequency of 1-2 day hearings in civil law jurisdictions suggests that evidentiary presumptions like the rule in *Browne v. Dunn* have a limited role (if any) to play in civil-law arbitrations. By contrast, common-law practitioners are less likely to accept a 1-2 day hearing not just because of a greater faith in the ability of cross-examination to reveal the truth, but also because they assume they have a duty to put their case. Two leading English practitioners argue that "proper cross-examination … may require days (or even weeks)" and that, although it is undesirable, if the parties run out of time, the hearing should be adjourned until the parties can complete the presentation of their cases.[26] This reflects a cultural difference not just regarding the proper length of hearings, but about the fundamental purpose of cross-examination and the consequences if cross-examination is cut short.

The Rule in Browne v Dunn *in Chess-Clock Proceedings*

Those that advocate for greater adherence to the rule in *Browne v. Dunn* in arbitration do so partly on the grounds that cross-examination is borrowed from the common-law tradition and so arbitral tribunals should have regard to common-law rules of evidence.[27] However, the tendency towards shorter hearings in international arbitration means that, so far as the duration of hearings is concerned, arbitrations can more closely resemble civil-law court cases than they do common-law court cases. The chess-clock system adopted in many arbitrations is in tension with the rule in *Browne v. Dunn* in at least three respects.[28]

First, the chess-clock assumes that it is procedurally preferable for a party to run out of time in the presentation of its case than for the tribunal to permit additional time for that party to present its case. That assumption may make sound commercial sense from the point of view of the parties to arbitration, but it is not the assumption in common-law court cases where the rule in *Browne v. Dunn* is applied more strictly. The leading English-law textbook on evidence suggests that witnesses should be recalled if counsel has failed to cross-examine on a particular contention.[29]

The rule in *Browne v. Dunn* cannot sensibly be applied in circumstances where counsel is pressed for time (or has run out of time), and so cannot (or has not) put every disputed contention to the witness. Jan Paulsson argues that, if a party is forced to curtail cross-examination because it runs out of time, "they have no one to blame but themselves."[30] But some arbitrators may feel uncomfortable about conflating so completely a party and its counsel (the party itself is unlikely to have used time inefficiently at the hearing) and may feel an obligation to get to the truth no matter who is to blame for running out of time. It would be disproportionate and would not serve the interests of justice if a party were prevented from making certain assertions, because that party's counsel did not properly estimate the time required for the hearing or failed to organise their hearing-time as well as they might have done.

Second, the chess-clock assumes that each party is free to use its time at the hearing as it pleases. Such a direction would be misleading if an arbitral tribunal intended to apply the rule in *Browne v. Dunn* strictly. In the example given above, Indian counsel who prepared a 14-hour opening submission would have destroyed their case before they came to the end of those submissions, if they left insufficient time to challenge the opposing party's witnesses in cross-examination. The imposition of a duty to put one's case to the opposing party's witnesses curtails each party's freedom to use its time as it pleases.

Third, the chess-clock requires parties to make strategic decisions about which witnesses to call and when. By contrast, the rule in *Browne v. Dunn* limits the ability of the parties to make such strategic decisions about their cross-examination. Instead, parties may feel obliged to cross-examine on every point where they wish to contradict the witness.

The resolution of these tensions does not mean abandoning the chess-clock method, which is an important tool to ensure the proper use of hearing time. And it does not mean abandoning the policy considerations that underpin the rule in *Browne v. Dunn*, which stop parties from skirting around major disputed issues and help ensure that witnesses are given a chance to explain inconsistencies and contradictions in their evidence when such explanations might exist. But it does mean that arbitral tribunals should address how the rule in *Browne v. Dunn* is to apply, if at all, at the start of proceedings – particularly if hearing-time is short and if counsel comes from different legal traditions (including where counsel may be more familiar with courtroom procedures).

At present, the evidentiary presumptions applied by arbitral tribunals and counsel are often opaque, and any conflicting presumptions may only become apparent during the course of the hearing itself. In many arbitrations, the parties will adopt the *IBA Guidelines on the Taking of Evidence in International Arbitration* as guidance, which state that the rule in *Browne v. Dunn* does not apply ("if the appearance of a witness has not been requested … none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement").[31] However, at least as far as common-law arbitrations are concerned, the authors agree with David Williams and Anna Kirk that: "while there is no official rule in international arbitration that a witness's evidence is accepted if not challenged, in reality this is likely to be the case."[32]

It is submitted that, if the parties agree on short, chess-clock hearings, arbitral tribunals should be slow to apply any

presumption about the weight of witness evidence that has not been challenged, absent agreement by the parties. An exception may be made for serious misconduct (such as fraud), where tribunals should expressly inform parties that they expect such allegations to be put to the witness.

In light of the above, it is legitimate for parties to reduce hearing-time in order to save time and costs, and to request a chess-clock system to ensure that the time is used evenly and efficiently. When time is short, advocates cannot be expected to fulfil a duty to put all points of disagreement to a witness. Instead, the purpose of cross-examination must be to test the evidence of the most important witnesses on the most important points in the time available. The chess-clock is an inelegant compromise, but a necessary one.

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1 *See* Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int'l 19 (2006), at p. 19; Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed., 2014), at p. 2271. (Emphasis added.)
2 *See* Blackaby and Partasides, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed., 2015), at para. 6.169; Born, *supra* note 1, at p. 2272; Williams and Kirk, "Fair and Equitable Treatment of Witnesses in International Arbitration – Some Emerging Principles", in Caron *et al* ed., *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015), at p. 367; Nappert and Harris, "The English Approach to Cross-Examination in International Arbitration", in Newman and Sheppard ed., *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, LLC, 2010), at p. 258.
3 Born, *supra* note 1, at p. 2272; Paulsson, *supra* note 1, at p. 21. Professor Böckstiegel actually argued that his method should not be equated with the chess-clock method, and that there must be some flexibility to proceedings. *See* Böckstiegel, *Party Autonomy and Case Management – Experiences and Suggestions of an Arbitrator*, 2013 SchiedsVZ 1, at p. 5.
4 Queen Mary, University of London, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (2012) (http://www.arbitration.qmul.ac.uk/docs/164483.pdf)
5 *See above* at note 3.
6 Böckstiegel, *supra* note 3, at p. 5.
7 *See* Paulsson, *supra* note 1, at p. 22. (Emphasis added.)
8 Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 Arb. Int'l 375 (2008), at p. 377.
9 *See*, *e.g.*, English Arbitration Act 1996, at ss. 33(1)(a) and 68(2)(a); *Swiss Federal Statute on Private International Law*, at Arts. 182 and 190.
10 Kreindler, "Cross-Examination against the Clock", in Newman and Sheppard ed., *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, LLC, 2010), at p. 116.
11 *See*, *e.g.*, Newman and Sheppard, 'Introduction", in Newman and Sheppard ed., *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, LLC, 2010), at p. xxix; Kent, "An Introduction to Cross-Examining Witnesses in International Arbitration" TDM 2 (2006).
12 *See above* at note 2.
13 Rivkin, *supra* note 8, at p. 383.
14 Rivkin, *supra* note 8, at p. 383.
15 On the adoption of *Browne v. Dunn* in numerous common law jurisdictions, *see* Bellhouse and Anjomshoaa, *The Implications of a Failure to Cross-examine in International Arbitration* (2008) (https://international-arbitration-attorney.com/wp-content/uploads/the-implications-of-afailure-to-cross-examine-ininternational-arbitrationthis-article-was-firs.pdf), at pp. 1-4. Another obvious reason for longer court hearings is that common-law judges often have limited time to prepare for hearings and may not have the benefit (or burden) of developed memorial-style written submissions. The hearing can be a chance for counsel to introduce judges to the case. Arbitrators, by contrast, will have been involved with the case for months (or years) by the time of a hearing and should be familiar with (at least) the main submissions and primary documents.
16 *See Browne v Dunn* (1893) 6 R 67 HL; *Tullow Uganda Ltd. v Heritage Oil and Gas Ltd.* [2013] EWHC 1656 (Comm), at paras. 61-62; Malek *et al* ed., *Phipson on Evidence* (Sweet & Maxwell, 18th ed., 2013), at para. 12-12.
17 *See Browne v Dunn* (1893) 6 R 67 HL; *Tullow Uganda Ltd. v Heritage Oil and Gas Ltd.* [2013] EWHC 1656 (Comm), at paras. 61-62.
18 *See* Bellhouse and Anjomshoaa, *supra* note 15, at p. 1. (Emphasis in original.)
19 *See*, *e.g.*, the hypothetical example in Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration* (Kluwer Law International, 2015), at p. 148.
20 Cremades and Cairns, "Cross-Examination in International Arbitration: Is It Worthwhile?", in Newman and Sheppard ed., *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, LLC, 2010), at pp. 241-242.
21 Waincymer, *Process and Evidence in International Arbitration* (Kluwer Law International, 2012), at p. 916, fn 99.
22 *See generally* Bellhouse and Anjomshoaa, *supra* note 15.
23 *See* Rowley, Koehnen, and Wisner, "Confrontation – Techniques for Impeachment", in Newman and Sheppard ed., *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, LLC, 2010), at p. 37; Williams and Kirk, *supra* note 2, at p. 368; Landolt, "Take the Witness: Cross Examination in International Arbitration – Book Review" TDM 2 (2011) (Landolt argues that the formal rule should not apply, but it is proper for witnesses to be confronted with accusations of dishonesty).
24 Rowley, Koehnen, and Wisner, *supra* note 23, at p. 37.
25 Queen Mary, University of London, *2012 International Arbitration Survey 'Current and Preferred Practices in the Arbitral Process* (2012) (http://www.arbitration.qmul.ac.uk/docs/164483.pdf).
26 *See* Leaver and Forbes Smith, "The British Perspective and Practice of Advocacy", in Bishop and Kehoe ed., *The Art of Advocacy in International Arbitration* (JurisNet LLC, 2010), at pp. 494 and 496.
27 *See* Williams and Kirk, *supra* note 2, at p. 368; Bellhouse and Anjomshoaa, *supra* note 15, at p. 6.
28 The tension between shorter hearings and the rule in *Browne v. Dunn* is addressed in Williams and Kirk, *supra* note 2, at p. 367.
29 Malek *et al* ed., *Phipson on Evidence*, *supra* note 16, at para. 12-12. The same passage suggests that the rule in *Browne v. Dunn* should be relaxed in court proceedings if the parties have agreed to limit the time at hearing. In the English court case of *Multiplex Constructions (UK) Ltd. v. Cleveland Bridge UK Ltd.* [2008] EWHC 2220 (TCC), the parties agreed to adopt the chess-clock method to limit time at hearing to three months, and it appears that the parties left the evaluation of much of the evidence to the judge's discretion (see para. 8).
30 *See above* at note 7.
31 *See* International Bar Association, *IBA Guidelines on the Taking of Evidence in International Arbitration* (2010), at Art. 4(8).
32 *See* Williams and Kirk, *supra* note 2, at p. 369.

REFORMING INTERNATIONAL ARBITRATION FROM THE INSIDE – THE PROACTIVE ROLE OF INTERNATIONAL ARBITRATORS

By Bogdan-Florin Nae

Motto: "*Never in the history of international arbitration has it been both frequently used and so frequently criticized.*"[1]

I. Introduction. "*Due Process Paranoia*" and the Need for Reform of International Arbitration

Since time immemorial, it has been a commonplace to describe the advantages of arbitration in contrast with national court adjudication. Among them, economies of time and money have been spearheading the list – both in legal scholarship[2] and in the relevant case law[3] – since relatively recently. Nowadays, however, this view has become obsolete even in theory. As noted in a leading scholarly work: "*[i]t used to be said that arbitration was a speedy and relatively inexpensive method of dispute resolution. This is no longer so, at least where international arbitration is concerned*"[4]. International arbitration users themselves no longer praise its swift mechanism and seem to be becoming more and more dissatisfied with it. Indeed, a staggering 68% of the respondents to 2015 Queen Mary's Survey, when asked what the three worst characteristics of international arbitration are, listed among them its large costs, and 36% listed its lack of speed[5]. Although this might suggest that – at least in the Survey's respondents' view – there is not a strong correlation between time and costs issues in arbitration[6], in reality, usually, the longer the procedure, the bigger at least some of its costs, *e.g.*: (i) the arbitrators' fees, (ii) those of the parties' counsel, (iii) those of the administering arbitral institution, as well as (iv) those of the various legal and technical experts, (v) arbitration's logistical costs (such as those entailed by extensive travelling, renting conference rooms, hotel rooms, etc.[7])[8].

Perhaps the major identified reason for the current state of international arbitration is what has inventively been called "*due process paranoia*"[9]. It appears that currently there is a "*<<never-ending battle>> between efficiency and due process*"[10] which widens the gap between expectations and reality: out of fear that dismissing a procedural request – regardless of how ungrounded it might be – may affect the requesting party's due process

rights, international arbitrators will go for the safer route and uphold it[11]. Simply put, due process is unfortunately becoming an instrument of procedural abuse, being more and more used a sword, rather than as a shield[12].

Without attempting to impose any causal oversimplification, this study will briefly elaborate on a model which tends to reduce costs by reducing the length of an arbitration procedure. More specifically, the main idea developed here is that arbitrators must be brave enough so as to take up the role of guardians of arbitral efficiency and must do so by streamlining the process as much as necessary through the use of their procedural discretion – without, of course, affecting the parties' procedural rights. In order to support this idea, we will first argue that arbitrators are in the best position, out of all stakeholders, to reform international arbitration, and they should do so by exercising their procedural discretion (**II**). Second, we will demonstrate that the current legal regime of international arbitration supports this approach (**III**). Third, we will show that inhibitions from doing so on the part of arbitrators are not grounded (**IV**). Finally, we will provide some brief conclusions (**V**).

II. Who Should Reform International Arbitration and How Should This Be Done?

The process of reforming the current state of international arbitration is certainly no easy task for its stakeholders, but, as we will show below, some may be in a position to achieve better results than others.

First, national legislators appear to be best suited for doing so, since domestic procedural rules greatly influence international arbitration or, as Prof. P. Sanders beautifully put it, "*[f]alling back on national arbitration laws apparently cannot be avoided*" and international arbitration can be compared with a young bird: "*[i]t rises in the air, but from time to time it falls back on its nest*"[13]. However, concluding that national lawmakers can easily change the *status quo* would be wrong, given that they always have to be careful not to a disturb the sensitive balance achieved by the current quasi-harmonization between the domestic regulation of international arbitration in many states – there is arguably a certain alignment between the laws and practices of the most developed jurisdictions, notwithstanding unavoidable domestic differences. Additionally, requirements instituted by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "NYC") would be difficult to modify, as it is extremely difficult to obtain the consent of more than 100 states, and, as advocated by some[14], counterproductive. Finally, re-amending the 1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006 (hereinafter, "UML") – which anyway is not envisaged and probably would be difficult to achieve – would be relevant only insofar as it would be followed by an according modification of domestic regimes.

Second, since they are most affected by international arbitration's current drawbacks, arbitration users might be in the best position to eliminate them. However, requiring the parties to reform the system would be unrealistic: although they complain about arbitration's lengthy and expensive character, they are at the same time benefitting from it, most often when they find themselves in the position of a respondent, by making use of dilatory tactics[15]. Once entered into an arbitration, the primary concern of the parties and of their counsel will not be being done with it soon, but being done with it in a favourable manner[16]. And in the framework of a much expected transaction, the parties and their transactional lawyers are more preoccupied by opening the bottles of champagne than negotiating the midnight clause usually 'thrown' at the end of the contract and tailoring the proceedings so as to avoid potential abuses of process, should a dispute arise.

Third, arbitral institutions might be best suited for this task, since they benefit from an invaluable insight into the practicalities of many disputes. Although the leading players on the market for arbitration institutions have proved to be genuinely preoccupied with the users' concerns and protests, there is not that much that they can do. They could – and did – modify their arbitration rules and introduced much needed innovations[17]. They also produced a breadth of soft law instruments, which complement their rules[18]. However, apart from this, they are not truly the ones 'in charge', as they cannot possibly foresee the mechanics of each dispute to be resolved under their rules and they do not have the power to give binding procedural directions to the parties, as arbitrators can.

From all of the above, it follows that reforming the current state of arbitration is ultimately a matter of practice, and should be considered on a case by case basis. This leads us to the conclusion that arbitrators may, in fact, be in the best position to do so[19]. Although in international arbitration's recent history, a considerable emphasis has been put on guidelines, codes of best practices and other soft law instruments addressed to arbitrators[20], there will always remain "*rule-free zones*" in which they will have to decide[21].

Consequently, is our contention that, in order to improve the state of the system, arbitrators must assume a proactive role in the course of the proceedings. In this respect, they can draw useful inspiration from the "*principle du juge activ actif*" (also called "*l'activisme du juge*"[22]), governing the conduct of national court judges existent under civil procedure provisions in civil law jurisdictions[23]. This could be translated as the proactive role of international arbitrators – or, in other words, arbitral activism –, which simply refers to their "*taking charge and staying in charge of the arbitral process*"[24].

III. The Current Legislative Framework Governing International Arbitration Favours Proactive Case Management by Arbitrators

Under the most important national laws – including the UML – (**A**) and international arbitration rules (**B**), international arbitrators are entrusted with a broad power[25] to determine how the cases are to be conducted, subject to the mandatory provisions of the applicable procedural law and, in most cases, also to the agreement of the parties[26]. In other words, the current legislative – be it hard or soft – framework of international arbitration supports a proactive approach to procedural decisions, and arbitration users are well aware of this: answering to 2015

Queen Mary's Survey, "*[s]ome interviewees commented that most institutional rules offer the mechanisms for arbitrators to be firm and decisive, but that these tools are often not used effectively. It was therefore suggested that rather than there being a <<lack of effective sanctions during the arbitral process>>, the issue is more a <<lack of effective use of sanctions>> by arbitrators*"[27].

A. The Approach Prescribed by UML and by National Arbitration Legislation: International Arbitrators' Residual Procedural Discretion

In principle, the UML, as well as the national procedural laws of the most developed jurisdictions, entrust the arbitral tribunals with broad powers to make procedural decisions. However, the arbitrators are not given *carte blanche*, as under most of these provisions their powers can easily be superseded by the parties' agreement and they become applicable only absent such agreement – hence our proposed denomination: "residual procedural discretion".

The UML contains, in its Art. 19, a rule which has reportedly been called by the UNCITRAL Secretariat a part of the "*Magna Charta of arbitral procedure*"[28]. According to Art. 19(2), in the absence of an agreement by the parties on the procedure to be followed by the arbitral tribunal[29], the latter is enabled "*to conduct the arbitration in such manner as it considers appropriate*". Furthermore, the same provision makes it clear that "*[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence (emphasis added)*", thus suggesting that the enumeration is only meant as an example and is not limitative.

Section 33(1)(b) of the 1996 English Arbitration Act[30] provides, as a general duty of the tribunal, that it "shall […] adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined". Nevertheless, Section 34(1) seems to adopt the same approach as Art. 19 of the Model Law, providing that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter (emphasis added)".

Art. 1509(2) of the French Code of Civil Procedure [31] provides that "*[w]here the arbitration agreement is silent, the arbitral tribunal sets the procedure insofar as needed, either directly or by reference to a set of arbitration rules or to procedural rules*"[32].

Art. 182(2) Swiss Law on Private International Law (*Loi fédérale sur le droit international privé*)[33] provides that "*[i]f the parties have not regulated the procedure, it should be set, when needed, by the arbitral tribunal, either directly or by reference to a law or to a set of arbitration rules*"[34].

Therefore, it becomes clear that as per the legal *regime* of most sought-after jurisdictions, international arbitrators benefit from a residual discretion when deciding on various procedural issues.

B. The Approach Prescribed by International Arbitration Rules: International Arbitrators' Increasing and No Longer Residual Procedural Discretion

In order to enable the arbitral tribunal to efficiently manage the case, some arbitration rules – either *ad hoc* or institutional – contain provisions broadly empowering it to decide on procedural issues, some of these rules limiting, at the same time, the parties' right to agree on those issues[35]. This limitation is an innovation compared to the established party autonomy-

based conception of international arbitration and might suggest a shift in the current conceptual foundations of international arbitration towards a more jurisdictional – as opposed to a mixed or contractual – approach.

For example, Art. 17(2) of the 2010 UNCITRAL Arbitration Rules[36] provides that the arbitral tribunal "*may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties*". Thus, in respect of timing issues, the arbitral tribunal is not bound by the parties' agreement and is enabled, after having heard the parties' positions, to exercise its own discretion[37].

In the same vein, the 2014 LCIA Rules[38] contain, in Art. 22, an all-encompassing rule laying down the additional powers of the tribunal with regard to the procedure. The most notable change introduced to the correspondent provision in the 1998 Rules is the elimination of the parties' ability to contract out of the powers of the tribunal under Art. 22[39]. As stated in the leading commentary of the LCIA Rules, "*[g]iven the source of the Tribunal's power, anchored in the Arbitration Agreement subject only to any mandatory legislation at the seat of the arbitration, this change shifts the balance of power*" and when agreeing to arbitrate under the 2014 LCIA Rules, the parties "*waive the right to restrict or eliminate any of the powers*" listed under Art. 22[40]. Interestingly, a comparable enumeration of the tribunal's powers is not to be found in many other international arbitration rules.

In the remainder of this sub-section, we will briefly present the relevant provisions of some more conservative institutional arbitration rules, which still pay a great deal of deference to the parties' agreement on procedural issues.

The 1998 DIS Arbitration Rules[41], in Art. 24.1, provide that "*[s]tatutory provisions of arbitral procedure in force at the place of arbitration from which the parties may not derogate, the Arbitration Rules set forth herein, and, if any, additional rules agreed upon by the parties shall apply to the arbitral proceedings. Otherwise, the arbitral tribunal shall have complete discretion to determine the procedure*".

Art. 19 of the 2012 ICC Arbitration Rules[42] reads: "*[t]he proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration*".

The 2016 SIAC Rules[43] seem to provide, in Rule 19.1, for a wide procedural discretion of the arbitral tribunal: "*[t]he Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute*". This approach is developed in Rule 19.4, which reads: "*[t]he Tribunal may, in its discretion, direct the order of proceedings, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case*". However, in what concerns more specific issues, Rule 27, laying down the additional powers of the tribunal, requires that such powers are held "*[u]nless otherwise agreed by the parties [...] and except as prohibited by the mandatory rules of law applicable to the arbitration*".

Art. 2(1) of the recently approved[44] 2017 SCC Rules[45] goes even further and sets out a general duty, both for the tribunal and the parties, to act efficiently and expeditiously[46]. However, Art. 23(1) of the same rules reads: "*[t]he Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties*".

As it can be seen, there are already broadly used and reliable international arbitration rules which afford great procedural discretion to arbitrators, to the extent that such discretion even trumps the parties' agreement. This is countervailed by the more numerous rules embracing the 'traditional' conception, which upholds the 'sanctity' of party autonomy. Far be it from us to suggest that party autonomy be sacrificed or that the second category of rules be abolished. As with most dilemmas, the more moderate approach should prevail: arbitrators should benefit from 'full' – and no longer residual – procedural discretion, but it should be exercised only in truly exceptional situations.

IV. Arbitrators Should Not Be Afraid to Adopt a Proactive Approach. The Fear of Setting Aside of Awards and the "*Effects on the Award*" Requirement as an Additional Safety Net

It is fairly probable that arbitrators' hesitation in making use of their procedural discretion can be first and foremost attributed to their perception that national courts will annul or refuse to recognize and enforce their awards if they put it to use[47]. Indeed, it goes without saying that arbitrators are only as good as their awards, which should be annulment-proof before the national courts at the seat and easily enforceable before the courts abroad. Moreover, some arbitration rules[48] provide for the tribunal's duty – although obviously a best efforts one[49] – to render an enforceable award, hence some arbitrators' perhaps excessive caution[50]. However, these concerns are not grounded, as reviewing courts rarely intervene in the procedural management decisions made by arbitrators[51]. In the remainder of this article, we will show that, besides the recently suggested "*procedural judgment rule*"[52], there is – at least in some jurisdictions[53] – an additional safety net: the "*effects on the award*" requirement.

Preliminarily, it must be stressed that although the decisions which are used to support our argument are from a limited number of jurisdictions, they can be applied *mutatis mutandis* to all Model Law jurisdictions, there being similarities in national approaches to mandatory procedural requirements[54]. This is reinforced by the provisions of the UML itself, which, in Art. 2, provides that in its interpretation, "*regard is to be had to its international origin and to the need to promote uniformity in its application*". Additionally, the deference paid in most jurisdictions by courts to the exercise of procedural discretion by arbitrators arises from the limited role of judicial intervention in international arbitration, as well as from the importance of efficiency[55] and finality in arbitral procedure, which are expected to be the cornerstones of arbitration in the legal systems of all civilized nations.

Generally, there are three main grounds for annulment

or non-enforcement of an award due to excessive use of the arbitrators' powers: (i) violation of the parties' right to present their case[56]; (ii) violation of the parties' right to equal treatment[57]; (iii) violation of any agreement between the parties[58]. While ground (i) may be fitted under Arts. 34(2)(a)(ii)[59] and 36(1)(a)(ii) UML[60] and Art. V(1)(b) NYC[61] respectively, ground (ii) is covered by Arts. 34(2)(b)(ii)[62] and 36(1)(b)(ii) UML[63] and Art. V(2)(b) NYC[64], and ground (iii) may fall within Arts. 34(2)(a)(iv)[65] and 36(1)(a)(iv) UML[66] and Art. V(1)(d) NYC[67]. In practice, requests based on these provisions are among the most frequent[68].

In our view, the arbitrators' fear is ungrounded. Indeed, as reported by the UML Digest Case Law, "*some courts have added qualitative requirements as to the gravity of the breach or its effect on the award*"[69], requesting proof from the applicant that the award was based on the breach[70]. This is called the "*effects on the award*" requirement[71].

More specifically, national court decisions in Model Law jurisdictions have emphasized the narrow and exceptional character of Art. 18's mandatory procedural provisions (sometimes referring to them as "*minimum procedural standards*"[72] or "*judicial philosophy of minimal interference*"[73]) in actions to annul or deny recognition of an award. For instance, a court in Canada held that the "*conduct of the Tribunal must be sufficiently serious to offend the court's most basic notions of morality and justice to offend Article 18 or Article 24 of the Model Law*"[74]. In the same jurisdiction, it was held that in order to lead to the setting aside of an award for violation of due process, the conduct of the tribunal must have been sufficiently serious to offend the most fundamental concepts of morality and justice and it was required that the alleged violation of this principle have an effect on the award's content[75]. Similarly, a German court, in a case where the presentation of a witness was rejected by the tribunal, required the applicant to state what the witness would have said and how its deposition would have affected the outcome of the dispute[76] and a in a case decided in the same state the tribunal's refusal to hold a hearing was not found to be a violation of due process because the applicant did not prove that the presentation of arguments at that hearing would have led to a different outcome[77].

Similarly, as stated by a distinguished scholar and practitioner in the field, "*only procedural decisions by an arbitral tribunal that are grossly unfair and one-sided, or that effectively preclude a party from presenting its case, will be held to violate a party's rights to equal treatment or a fair hearing*"[78].

What is more, some court decisions provided that even if one of the grounds for setting aside an award were fulfilled, it was still within the discretion of the court to decide whether the award should be upheld or set aside and setting aside should be based on a serious defect in the arbitral procedure[79]. It was rightly argued that arbitrators should not fear using their powers because national courts "*accept an arbitral tribunal's unreviewable decision-making prerogative when it comes to the determination of individual procedural situations*"[80]. This deference to the arbitrator's discretion means that "*[i]t is not ground for intervention that the court considers that it might have done things differently (emphasis added)*"[81]. The courts will intervene only if they find "*that things must have been done differently in order to safeguard the parties' rights (emphasis added)*"[82].

Courts therefore afford arbitral tribunals the "*widest discretion permitted by law to determine the procedure to be adopted, and to ensure the just, expeditious, economical and final determination of the dispute*"[83] and arbitral tribunals' concerns with respect to the potential setting aside or refusal of recognition and enforcement of their awards due to their use of the procedural discretion to which they are entitled are not justified – unless, of course, the arbitrators' conduct is indeed excessive, in which case the competent national courts should rightly have no mercy for the 'tainted' part of the award.

V. Conclusion

At the end of our modest contribution, it can be seen that there is some potential to the idea that arbitrators are best positioned, have the legal instruments and should not be afraid, to adopt a proactive role in order to reform international arbitration form the inside, as urged by arbitration users.

Of course, there is only so much that legal authors can do in this respect. Their role is intrinsically limited to that of architects of this reform. Ultimately, it is upon arbitrators to build on the scholarly constructions and assume the role of artisans of positive change and while experience does is certainly important for finding "*a way of combining firmness with fairness*"[84], younger arbitrators can definitely play a role in the fruitful evolution of international arbitration.

In any event, we hope to have encouraged further reflection and debate on the role of arbitrators in reforming the system of international arbitration. Most certainly, any discussion – either approving or disapproving the author's point – on the thorny issues raised by this much needed reform is most welcome.

Let us not forget that "*[t]he development of the doctrine of international arbitration, considered from the standpoint of its ultimate benefits to the human race, is the most vital movement of modern times*"[85].

Bogdan-Florin Nae

1 *Making International Arbitration Suitable for the 21st Century*, Distinguished Leading Practitioner Lecture delivered by Mr. D. W. Rivkin at the Center for the Interdisciplinary Study of Conflict and Dispute Resolution of the Case Western Reserve University School of Law on 19 October 2011, available at <*http://law.case.edu/Lectures-Events/Webcast/lecture_id/275*>.

2 See G. B. Born, *International Commercial Arbitration*, 2nd edition, Kluwer Law International, Alphen aan den Rijn, 2014, pp. 85 *et seq*.

3 See, *e.g.*: "*[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed*" – *Stolt-Nielsen S.A. et al. v. Animalfeeds International Corp.*, Supreme Court of the U.S., 27 April 2010; the "*twin goals of arbitration*" are "*settling disputes efficiently and avoiding long and expensive litigation*" – *Folkways Music Publishers, Inc. v. George David Weiss, June Peretti, Luigi Creatore and Abilenemusic Corp.*, U.S. Court of Appeals for the Second Circuit, 26 March 1993.

4 N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, 5th edition, Oxford University Press, Oxford, 2009, para. 1.100, p. 34.

5 Queen Mary, University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, p. 7, available at <*http://www.arbitration.qmul.ac.uk/docs/164761.pdf/*>. See also other surveys: "*[f]or respondents who considered arbitration not to be well suited to their industry, costs and delay were cited as the main reasons more than any other factors*" – Queen Mary, University of London, *2013 Corporate Choices in International Arbitration: Industry Perspectives*, p. 5, available at <*http://www.arbitration.qmul.ac.uk/docs/123282.pdf*>; "*the length of time and the costs of International Arbitration are seen as the disadvantages*" – Queen Mary, University of London, *2008 International Arbitration Study – Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards*, p. 2, available at <*http://www.arbitration.qmul.ac.uk/docs/123294.pdf*>.

6 Or it might simply evidence that international arbitration users do not mind waiting a long time for the final award, but they do not like paying much for it.

7 N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *op. cit.*, paras. 1.100, 1.101, p. 34.

8 On the other hand, these are at least partially countervailed by arbitration's 'one stop shop' nature, as opposed to that of state court litigation, where, in some cases, there is at least one phase of review of the merits of the court of first instance's decision.

9 *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, p. 10, available at <*http://www.arbitration.qmul.ac.uk/docs/164761.pdf/*>.

10 L. Y. Fortier, *The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – A Few Plain Rules and a Few Strong Instincts*, in A. J. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9, Kluwer Law International, the Hague, 1999, p. 396.

11 "*<<Due process paranoia>> describes a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully*" – *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, p. 10, available at <*http://www.arbitration.qmul.ac.uk/docs/164761.pdf/*>. After all, this arbitral approach is, at least *prima facie*, understandable: the law prohibits breach of mandatory procedural rules, not lengthy or expensive proceedings.

12 See, *e.g.*: Prof. L. Reed, 31st Freshfields Arbitration Lecture, *(Ab)Use of Due Process: Sword or Shield*, 27 October 2016, as reported at <*http://globalarbitrationreview.com/article/1070112/reed-condemns-trump-approach-to-due-process*> and <*http://arbitrationblog.practicallaw.com/curing-due-process-paranoia/*>; B. Cremades, Chartered Institute of Arbitrators Alexander Lecture, *Use and Abuse of Due Process in International Arbitration*, 16 November 2016 as reported at <*http://www.ciarb.org/news/ciarb-news/news-detail/news/2016/11/17/alexander-lecture-2016-the-use-and-abuse-of-due-process-in-international-arbitration*> and <*http://globalarbitrationreview.com/article/1076348/second-leading-arbitrator-highlights-due-process-threat*>.

13 P. Sanders, *The making of the Convention*, in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects*, United Nations Publications, New York, 1999, p. 4.

14 See, *e.g.*, E. Gaillard, *The Urgency of Not Revising the New York Convention*, in A. J. van den Berg (ed.), *50 Years of the New York Convention: ICCA International Arbitration Conference*, Kluwer Law International, the Hague, 2009, pp. 689-696. To the contrary, see, *e.g.*, A. J. van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards. Explanatory Note*, available at <*http://www.newyorkconvention.org/11165/web/files/document/1/6/16015.pdf*>.

15 On dilatory tactics see, *e.g.*, M. Rubino-Sammartano, International Arbitration Law and Practice, 3rd edition, Juris, New York, 2014, para. 22.18, pp. 904-905

16 Indeed, as put by an arbitration practice specialist, some counsels' approach to arbitral efficiency is along the following lines: "*[w]hen clients instruct me on new case, they do not tell me to conclude the case quickly and cheaply. They tell me to win the case*" – C. Newmark, *Controlling Time and Costs in Arbitration*, in L. W. Newman, R. D. Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edition, Juris, New York, 2008, p. 81.

17 See, *e.g.*: Art. 30 and Appendix VI of the 2017 ICC Rules, in force as from 1 March 2017, providing for an expedited procedure, applicable to arbitrations where the amount in dispute does not exceed US$ 2,000,000; Rule 5 of the 2016 SIAC Rules, providing for an expedited procedure, applicable to arbitrations where the amount in dispute does not exceed the equivalent amount of S$6,000,000.

18 See, *e.g.*, ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, 2012, available at <*http://staging.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/*>.

19 However, doing so is certainly not easy for international arbitrators, who increasingly find themselves under a breadth of obligations: "*[i]t is the duty of the arbitrators in international arbitration to be independent of the parties and in an unbiased way and in accordance with due process […] to make themselves acquainted with the facts of the case and the claims, allegations and defences of the parties and, within a reasonably short period of time, to make a reasoned award, based on applicable law, which fulfils the requirements for the award to be enforceable.*" - A. Philip, *The Duties of an Arbitrator*, in L. W. Newman, R. D. Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edition, Juris Publishing, New York, 2008, p. 67.

20 W. W. Park, *The Four Musketeers of Arbitral Duty: Neither One-for-All Nor All-for-One*, in Y. Derains, L. Lévy (eds.), *Is Arbitration Only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator*, Dossier VIII of the ICC Institute of World Business Law, ICC Services Publications Department, Paris, 2011, p. 25.

21 K. P. Berger, J. O. Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, Arbitration International, vol. 32, no. 3/2016, p. 3

22 J.-F. van Drooghenbroeck, *Le nouveau droit judiciaire, en principes*, in G. de Leval, F. Georges (eds.), *Le droit judiciaire en mutation. En hommage à Alphonse Kohl*, para. 35, p. 241. This should not be confused with the pejorative meaning of judicial activism, sometimes used in political rhetoric to describe a process where judges decide cased on the basis of their own personal policy preferences rather than of the applicable law – see, *e.g.*, *Judicial activism*, *Encyclopaedia Britannica*, available at <*https://www.britannica.com/topic/judicial-activism*>.

23 Since, as various stakeholders have been complaining, international arbitration had borrowed too many negative traits from court litigation, it could draw inspiration from some healthy principles of the latter.

24 G. Aksen, *On Being a Proactive International Arbitrator*, in R. Briner, L. Y. Fortier, K. P. Berger, J. Bredow (eds.), *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel*, Carl Heymanns Verlag KG, Cologne, 2001, p. 13.

25 "*The existence, nature and scope of the arbitrator's discretionary powers constitute the hallmarks of arbitration, particularly in the international context*" - L. Y. Fortier, *op. cit.*, p. 396; "*[t]hat the Tribunal is the master of his own procedure is one of the foundational elements of the internationalarbitral process*" – *Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd*, High Court of Singapore, 30 October 2014.

26 L. Y. Fortier, *op. cit.*, p. 396; S. H. Elsing, *On Babies and Bathwater: Keeping the Good (and Getting Rid of the Bad) from the Company's Perspective*, in A. W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation. The Fordham Papers 2010*, Marinus Nijhoff Publishers, Leiden, Boston, 2011, p. 315.

27 Queen Mary, University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, p. 10, available at <*http://www.arbitration.qmul.ac.uk/docs/164761.pdf/*>.

28 L. Y. Fortier, *op. cit.*, p. 396.

29 From an overall interpretation of both paragraphs of Art. 19, it appears that this freedom of the arbitral tribunal is only triggered in the absence of an agreement by the parties. This seems to be implied in the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (hereinafter, "UML Digest"), referring to "*the supplementary discretion of the arbitral tribunal (emphasis added)*" – UML Digest, p. 100, para. 2, available at <*http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf*>. However, as we will show below, this discretion seems to be beginning to lose its residual character and appears to be becoming the default rule in international arbitration – at least under some institutional arbitration rules.

30 The 1996 English Arbitration Act is available at <*http://www.legislation.gov.uk/ukpga/1996/23/contents*>.

31 The French Code of Civil Procedure is available at <*https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716*>.

32 Author's translation. The original reads: "*[d]ans le silence de la convention d'arbitrage, le tribunal arbitral règle la procédure autant qu'il est besoin, soit directement, soit par référence à un règlement d'arbitrage ou à des règles de procedure*".

33 The Swiss Law on Private International Law is available at <*https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html*>.

34 Author's translation. The original reads: "*[s]i les parties n'ont pas réglé la procédure, celle-ci sera, au besoin, fixée par le tribunal arbitral, soit directement, soit par référence à une loi ou à un règlement d'arbitrage*".

35 For a similar opinion, see K. P. Berger, J. O. Jensen, *op. cit.*, p. 18.

36 The 2010 UNCITRAL Arbitration Rules are available at <*https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf*>.

37 For the same opinion, see: K. P. Berger, J. O. Jensen, *op. cit.*, p. 18; D. D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd edition, Oxford University Press, Oxford, 2013, p. 48.

38 The 2014 LCIA Rules are available at <*http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx*>.

39 Compare Art. 22.1 of the 1998 LCIA Rules ("*[u]nless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views […] (emphasis added)*") with Art. 22.1 of the 2014 LCIA Rules ("*[t]he Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide […]*"). See also M. Scherer, L. Richman, R. Gerbay, *Arbitrating under the 2014 LCIA Rules: A User's Guide*, Kluwer Law International, the Hague, 2015, p. 245. Additionally, Art. 22 also clarifies under which of its paragraphs the tribunal may act *sua sponte* or, to the contrary, upon the application of one of the parties.

40 M. Scherer, L. Richman, R. Gerbay, *op. cit.*, pp. 245-246. This shift is relevant insofar as, although mandatory procedural guarantees apply to procedures agreed on by the parties, as well as to those ordered by arbitrators, in the absence of an agreement by the parties, national courts are more deferential with respect to the former category because "*[a]lthough the parties' arbitration agreement will ordinarily grant the arbitrators broad procedural discretion, this is not intended to be, and cannot be regarded as, unlimited. A tribunal's imposition of unfair or arbitrary procedures, over a party's objection, is very different from a party's knowing and informed acceptance of such procedures, either for reasons of its own or in return for other benefits*" – G. B. Born, *op. cit.*, p. 2183 and the case law cited therein.

41 The 1998 DIS Arbitration Rules are available at <*http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10*>.

42 The 2012 ICC Rules are available at <*http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/*>.

43 The 2016 SIAC Rules are available at <*http://siac.org.sg/our-rules/rules/siac-rules-2016*>.

44 See <*http://www.sccinstitute.com/about-the-scc/news/2016/the-new-scc-2017-arbitration-rules-now-public/*>.

45 The 2017 SCC Rules, possibly subject to linguistic adjustments, as per the disclaimer on their cover page, are available at <*http://www.sccinstitute.com/media/159828/final_draft_arbitration-rules-17112016.pdf*>.

46 Art. 2(1) of the 2017 SCC Rules reads: "*[t]hroughout the proceedings, the SCC, the Arbitral Tribunal and the parties shall act in an efficient and expeditious manner*". As applications of this general duty see, *e.g.*, Art. 23(2) ("*[i]n all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case*") and Art. 30 (*[a]t any time prior to the close of proceedings pursuant to Article 40, a party may amend or supplement its claim, counterclaim, defence or set-off provided its case, as amended or supplemented, is still comprised by the arbitration agreement, unless the Arbitral Tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it, the prejudice to the other party or any other relevant circumstances*).

47 For a similar opinion, see K. P. Berger, J. O. Jensen, *op. cit.*, pp. 7, 9. A second reason for arbitrators to tolerate procedural requests which are not reasonable could be the fear that by not doing so, they might upset the party who made such request – especially if it is precisely the party which appointed them – and thus would forgo the opportunity of a new nomination. This, of course, does not fall within the category of "*due process paranoia*" – K. P. Berger, J. O. Jensen, *op. cit.*, footnote 40, p. 9. What is more, arbitration users have stated, not long ago, that they would rather have an arbitrator who applies a proactive case management style than a deferential or reactive one: "*[i]t is noteworthy that respondents prefer a pro-active case management style rather than a deferential or reactive style (43% vs. 21%)*" – Queen Mary, University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, p. 25, available at <*http://www.arbitration.qmul.ac.uk/docs/123290.pdf/*>. Therefore, it becomes clear that what bothers arbitration users so much is not the absence of mechanisms to streamline the arbitral process, but rather the paucity with which they are used.

48 See *e.g.*: Art. 42 of the 2017 ICC Rules – "*[i]n all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law*"; Art. 32.2 of the 2014 LCIA Rules – "*[f]or all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat*".

49 See, *e.g.*, C. Boog, *The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award*, available at <*http://kluwerarbitrationblog.com/2013/01/28/the-lazy-myth-of-the-arbitral-tribunals-duty-to-render-an-enforceable-award/*>.

50 In any event, some distinguished authors have argued, with regard to an older version of the relevant provision in the ICC Rules, that it was "*widely*

misunderstood as imposing a[n] […] obligation on […] the Arbitral Tribunal, in all circumstances" – Y. Derains, E. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd edition, Kluwer Law International, the Hague, 2005, pp. 384-385.

51 "*The supervisory role of the court over the Tribunal's exercise of his case management powers should […] be <<exercised with a light hand>> in the context of a challenge on the basis of the fair hearing rule*" – *Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd*, High Court of Singapore, 30 October 2014.

52 According to the "*procedural judgment rule*", "*[…] a court will not second-guess an arbitrator's exercise of his procedural judgment, if his decision is grounded in a bona fide assessment of the case and is reasonable under the circumstances*" – K. P. Berger, J. O. Jensen, *op. cit.*, p. 14.

53 The *effects on the award* requirement is all the more relevant as the seats of many international arbitrations are established in these jurisdictions.

54 G. B. Born, *op. cit.*, p. 2179.

55 G. B. Born, *op.cit.*, p. 2179.

56 In case law, alleged violations of the parties' right to present their case (ground (i)) are also referred to as "*violations of due process*", "*violations of the right to be heard*" or "*violations of natural justice*" – see, *e.g.*, *Attorney General v. Lyall Tozer*, High Court of New Zealand, 2 September 2003. The tribunal's duty to act, and be seen to act, in conformity with the rules of due process is also referred to as the "*duty to act judicially*" – N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *op. cit.*, para. 5.67, p. 334.

57 These first two grounds are collectively referred to as the parties' "due process rights" – K. P. Berger, J. O. Jensen, *op. cit.*, p. 7.

58 K. P. Berger, J. O. Jensen, *op. cit.*, p. 7.

59 Art. 34(2)(a)(ii) UML reads: "*[a]n arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: […] (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case (emphasis added)*".

60 Art. 36(1)(a)(ii) UML reads: "*[r]ecognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: […] (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case (emphasis added)*".

61 Art. V(1)(b) NYC reads: "*[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (b) [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case (emphasis added)*".

62 Art. 34(2)(b)(ii) UML reads: "*[a]n arbitral award may be set aside by the court specified in article 6 only if: […] (b) the court finds that: […] (ii) the award is in confl ict with the public policy of this State*".

63 Art. 36(1)(b)(ii) UML reads: "*[r]ecognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: […] (b) if the court finds that: […] (ii) the recognition or enforcement of the award would be contrary to the public policy of this State*".

64 Art. V(2)(b) NYC reads: "*[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: […] (b) the recognition or enforcement of the award would be contrary to the public policy of that country*".

65 Art. 34(2)(a)(iv) UML reads: "*[a]n arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: […] (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law (emphasis added)*".

66 Art. 36(1)(a)(iv) UML reads: "*[r]ecognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:[…] (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (emphasis added)*".

67 Art. V(1)(d) NYC reads: "*[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (d) [t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (emphasis added)*".

68 Uncitral digest.. http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf para. 47, p. 145, para. 23, p. 177.

69 UML Digest, para. 51, p. 145.

70 UML Digest, para. 76, p. 150.

71 UML Digest, para. 76, p. 150.

72 *Bayview Irrigation District #11 v. United Mexican States*, Ontario Superior Court of Justice, 5 May 2008.

73 *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd*, Singapore Court of Appeal, 9 May 2007. On the need to keep judicial intervention to a minimum, see also *Rashtriya Chemical v. J.S. Ocean Pte Ltd*, The High Court of Judicature at Bombay, 20 April 2010.

74 *Xerox Corporation Ltd and Xerox Corporation v. MPI Technologies Inc. and MPI Tech SA*, Ontario Superior Court of Justice, 30 November 2006.

75 *Re Corporación Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.*, Ontario Superior Court of Justice, 22 September 1999]; confirmed in *Corporación Transnacional de Inversiones v. STET International*, Court of Appeal for Ontario, 15 September 2000.

76 Provincial Court of Appeal Oldenburg, decision in case no. 9 SchH 3/05, 30 May 2006.

77 Provincial Court of Appeal Karlsruhe, decision in case no. 10 Sch 8/08, 27 March 2009.

78 G. B. Born, *op. cit.*, p. 2180.

79 *The United Mexican States v. Metalclad Corporation*, British Colombia Supreme Court, Canada, 2 May 2001; see also *Brunswick Bowling & Billiards Corporation v. Shanghai ZhongLu Industrial Co. Ltd. and Another*, High Court of Hong Kong, Court of First Instance, 10 February 2009.

80 K. P. Berger, J. O. Jensen, *op. cit.*, p. 10.

81 *ABB AG v. Hochtief Airport GmbH and Another*, High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court, 8 March 2006, *apud* K. P. Berger, J. O. Jensen, *op. cit.*, p. 10.

82 K. P. Berger, J. O. Jensen, *op. cit.*, p. 10.

83 *Brandeis Brokers Ltd v. Black and others*, High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court, 25 May 2001.

84 N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *op. cit.*, para. 6.219, p. 422; see also W. W. Park, *op. cit.*, p. 38.

85 W. H. Taft, *Dawn of World Peace*, in *U.S. Bureau of Education Bulletin No. 8/1912*, *apud World Peace*, in *Hoyt's New Cyclopedia of Practical Quotations*, New York and London, Funk & Wagnalls, 1922, available at <*http://www.bartleby.com/78/906.html*>.

THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS AND INTERNATIONAL LITIGATION: Enemies or Companions for the New York Convention and International Arbitration?

By Margherita Magillo

I. Introduction

1. During the last century, as a total of 156 states became signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "NY Convention"), parties to complex international transactions increasingly inserted arbitration clauses in their agreements. In fact, thanks to such convention, parties gained certainty as to which entity (*i.e.* an arbitral tribunal) would have decided their disputes and, more importantly, that the ensuing arbitral award would have been recognized and enforced almost all over the globe. Thus, the NY Convention significantly contributed to the success of international arbitration.

2. Nevertheless, certain parties continued to opt for litigation, rather than arbitration, due to a number of reasons, notably the cost of arbitration, the delays due to the over-commitment of experienced arbitrators or the problems in joining third parties to arbitral proceedings. Where parties to international transactions opt for litigation, in order to manage risk by gaining certainty as to which court will decide their prospective disputes, they may insert choice of court agreements (also known as forum selection clauses) in their contracts. Nevertheless, traditionally such clauses did not wipe out issues as to the chosen court's jurisdiction and did not guarantee that any final judgment would have been enforced abroad, provided that there were no widely adhered to global uniform rules on the matter and parties had to typically rely on national laws.

3. In this context, in 1996 the Hague Conference of Private International Law started working on a convention creating uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil and commercial matters. Such project was subsequently narrowed down to a convention on jurisdiction based on choice of court agreements in commercial cases and enforcement abroad of the ensuing judgments. On this basis, the final text of the Hague Convention on Choice of Court Agreements (the "Hague Convention") was drawn up on June 30, 2005.[1]

4. The Hague Convention entered into force on October 1, 2015 and has been currently signed by 31 countries, *i.e.* the EU member states (except for Denmark), Mexico and Singapore. Notably, the USA and Ukraine also signed the Hague Convention, however neither of them has ratified it yet.

5. Provided that the Hague Convention was viewed as an attempt to achieve for choice of court agreements and the resulting judgments what the NY Convention accomplished for arbitral agreements and arbitral awards,[2] our analysis herein is intended to describe the main features of the Hague Convention and deals with the issue as to how it will relate to the NY Convention, including whether it might influence the current relationship between international commercial litigation and international commercial arbitration.

II. Analysis of the Hague Convention

6. The Hague Convention applies "*in international cases to exclusive choice of court agreements concluded in civil or commercial matters*" (Art. 1). The difference between a non-exclusive choice of court agreement and an exclusive one, both designating one or more specific courts, is that the latter designates such court(s) to the exclusion of the jurisdiction of any other courts. Under Art. 3 of the Hague Convention, choice of court agreements are presumed exclusive "*unless the parties have expressly provided otherwise*". In fact, contracting states may decide to extend the effects to non-exclusive choice of court agreements via bilateral declarations.

7. The Hague Convention fosters greater legal certainty for cross border court disputes thanks to the following three basic rules:

(i) the court chosen in the (exclusive) choice of court agreement shall in principle hear the case, subject to a limited number of exceptions, unless the choice of court agreement is null and void (Art. 5);

(ii) any court not chosen that is nonetheless seized must in principle refuse to hear the case (Art. 6); and

(iii) any judgment rendered by the chosen court must be recognized and enforced in other contracting states without review on the merits (Art. 8), unless one of the limited grounds for recognition applies (Art. 9).

8. According to the first principle, Judges of the chosen courts will no longer be able to rely on the "*forum non conveniens*" doctrine to refuse to hear the case, if it is contrary to what the parties agreed in the forum selection clause. Under Art. 5, the only cases in which chosen courts can refuse to hear the case are when the choice of court agreement is null and void under the law of the chosen court's State and when hearing the case is contrary to the internal jurisdiction *criteria* related to subject matter or to the value of the claim. Internal allocation of jurisdiction among the courts of a Contracting State also continues to apply.

9. According to the second principle, courts other than the chosen court that have been seized shall suspend or dismiss proceedings to which a forum selection agreement applies, regardless of whether such non-chosen courts were seized first. Therefore, non-chosen courts of Contracting States of the Hague Convention cannot invoke "*lis pendens*" even if it is provided for by their national law. Exceptions apply in the five specific cases listed in Art. 6, letters a) to e), which include cases where the choice of court agreement is null and void under the law of the State of the chosen court; where a party lacked capacity to conclude the agreement under the law of the State of the court seized; where giving effect to the forum selection clause would lead to a manifest injustice or would be contrary to the public policy of the State of the court seized; where for exceptional reasons the agreement cannot be performed; and where the chosen court refused to hear the case. In this respect, it is worth noting that the Hague Convention differs from the New York Convention in that the latter does not specify the law that the court seized shall apply in assessing to the validity of the arbitration agreement, when it states that "[t]*he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an* [arbitration] *agreement …, shall … refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*." (Art. II (3) of the NY Convention).

10. As regards recognition and enforcement of foreign judgments under the third rule above, the Hague Convention drafters were mindful that the value of a forum selection clause in a cross border transaction is directly proportional to the possibility that the resulting judgment is enforced in a great number of countries. Art. 8 of the Hague Convention seeks to achieve such aim by stating that judgments shall be recognized and enforced in other Contracting States and that they shall not be reviewed on the merits. The exceptions to these rules are outlined in Art. 9 of the Hague Convention and essentially pertain to: the validity of the choice of court agreement or the capacity of the parties to conclude it; due process and procedural issues; fraud; breach of public policy; and inconsistency with previous judgments. [3]

11. Another interesting exception to recognition and enforcement is contained in Art. 11 of the Hague Convention, which provides that were the foreign judgment awards punitive damages that do not compensate a party for actual loss or harm suffered, its recognition or enforcement may be refused by the requested State. This is due to the fact that many jurisdictions, typically civil law systems, still do not recognize the concept of exemplary or punitive damages, but merely that of compensatory damages.

12. Moreover, the Hague Convention provides for the recognition and enforcement of judicial settlements (Art. 12), which are increasingly becoming a tool to deflate the workload of the Courts, where there is room for a settlement.

III. Practical Implications of the Hague Convention on International Commercial Litigation and its Impact on the International Arbitration System

13. The Explanatory Memorandum prepared by the

European Commission when proposing the approval of the Hague Convention by the EU stated that the Hague Convention was designed to create "*an optional worldwide judicial dispute resolution mechanism alternative to the existing arbitration system*".[4] In fact, the Hague Convention's objective is that of increasing certainty, efficiency and predictability in international commercial litigation, similarly to what does the NY Convention in respect of international commercial arbitration.

14. Not only the current 29 contracting states take advantage of the rules of the Hague Convention, provided that also a party that is not resident in a contracting state may conclude a choice of court agreement opting for the jurisdiction of the courts of a state that is a party to the Hague Convention. In fact, the Hague Convention does not require a substantial connection to the chosen court jurisdiction. On the other hand, a party wishing to thwart a choice of court agreement could still bring parallel proceedings in non-member states, which are not bound by the obligation to refuse to hear the case set forth under the Hague Convention, giving precedence to the chosen court.[5]

15. In any event, the supporters of the Hague Convention believe that its rules could enhance the attraction of the important judicial hubs hosted by some of the member states, such as Singapore or London, that may be considered a valid alternative to arbitral tribunals for some of their features.

16. Indeed, Singapore recently inaugurated the Singapore International Commercial Court ("SICC"), which has jurisdiction in international commercial matters brought to it under a forum selection clause and/or referred to it by the High Court of Singapore.[6] The SICC offers the parties a great degree of flexibility, certainty and efficiency. Indeed, similarly to arbitration, it allows parties to apply to their dispute the substantive law they have chosen; it independently appoints Judges from a list that includes "international judges" coming from jurisdictions other than Singapore; and, in certain circumstances limited to international cases, it takes appearance from foreign counsel who are not qualified in Singapore. Moreover, being a judicial court, it has the power to join third parties in the proceedings quite simply.

17. However, unlike arbitration, the SICC can only grant limited confidentiality, upon request of a party, merely with respect to the subject matter and the documents of the case, but not as to the existence of the case itself. Moreover – unlike arbitral awards – the SICC judgments may be appealed on the merits before the High Court of Singapore, although the parties may waive or limit their right to appeal. In any event, one of the upsides of referring disputes to the SICC is that since Singapore ratified the Hague Convention in June 2016, the decisions of the SICC can be enforced in all member states of the Hague Convention.

18. London has also traditionally been a very popular chosen forum for international litigation, given the frequent choice of the parties to have their agreements governed by English law, the excellence and impartiality of the judiciary, the presence of many experienced lawyers and experts, the English courts' tendency to support arbitration and due to the availability of effective *interim* protective remedies. Nevertheless, it is currently being discussed how London can maintain its role as go-to jurisdiction after Brexit, given that the London Court judgments would no longer benefit from the advantageous enforcement system within the EU pursuant to the Bruxelles I *bis* regulation and that it would no longer be a party to the Hague Convention as an EU member state. In this respect, it has been argued that a first step would be for the UK itself to ratify the Hague Convention post-Brexit, in order to give the parties certainty that their choice of court agreements in favour of English courts will still be respected and that the ensuing judgments may be enforced within the European Union, as well as in the other member states of the Hague Convention, as they are now.[7]

19. Of course, the Hague Convention would not apply to English judgments that are not issued by courts appointed in choice of courts agreements and, in that regard, the UK should adopt other solutions, such as that of signing the Lugano II Convention, that currently extends the effects of the Brussels I *bis* regulation to Switzerland, Norway, Denmark and Iceland. However, certain additional conditions would need to be satisfied to accede to the Lugano II Convention, including obtaining a unanimous agreement of the contracting parties.[8]

20. It is also worth mentioning that, in the UAE, Dubai recently created a popular commercial court system directed to resolve international disputes, under the auspices of the Dubai International Financial Centre ("DIFC"). In particular, the DIFC is proposing a new enforcement method that would be obtained by converting DIFC judgments into arbitral awards thanks to a suggested hybrid litigation-arbitration clause. However, concerns have been raised as to how a judgment converted into arbitral award would satisfy the NYC requirements. The UAE may also rely on a range of bilateral agreements on enforcement of judgments in the Gulf, and, although it is not currently a party to the Hague Convention, it is reportedly investigating such possibility, as – among other things – the enforceability of the DIFC's decisions in the Hague Convention member states would make the DIFC itself more appealing. [9]

21. As to other potential practical implications, it has been stated that, to the extent that the Hague Convention regime concerning exclusive choice of court agreements gains momentum, it could have an impact on the traditional prevalence of non-exclusive choice of court clauses in the banking and financial sector, such as in the ISDA Master Agreement. In fact, the Hague Convention only covers exclusive choice of court agreements and, to date, none of its member states extended its application to non-exclusive choice of court clauses by means of bilateral declarations.[10]

22. It must nevertheless be noted that, in order to become a true rival to the NY Convention which applies in 156 jurisdictions, the Hague Convention – which counts 29 member states – would need to be ratified by an increasing number of States or, at least, by a global superpower such as the USA or China, to potentially challenge the NY Convention.[11] As mentioned, the USA have already signed the Hague Convention in 2009, however they will not become a party to the same convention until the US Senate gives its advice and consent and the Convention is ratified, according to the US discipline on implementing international treaties in its legal system. In this respect, it has been noted that issues may arise in light of the fact that the Hague Convention deals with a matter that is usually left to State law and that its implementation would therefore amount to an unprecedented attempt to change state court jurisdiction through federal law. As a result, discussions are been carried out as to the best way to implement the Hague Convention in the USA in light of U.S. Federalism and the interplay between its federal government and the states.[12]

23. According to the Secretary General of the Hague Conference of Private International Law, some countries, such as Australia and New Zealand, are also making progress towards implementations and others are carrying out feasibility studies, such as China, Denmark and countries in the Asia Pacific Region.[13]

24. It must of course be taken into account that the Hague Convention limits its scope to judgments of courts chosen by the parties in forum selection clauses and does not provide for recognition and enforcement of all types of court judgments abroad.

25. In an attempt to go one step further, the Hague Conference of Private International Law is currently working on a draft "Judgments Convention" directed to regulate the recognition and enforcement of international judgments in civil and commercial matters, regardless of the existence of a forum selection clause. Between 2012 and 2015 the Judgments Project's working group met five times and prepared a draft convention in June 2016, according to which foreign judgments shall be recognized and enforced between member states without review on the merits.[14] The Special Commission of the Judgments Project is expected to meet again to discuss the draft convention in February 2017 in The Hague.[15] According to some, the Judgments Convention could be the real game-changer in the relationship between international commercial litigation and arbitration.[16]

IV. Conclusions

26. It appears that the Hague Convention on Choice of Court Agreements is a step towards an increase of certainty for parties to international transactions that typically insert forum selection clauses, rather than arbitration clauses, in their agreements. Moreover, the existence of important international commercial litigation hubs within the current (and potentially future) member states of the Hague Convention is another advantage for such parties.

27. It is also true that an increase in the number of contracting states to the Hague Convention, together with

the progress of the Judgments Project – that would extend the benefits in terms of enforcement to international judgments not issued by courts chosen by a forum selection clause – could potentially draw a fair share of the users of international commercial arbitration towards litigation.

28. Nevertheless, the success of international arbitration does not only consist in the smooth and effective enforcement system set forth under the NY Convention, which could potentially be compared to the Hague Convention and Judgments Convention systems taken together in the future. In fact, arbitration also excels in flexibility, party autonomy, confidentiality and finality. In this respect, there does not (yet) seem to be a court litigation system having all such features. Indeed, as to flexibility, courts would hardly allow parties to hold hearings in other location than where the court is. As to party autonomy, although a court may independently appoint a judge in light of his/her specific skills and experience, in litigation parties cannot directly appoint their judges taking into account their experience on the subject matter of the litigation, their availability, etc., like they do with arbitrators. As to confidentiality, being litigation a public system, there could be some limitations to disclosure (as for instance those applied by the SICC), however they would typically be applicable upon request of the parties and would not affect the existence of the dispute itself, which would in principle be public. As to finality, arbitration is indeed a more expensive dispute resolution method than litigation, however it is designed to be a single instance method, whereas court litigations would typically encompass appeal of first instance decisions on the merits and sometimes further stages of challenge.

29. In light of the above, at least for the time being, international commercial litigation appears to be just an alternative, rather than a rival to international commercial arbitration.

Margherita Magillo
Milan, 6 December 2016

1 See full text of the Hague Convention of 30 June 2005 on Choice of Court Agreements at https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.
2 See Trevor Hartley, Masato Dogauchi, *Explanatory Report on the Hague Choice of Court Agreements Convention*, available at https://assets.hcch.net/upload/expl37final.pdf, [27], 787.
3 Art. 9 "*Refusal of recognition or enforcement"* of the Hague Convention provides as follows: "*Recognition or enforcement may be refused if - a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid; b) a party lacked the capacity to conclude the agreement under the law of the requested State; c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents; d) the judgment was obtained by fraud in connection with a matter of procedure; e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State; f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State*.".
4 See European Commission's Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Memorandum, § 1.2.
5 See Charles T. Kotuby Jr., Caroline N. Mitchell, Matthew J. Skinner, Gerjanne te Winkel, Antonio González, Lee Coffey, *The Hague Choice of Court Convention Takes Effect, and With It Greater Certainty for International Transactions*, October 2015, available at http://www.jonesday.com/the-hague-choice-of-court-convention-takes-effect-and-with-it-greater-certainty-for-international-transactions-10-29-2015/.
6 See Dalma Demeter and Kayleigh M. Smith, *The Implications of International Commercial Courts on Arbitration*, in *Journal of International Arbitration*, pp. 445-454.
7 See Ben Rigby, *Looking beyond Brexit*, in *Commercial Dispute resolution* (www.cdr-news.com), November 22, 2016 and Sara Masters and Belinda McRae, *What does Brexit mean for the Brussels regime?*, in *Journal of International Arbitration*, Kluwer Law International 2016, Volume 33, Issue 7, pp. 494-495.
8 Sara Masters and Belinda McRae, *idem*, pp. 488-491.
9 See Dalma Demeter and Kayleigh M. Smith, *idem*, pp. 452 ff.
10 Christophe Bernasconi, *Choice of Court Convention, an inspired choice*, in *International Financial Law Review*, October 1, 2015, available at http://www.iflr.com/Article/3493513/Choice-of-Court-Convention-an-inspired-choice.html.
11 See Andrew Stephenson, Lindsay Hogan, Jaclyn Smith (Corrs Chambers Westgarth), *Singapore Gives Effect to Hague Convention on Choice of Court Agreements*, 26 October 2016, available at http://www.lexology.com/library/detail.aspx?g=12b77d63-0a37-46a3-bd11-f22d33d93a9f.
12 See Alexander Kamel, Cooperative Federalism: *A Viable Option for Implementing the Hague Convention on Choice of Court Agreements*, in *The Georgetown Law Journal*, Vol. 102:1821 2014, page 1823 and ff.
13 Christophe Bernasconi, *idem*.
14 The draft proposed text of the Judgments Convention may be found on the Hague Conference on Private International Law's website at https://assets.hcch.net/docs/42a96b27-11fa-49f9-8e48-a82245aff1a6.pdf.
15 See section dedicated to the "Judgments Project" on the Hague Conference on Private International Law's website at https://www.hcch.net/en/projects/legislative-projects/judgments.
16 Sapna Jhangiani and Rosehana Amin, *The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a 'Game-Changer' in International Disputes?*, in *Kluwer Arbitration Blog*, 23 September 2016, available at http://kluwerarbitrationblog.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes/.

THIRD PARTY FUNDING – A NEW ERA?

By Nicholas Ashcroft

Summary

In a landmark decision, the English High Court has upheld the decision of the arbitrator in an ICC arbitration to allow the recovery of the costs of third party funding in addition to the award of legal costs and damages, finding that the arbitrator's general powers extended to include the power to award third party funding costs.

Whilst not a new issue, and indeed an issue explored at length by commentators and a number of the arbitral institutions, this decision propels into the spotlight the question increasingly being asked of arbitrators in often private and confidential proceedings, to award the cost of funding as well as the legal costs themselves.

As discussed below, it is a decision that may embolden arbitrators faced with similar circumstances and similar arbitration agreements/rules. It will certainly encourage more parties to reach for the support of a funder when the cost of arbitration proceedings is overwhelming. It may also encourage parties to use funding for reasons other than necessity – such as where a party does not want the cost or risk of the proceedings on its balance sheet, or where a party wants to use the adverse cost risk as a tactical ploy (in a similar way to the manner in which Conditional Fee Arrangements were often used prior to Lord Justice Jackson's reforms).

The judgment is good news therefore for funders and those with claims to pursue, but insufficient funds. On the flip side, the judgment is potentially extremely painful for the losing party. This leads us to question, does the decision open up the floodgates for recovery of third party funding costs in arbitration in a manner akin to the position of claimants in the English courts with condition fee agreements and ATE policies prior to 1 April 2013? Probably not, or at least not yet.

Background

Following a dispute relating to an offshore drilling platform, an ICC arbitration was commenced by Norscot Rig Management PVT Limited (**Norscot**) against Essar Oilfields Services Limited (**Essar**). In order to advance with the proceedings, Norscot entered into a third party funding arrangement consisting of an advance of approximately £650,000. The terms of the arrangement provided

that, if successful, Norscot had to pay to the funder either 300% of the sum advanced or 35% of the damages received – whichever was greater.

When Norscot succeeded in the arbitration, it sought its costs from Essar including the costs of the third party funding. The arbitrator made an award ordering Essar to pay costs on an indemnity basis, including £1.94 million which Norscot had paid to its third party funder - Woodsford Litigation Funding - who had advanced a sum of around £647,000 to Norscot for the purpose of the arbitration.

The arbitrator was critical of Essar's conduct and concluded that Essar had deliberately put Norscot in a position where it did not have the resources to fund the arbitration and it was therefore reasonable for it to seek third party funding.

Essar proceeded to challenge the Award in the English High Court on the ground of serious irregularity under section 68(2)(b) of the Arbitration Act 1996 (the Arbitration Act), arguing that the arbitrator had exceeded his powers by extending the definition of *"other costs"* within section 59(1)(c) of the Arbitration Act to include third party litigation funding.

Judgment

The English High Court dismissed the appeal and upheld the arbitrator's ruling. However, there are two key points to note:

- First, at the outset of his judgment, His Honour Judge Waksman QC, makes an important point of context by highlighting the limited scope of section 68 of the Arbitration Act quoting paragraph 280 of the DAC Report which said:

- *"Section 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected"*

- In other words, the English Courts will only interfere with the decision of an arbitrator in very exceptional circumstances. The judgment goes on to conclude that there was no serious irregularity within the meaning of s.68(2)(b) of the Arbitration Act, and so even if the arbitrator had been wrong in his construction of *"other costs"* the appeal would have failed. This reinforces, yet again, the reluctance of the English courts to interfere with arbitral awards – an important reminder for parties considering the most appropriate seat in their arbitration agreements.

- Secondly, the judgment concludes that, in any event, the arbitrator was entitled to interpret *"other costs"* so as to include the costs of third party funding. There was therefore no error of law anyway. In reaching this conclusion His Honour Judge Waksman QC explored a number of issues that will be of interest to parties considering third party funding:

- The approach taken by the English courts under the Civil Procedural Rules (where third party funding is not recoverable) as to what can and cannot be awarded by way of costs is of little direct relevance. The relevant context is the Arbitration Act itself and the scope of procedural powers conferred upon the arbitrator by the agreement between the parties.

- The analysis of the arbitrator's power to award costs starts with the scope of the powers conferred upon the arbitrator by the agreement between the parties because section 63 of the Arbitration Act provides that *"[t]he parties are free to agree what costs of the arbitration are recoverable"*. In this case the parties had agreed to arbitrate by reference to the ICC Rules (the 1998 version) and Article 31(1) of those rules states;

- *"The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration"*

- The judgment explores the meaning of *"costs of the arbitration"* as defined by section 59 of the Arbitration Act and also used in Article 31(1) of the ICC Rules (1998 version). It concludes that the wording *"other costs"* – also used in both the Arbitration Act and ICC Rules - should to be *"regarded in a broad sense"* and can be construed as including third party funding. The right test to apply when assessing what should be classed as *"other costs"* is a *"functional"* one and the costs incurred in bringing or defending the claim should be considered.

- The ICC Commission Report of 2015 - "Decisions on Costs in International Arbitration" - was "relevant" and "highly pertinent" and supported "the functional view" used to construe the meaning of "other costs". Whilst "not determinative" it does demonstrate the important role played by the large volume of commentary that surrounds this issue.

Further observations

As explained above, seeking to recover the costs of third party funding in arbitration proceedings is not a new concept. However, arbitration proceedings are often concluded behind closed doors and shrouded in confidentiality and therefore it is difficult to conduct any proper analysis of the circumstances in which funding costs have been sought and awarded and the reasons for doing so.

This decision propels the confidential findings of the arbitrator in the Norscot proceedings into the public eye and will

no doubt heighten interest in third party funding and alternative funding options for arbitration, particularly as the decision is contrary to the position on third party funding in litigation in the English Courts.

Third party funding is not a cheap option for progressing litigation or arbitration proceedings. In fact, as the Norscot decision highlights, the cost can often be high – in this case a 300% plus return for funders, which was accepted by the judge, on hearing expert evidence from a well known broker, to be a market rate (although for the right case, funding costs can be much lower). If funding costs are not recoverable, the issue facing many parties looking for funding is one of simple economics. Is the claim of sufficient value and the legal costs low enough to make funding a realistic commercial option? The answer is often no and even if the claim is of sufficient value, the prospect of giving away a substantial proportion of the award can be, at the very least, unpalatable. The upshot of this is that historically, third party funding has only been used by those who genuinely do not have the funds to progress the claim and/or with a strong enough case to negotiate better terms with funders.

The decision of the English High Court in Norscot may well be a game changer – if there is a reasonable prospect of recovering the third party funding cost, then these historical concerns and the economics of funding arrangements are less problematic. However, before potential claimants rush to obtain third party funding, a few words of caution.

First, the conclusion reached by the English High Court that the arbitrator **had the power** to award third party funding costs, was based on the specific wording of the Arbitration Act and the ICC Rules. Whilst many of the main arbitral institutional rules contain similar wording around *"costs"* (see comparison below), an arbitrator will only have the power to award funding costs if a) the arbitration agreement between the parties confers power to do so; and b) the law of the seat of the arbitration permits it.

Secondly, the decision is limited to the question of whether the arbitrator in the Norscot proceedings had the power to award third party funding costs. It does not address all the circumstances in which it will be appropriate for an arbitrator to award the costs of third party funding. For example:

- Essar's conduct in relation to the agreement and during the course of proceedings was criticised by the arbitrator. Is bad conduct a prerequisite to recovery?

- The arbitrator found that Essar had deliberately forced Norscot to seek third party funding; does the decision also apply to those parties who voluntarily choose a third party funding option?

- Would the decision extend to third party funding options which were not, as in this case, based on standard market rates?

A comparison of the cost provision in the main institutional rules (latest rules)

As the comparison below highlights, the majority of the arbitration institutions' rules, except for DIAC and HKIAC, provide that an arbitrator may award *"other costs"*. Notably, under the DIAC rules, in the absence of any agreement by the parties or provision in the local arbitration law, the tribunal has no power to

allow the recovery of legal fees at all. Under the HKIAC rules the provisions on costs extend to *"legal representation and assistance"*. It may therefore be that *"assistance"* could be interpreted in the same way as *"other costs"*.

The comparison below does not consider the law of the seat of the arbitration which will also need to be considered in an assessment of the likelihood of the recoverability of third party funding in any particular arbitration. However it is worth noting that:

- Whilst not yet widely used in the UAE, litigation funding is not contrary to UAE law. As a matter of practice, DIAC tribunals will typically record in the minutes of the preliminary meeting (or a separate Arbitration Deed or Terms of Reference) the agreement of the parties as to the issues which will be addressed in the arbitration. The Arbitration Deed will often vest the tribunal with the authority to include in its final award the issue of legal costs, which it will do taking into account the relative success and failures in each parties' case and the reasonableness of the fees claimed.

- Third Party Funding is not currently permitted under Singapore law. However, this is expected to change soon. Singapore's Ministry of Law published draft legislation (Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016) to put in place a framework for third party funding for international arbitration proceedings. The draft legislation was open for public consultation from 30 June to 29 July 2016. It is anticipated that the proposed legislative amendments will be passed by the Singapore Parliament in the near future.

- It has remained unclear as to whether or not the doctrines of champerty and maintenance also apply to third party funding for arbitrations taking place in Hong Kong. In 2013, the Chief Justice and the Secretary for Justice asked the Law Reform Commission of Hong Kong to review this subject. On 19th October 2015, the Law Reform Commission (the "Commission") released a consultation paper recommending that third party funding be permitted for arbitrations in Hong Kong (the "Consultation Paper"). The Law Commission's final report was published on 14 October 2016 and it recommends that the law should be amended to clarify that the common law principles of maintenance and champerty do not apply to arbitration and associated proceedings under the Hong Kong Arbitration ordinance, with appropriate safeguards in place.

Rules	Article No.	Provision
International Chamber of Commerce (ICC) Note – this is based on current version of the ICC Rules, the Norscot decision was made by reference to the 1998 version of the rules, although the provision on costs is identical.	37.1	The costs of the arbitration shall include: • the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court; • the fees and expenses of any experts appointed by the arbitral tribunal; and • the reasonable legal and other costs incurred by the parties for the arbitration.
The London Court of International Arbitration (LCIA)	28.3	The Arbitral Tribunal has the power to decide by an award that all or part of the legal or other expenses incurred by a party be paid by another party. The Arbitral Tribunal shall decide the amount of such legal costs on such reasonable basis as it thinks appropriate.
The London Court of International Arbitration - Mauritius International Arbitration Centre (MIAC)	28.3	The Arbitral Tribunal has the power to order in its award all or part of the legal or other costs incurred by a party, unless the parties agree otherwise in writing. The Arbitral Tribunal is able to determine and fix the amount of each item comprising such costs on such reasonable basis as it thinks fit.

Rules	Article No.	Provision
Dubai International Arbitration Centre (DIAC)	2.1 of Appendix – Cost of Arbitration	The costs of the arbitration shall include: • the Centre's administrative Fees for the claim and any counterclaim; • the fees and expenses of the Tribunal fixed by the Centre in accordance with the Table of Fees and Costs in force at the time of the commencement of the arbitration; • any expenses incurred by the Tribunal; and • fees and expenses of any experts appointed by the Tribunal.
Hong Kong International Arbitration Centre (HKIAC) - Institutional Arbitration Rules	33.1	The arbitral tribunal can determine the costs of the arbitration in its award. The term "costs of the arbitration" includes only: • the fees of the arbitral tribunal, as determined in accordance with Article 10; • the reasonable travel and other expenses incurred by the arbitral tribunal; • the reasonable costs of expert advice and of other assistance required by the arbitral tribunal; • the reasonable travel and other expenses of witnesses and experts; • the reasonable costs for legal representation and assistance if such costs were claimed during the arbitration; • the registration fee and administrative fees payable to HKIAC in accordance with Schedule 1.
American Arbitration Association (AAA) – International Dispute Resolution Procedures	34	The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case. Such costs may include: • the fees and expenses of the arbitrators; • the costs of assistance required by the tribunal, including its experts; • the fees and expenses of the Administrator; • the reasonable legal and other costs incurred by the parties; • any costs incurred in connection with a notice for interim or emergency relief • pursuant to Articles 6 or 24; • any costs incurred in connection with a request for consolidation pursuant to Article 8; and • any costs associated with information exchange pursuant to Article 21.
Singapore International Arbitration Centre (SIAC)	37	The Tribunal has the authority to order in its award all or part of the legal or other costs of a party to be paid by another party.

IRRATIONAL EXPECTATIONS IN THE NEGOTIATION-ARBITRATION SPECTRUM

By José María de la Jara[1] and Lucía Varillas[2]

If parties want to settle, they need to prepare to travel through the negotiation-arbitration spectrum.

At the beginning of the ride, discussions tend to be friendly and honest. However, turbulence can cause one of the parties to lose control. After that, the journey can quickly turn into a bumpy one, leading to formal complaints, triggering a negotiation period and filing the request for arbitration.

However, arbitration is triggered by many reasons and not all of them seek to actually travel the road until the award. For example, we may start arbitration to show the other party seriousness about our claims, to "bluff" or to gather more information. Hence, settlement talks are frequently held after new and critical information is presented. Typically, these milestones happen after the beginning of arbitration, procedural hearing, claims reception, discovery or the closing arguments.

In each of these stops, the parties rely on the lawyer's navigation skills. Thus, counsels are demanded to calibrate the speed, timing and angle to approach the other party for settlement. In order to do so, they start by calculating the success rate of the case and then reassess each time new information is disclosed.

In this short article, we will venture on the negotiation-arbitration spectrum. Our mission is to discuss how optimism and confirmation bias distort the lawyer's navigation system and may tilt parties' destination towards arbitration. Finally, we will propose some tools to mitigate the impact of cognitive shortcuts and enhance the chances of a settlement, even during arbitration.

Cognitive turbulence in the negotiation-arbitration spectrum

Optimism is responsible for silver-lining the darkest problems and refusing to give up when the odds are against us. Finding Nemo's *"just keep swimming"*, Johnny Walker's *"keep walking"* or Nike's *"just do it"* are only a few examples of a clear message: **positive thinking moves mountains**.

At plain sight, optimism may seem as a positive trait for

one to have. In fact, optimistic people tend to be more motivated, strive for more challenging goals, produce more, are more liked, suffer less depression and anxiety, among other benefits.[1]

However, Tali Sharot (Professor of Cognitive Neuroscience at the University College London) posits that **optimism acts as** a **cognitive shortcut** leading to overestimation of positive events and underestimation of experiencing negative effects.[2] Hence, we underrate the probability of being involved in an accident, having cancer, getting a divorce, or buying insurance for natural disasters.[3-4]

Parties in an arbitration may as well have an over-optimistic perception of their winning chances, with a low estimation of the costs and length of the proceeding.[5] They tend to believe that they have a better chance at winning cases, overestimate their persuasion abilities and underestimate the costs and duration of processes.[6] Consequently, **over-confident lawyers may end up causing more harm than good**.

In this regard, Margaret A. Neale and Max H. Bazerman compared the outcomes during simulated negotiations of over-confident negotiators and realistically confident negotiators who were trained and warned of the impacts of overconfidence.[7] The authors found out that realistically confident subjects settled of 61.5% of the cases, while overconfident subjects were able to achieve that result in only 36% of the negotiations.[8]

These results suggest that **over-confidence leads to less concessionary behavior than realistically confident behavior**.[9] In other words, each negotiator tends to apportion more value to the strengths of its case, while disregarding the arguments of the counterparty. This leads to polarization, making it harder to compromise and to reach an agreement. [10]

Therefore, if not properly accounted for, optimism bias may end up pushing parties away and lead them towards arbitration. As Oren Bar-Gill states, *"breakdowns in settlement negotiations are often attributed to an optimism bias shared by many lawyers and litigants"*.[11]

This dire consequence is even stronger when arbitration begins. If parties do not reach an agreement, they may trigger the next phase of the dispute resolution procedure in search for more information (e.g. the request for arbitration will include the amount and the core facts of the dispute).

Therefore, the search for a settlement requires a continued **evaluation** of the case. In other words, lawyers need to reassess the success rate when **new evidence** is presented.

At this stage, **confirmation bias** acts as a cognitive barrier towards one's ability to process such evidence in a neutral manner. In fact, it leads us to *"interpret new information in ways that are consistent with what we previously knew or believed or with our theory case"*.[12]

Furthermore, the increasing exchange of information between the parties as they move along the negotiation-arbitration spectrum and get closer to the award may not always help to align their perception of the weaknesses and strengths of their own cases. In fact, according to an International Arbitration Survey performed by PricewaterhouseCoopers and the School of International Arbitration in 2008, 43% of the proceedings are settled before the first hearing (often procedural), 31% before the hearing on the merits and only 26% before the award.[13]

Instead, claimants and defendants under confirmation bias tend to interpret ambiguous evidence through the prism of their own beliefs, each concluding that it supports their cases.[14]

For example, lawyers affected by this bias are less likely to take advantage of a discovery for settlement purposes. Instead of analyzing all the information, they focus solely on the documents that benefit their case theory. This is a major problem as any other relevant information is not given the same consideration or could even be ignored. In the end, broad document disclosure may end up wasting parties' time and money.

In fact, in the 2012 W&C Survey, 41% of the respondents said that document disclosure had affected the award only 0 to 2.5 times out of every 10 cases they had in the last 5 years, while only 8% of respondents of the International Arbitration Research conducted by Berwin Leighton Paisner felt that this procedure had significantly contributed to a favorable outcome.[15]

In sum, psychological studies and empirical evidence suggest that **exchange of information between the parties may actually end up pushing them away** due to overconfidence and polarization. Hence, lawyers tainted by optimism and confirmation bias will have a harder time trying to settle. Both sides have an irrational belief in the strengths of their case and thus find it more difficult to imagine middle ground for a negotiation. In the end, cognitive bias cloud settlement possibilities and end up frustrating clients when the actual outcome is not what they were told to expect.[16]

Debiasing techniques to steer through the negotiation-arbitration spectrum

Optimism bias prevents a neutral analysis of the case success chances, while confirmation bias clouds the reassessment of those possibilities when new information is disclosed.

Consequently, arbitration practitioners need to keep in mind that their own navigation system may tilt the final destination towards arbitration – even when settlement might be more beneficial for the parties.

For that reason, lawyers should perform a cost-benefit analysis at each milestone to recognize whether a settlement or an award is advisable. We propose the following examination for that purpose:

(1) Perform an efficiency examination before starting arbitration. Even if negotiation fails, counsels need to evaluate whether the shape of the process agreed in the arbitration clause could use some changes. For example, if the amount disputed is

not material, parties could agree to bring the controversy to an expedited procedure or a fast-track arbitration.

(2) Watch out for a bluff after receiving the request for arbitration. Does the other party *really* want an arbitral award or are they putting more pressure to reach a settlement? Parties and lawyers sometimes end up forgetting that they were just bluffing and get drawn into arbitration. As Ugo Draetta states, arbitration tends to take a life of its own and end up antagonizing parties.[17] In order for lawyers not to lose perspective, they need to remember the client's objective and let go their own financial interests. In this regard, charging a percentage of the agreement if a settlement is reached before arbitration could help. –This would change the frame of reference by turning settlements to victories for the litigation team, which may motivate lawyers not to close that door so quickly.

(3) Constantly take the perspective of the other party. Optimism and confirmation bias prevent litigators from evaluating evidence in a rational way and may prevent parties to settle. Hence, litigators should try debiasing techniques as considering the opposing party's perspective (consider-the-opposite), asking a member of the team to act as a "devil's advocate" or have a lawyer take a fresh look at the file. [18] Taking a step back and having others look at your work helps reduce confidence levels and gives a more realistic approach.[19] This examination should be performed after every major milestone (request for arbitration, procedural hearing, claim reception, discovery, hearing, closing arguments).

(4) Ask the arbitrators to open up "the black box" after the hearing on the merits. For example, they could open the deliberation to the parties, letting them know which their thoughts on the arbitration are. This way, parties and lawyers could do a better calculation of their chances of winning, increasing the probability of reaching a settlement. As Marc Blessing states, if both parties agree for the arbitrator to do so, opening the deliberation is a good way to convert disaster into a better process.[20]

(5) Bring help from outside if litigation teams are hampering settlement talks. Arbitration teams may be afraid towards negotiating with each other. If this is the case, litigators could step aside and call a settlement counsel. His advice would not be tainted by the litigation team's biased perspective and might find a reasonable way to encourage parties to settle.[21]

(6) Consider involving the arbitrators if settlement seems possible. In any stage of the arbitration, parties could ask for the arbitrator to get involved to facilitate a settlement between them, injecting some realism into their expectations though several means.[22] For example, arbitrators could acts as mediators (Med-Arb). This could be quicker and cheaper than waiting for the award, and especially would led benefit parties by letting theme maintain long-term business relationships.[23]

In sum, counsels need to be aware of the psychological biases that are present when analyzing evidence and calculating success rates. If not done properly, parties may be pushed away and drifted towards an award in the negotiation-arbitration spectrum. If lawyers want to take long journeys, they should do so at their own time and expense.

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ALTERNATIVE DISPUTE RESOLUTION AS A TOOL TO OVERCOME ACCESS TO JUSTICE IMPEDIMENTS AND INSTITUTIONAL DYSFUNCTION IN MEXICO

By Edgardo Muñoz[1]

I. Introduction

In recent years, Mexico has undergone a series of legal reforms purported to address the internal deficiencies of its judicial system. Along these reforms, the States and the Federation have enacted new laws that create Alternative Dispute Resolution ("ADR") centers for the resolution of civil and business complaints.

In line with other international examples, ADR mechanisms are helping to overcome the obstacles to access justice in Mexico. ADR has provided Mexico with a venue for conflict settlement that is free from the institutional dysfunction that characterizes its judicial system. Some of the ADR centers administered by State courts have reported remarkable results in the resolution of family disputes and small civil claims. However, there is still important progress to be made. Mexico's legal and the business community do not always promote or believe in this alternative system. This leaves many medium and big claims out of the realm of ADR.

In section II, we revisit some of the widely known obstacles to access justice and institutional dysfunctions of Mexico's judicial system. Section III discusses the most important efforts made by the government and private institutions in order to address Mexico's delicate situation in terms of access to justice and its low quality judiciary. Section IV provides a brief account and further prediction of the benefits that ADR promises to provide with to Mexican and foreign parties. Section V reflects the author's opinion about the work that still needs to be done to increase the use of ADR beyond the State courts' alternative justice centers.

II. Obstacles to access Justice and Institutional Dysfunctions of Mexico's Judicial System

It is no news that Mexico's judicial system has been struggling to reach the level of fairness and efficiency attained by other developed nations. Mexican courts are still overloaded of cases and understaffed, which characterizes México as a low-quality judiciary country.[2] The issuance of Court decisions takes quite some time, and after a decision is delivered to the parties, it is inevitably subject to a number of money and time-consuming appeals,[3] which are based on procedural flaws or constitutional infringements not always grounded.[4] As a country with lengthy judicial proceedings, justice in México is less accessible than in other countries with similar economic characteristics.[5]

The structural deficiencies of Mexico's judicial system of justice are coupled with a grounded distrust of its citizens towards State courts.[6] It has been reported that Mexico ranks among the top 5 OECD countries whose population perceives its government as highly corrupt, only below Russia, Venezuela and Paraguay.[7] While this is partially due to the inefficiency of the criminal system of justice that prosecutes few crimes,[8] civil and commercial proceedings, mainly at first instance courts, are also affected by corruption or negligent practices. In terms of Civil Justice, which regards how much a justice system is accessible and affordable, free of discrimination, corruption and improper influence by public officials, Mexico ranks 82 out of 102 countries in the World Justice Project's Rule of Law Index 2015.[9]

Corruption at the lower levels of justice creates important barriers to access to justice.[10] This specifically affects Mexico because before a matter reaches an appeal level court, parties in Mexican courts often have undue dealings with the first instance judge or his/her administrative staff.[11] As it has been point out, citizens that have experienced unjust outcomes from the justice system may choose not to rely upon formal legal procedures for the solution of their justice problems.[12]

Overall, there is considerable space for improving the quality of Mexico's judiciary. Despite the recent legislative efforts to overcome the situation, adherence to the rule of law in Mexico is still one of the weakest in OECD countries.[13] Mexico's low-quality judiciary for civil or business claims makes contract enforcement problematic. This has a direct impact in the economy of the country and the way of doing business in Mexico. It was been reported that a weak judiciary reduces the size of companies and their capital intensity, thus decreasing aggregate productivity in the whole country substantially[14]. It causes economic and social instability that puts pressure on low-income communities to find work outside Mexico, most often in countries with stronger currencies like the Untied States.[15]

III. Efforts made to overcome the current situation

In order to overcome the above obstacles to access justice, Mexico has endeavored to strengthen its judicial institutions in order to enforce law and adjudicate disputes in a fair and effective manner. With that in mind, in 2008 the Mexican Constitution was reformed in order to make the criminal trials faster with an adversarial oral system,[16] which is reported has reduced the average time of proceedings from 343 days to 132 days.[17] To this date, the new oral criminal judicial system fully operates in 9 out of 31 States for State law offences, and in 28 out of 31 States for Federal law offences.[18]

With regard to business law proceedings,[19] in 2012 amendments to Mexico's Code of Commerce establish the use of oral trials for claims below MXN 539,756.58 which is also forecasted to save time and money up to 50% in the resolution of business disputes.[20] Until now, twenty six Federal District Courts carry out oral trials for business claims, while four States offer them for civil claims.[21]

In 2013 a different reform to Mexico's *Amparo* Act was passed to limit amparo petitions which in the past allowed parties to suspend the government's and courts' legitimate actions while decisions were under appeal.[22] Following this change, Courts may give more consideration to the legitimacy of a constitutional complaint and the negative effects of a suspension of the courts' or the government's decisions.[23]

But efforts have not been made only to redress the internal deficiencies of Mexico's judicial system. Following article 17 of Mexico's Constitution, States and the Federal governments have enacted ADR laws to help State courts in the adjudication of disputes.[24] Since the turn of the new century, almost all State courts and State-level government agencies have created court-annexed mediation and conciliation centers for the resolution of civil claims.[25] These centers are usually called "alternative dispute centers" or "mediation" centers. They offer mediation and conciliation (but not arbitration). Their services are for both, parties in litigation proceedings who are referred by the State courts to mediate or conciliate and also for parties who agree from the outset to conciliate or mediate their disputes in the State sponsored ADR centers.[26] The settlements reached in mediation or conciliation proceedings at public or private ADR centers, are enforceable as a judicial decision would be.[27]

Private institutions and chambers of commerce, such as CANACO,[28] the Mexico City Arbitration Center and International Chamber of Commerce in Paris have also widely promote and administer private mediation, conciliation and arbitration proceedings in Mexico.[29] However, private mediation and conciliation proceedings are still few when compared with the numbers of mediation cases administrated by the States' centers.[30] On the other hand, international investment and commercial arbitration have flourished in the past two decades, while the number of domestic arbitration remains low.

The Mexican Arbitration Law dates from 1993 and is found in articles 1415 – 1480 of Mexico's code of commerce. The Mexican Arbitration Law incorporates the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration in full, with few modifications and adaptations made in 2011, which were deemed necessary to fit with the Mexican procedural law matters of judicial assistance to arbitration.[31] Mexico is also a Contracting State of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

of 1958 and the Inter-American Convention on Commercial Arbitration of 1975.

IV. Benefits expected from ADR

As research points out, promotion and recourse to ADR is increasingly identified as a principal strategy in reducing obstacles to access justice.[32] In particular, government legal recognition and private parties' use of ADR methods are among the policies and strategies that address institutional judicial dysfunction.[33]

As further developed in the next subsections, ADR provides a potential venue for conflict settlement that is free from the institutional dysfunction in low-quality judicial systems characterized by under-staffed and over-loaded courts, corruption and lengthy proceedings, and thus constitutes a tool to overcome Mexico's barriers to access justice.

In Mexico, ADR may be used in disputes over rights that a person may freely dispose of such as contractual or tort law rights and obligations. Pursuant to article 6 of Mexico's Federal Civil Code ("FCC"), people may waive their private rights when such does not affect directly the public order or third parties' rights.[34] This principle is the basis of articles 2946-2951 Mexico FCC that list the matters that shall not be resolved by settlement such as divorce,[35] disputes over incapacitated persons' or minors' rights, except where settlement is in their interest with prior judicial authorization,[36] tort liability arising from crimes,[37] the legal status of people and the validity of marriage agreements,[38] future claims based on crime, fraud or intentional harm,[39] the right to alimony,[40] future inheritance rights,[41] inheritance rights before a last testament or will is disclosed.[42]. Rights that traditionally have been considered as inalienable by private parties are also excluded from the realm of ADR. These may include matters such as parental custody, adoption, political rights, employment disputes over salaries, leave and pensions, tax disputes against the State, the absolute right to inheritance by minors, widows etc., despite any testament or will stipulation to the contrary.[43] In addition, article 1415 Mexico's code of commerce provides that all matters are susceptible to be solved by arbitration unless other laws stipulate the contrary or provide for special procedures [44]

Additionally, ADR has been promoted for new areas of business such as oil exploration. For example, articles 106 (II) and 107 of the 2014 Hydrocarbons Act establishes that assignees or contractors may request that the Ministry of Agricultural, Land and Urban Development conduct a mediation proceedings which focuses on forms or strategies of acquisition, use, enjoyment, and impact on land, property or rights, as well as the appropriate compensation the sale and purchase of such rights or property.[45]

a. Mediation and conciliation

Mediation is an ADR mechanisms whereby a third party called mediator leads the discussions between the disputing parties so they can reach a solution to their dispute. At the end of the process, the parties may sign a settlement which can be later on enforced as judgment. [46] In Mexico, scholars understand that the mediator cannot propose any solutions to the parties but that his or her role is limited to helping the parties to communicate.[47]

On the other hand, conciliation mirrors the technics and process of mediation but with elements that distinguishes from the latter. Besides listening to the conflicted parties and helping as a channel of communications among them, the conciliator proposes a non-binding solution to the parties.[48] The proposal is not binding on the parties but a simple recommendation that can eventually be accepted by the parties and incorporated into a settlement agreement that is enforceable as a judicial judgment.[49]

Mediation and conciliation are mechanisms highly appreciated by parties as they allow them to directly communicate with the mediator and conciliator who will be behind the solution eventually reached by them. In State courts adjudication, the parties do not get to meet or talk to the judge. Until recently, neither lawyers would have direct access to the judge.[50] The possibility that mediation and conciliation gives the parties to tailor the solution that puts an end to their disputes has an important sociological and psychological element that brings satisfaction about the process and the result.[51] Since parties are the architects of their settlement, corruption by adjudicators as a barrier to access justice is overcome.

In view of the fact that mediation and conciliation both favor finding the solution of a problem over determining which party is right as is the case in strict litigation in courts or arbitration, the parties are in most instances willing to continue an amicable or business relationship with their opposing party.[52] The adversarial nature of litigation or arbitration proceedings who often dissuades Mexican parties to sue, is eliminated.

Despite the fact that mediators and conciliators probably allocated much more time to solve a single dispute than a judge, mediation and conciliation processes are cheaper and faster than most court proceedings.[53] Parties are therefore able to turn the page on that matter faster and continue businesses or lives as usual.

b. Arbitration

Arbitration constitutes an alternative to adjudication in State courts whereby the parties to a legal relationship agree that any existing or future dispute between them be finally decided by an independent panel in accordance with the rules of an arbitration institution or under ad-hoc rules.[54]

One of the main advantages of arbitration is that proceedings substantially take less time than litigation.[55] This benefit is especially appealing to parties in business disputes. A business purpose could be completely lost if a dispute were to last for years in litigation. Arbitral proceedings are put to an end by the issuance of an arbitral award, which is final and binding up on the parties.[56] This feature of the award has a direct impact on the time that is invested in the resolution of a dispute simply because it is not subject to any appeal mechanisms.[57] Furthermore, arbitral tribunals do not depend on the courts' calendar. Arbitration meetings are easily coordinated and the dispute is solved in a considerably faster fashion.[58]

Moreover, most litigation in State courts follows a very formalistic approach in the conduct of the proceedings. This results in formalities that are often given higher importance than the substance of the dispute. Arbitration proceedings are tailored to meet the specific requirements of the parties.[59] This benefit can be particularly valued by all parties but in particular for businesses. Most business deals are made in the spot and under flexible rules on contract formation. In this regard, business parties prefer flexibility in their dispute resolution mechanism as well.

Many disputes arising out of businesses can be complex. State judges may lack the expertise needed in a dispute of this particular kind. An arbitration panel versed in the specificities of modern business law and practice is thus advisable. Parties can appoint arbitrators that are qualified for the dispute at stake, select the rules under which the proceedings shall be carried out, determine which law will be applicable to the substantive issues of the dispute, among other things.[60] If an arbitral tribunal is experienced enough, it should be able to grasp the decisive issues of fact and law in the dispute and adapt the procedure in order to ensure that such issues are properly dealt with.[61]

Moreover, parties to disputes will also value the personalized and high-end service performed by most arbitral tribunals. As opposed to State courts, arbitrators are appointed to handle one specific case from the beginning to the end. Accordingly, arbitrators get to know the parties and their counsel better than State judges do. Most importantly, as the case develops through the documents filed by the parties, the pleadings, the taking of evidence, etc., arbitral tribunals perform a thorough analysis of the case and get a proper understanding of it.[62] As a result, arbitral tribunals are fully qualified to issue sensible awards that will be suitable for the dispute at hand.

In addition, arbitration offers a private means of resolving legal controversies. This, in principle, makes arbitration confidential to the outside world.[63] While parties to all kinds of contracts appreciate the privacy and confidentiality that surrounds the arbitral proceedings, parties in business relationship particularly value this feature. This holds true since public mechanisms of dispute resolution can damage a business reputation. Likewise, business parties may have an interest in protecting valuable information such as trade secrets, ownership of assets, credit-lines, competitive practices or any delicate detail that could be subject to adverse publicity.[64] On the other hand, many ordinary civil disputes will probably appreciate that the dispute is kept private. Family disputes are by nature private matters where all parties seek for discretion. In State courts, issues that may be embarrassing to the parties are publically discussed during the probate process.[65]

V. What is missing?

Against the above background, most observers would bet that ADR mechanisms have a promising future in Mexico. ADR mechanisms are helping to overcome the obstacles to access justice in Mexico. However, there is still important progress to be made. In the past, some have argued that Mexico government's control and management of alternative dispute resolution centers for labor disputes has undermined the success of and confidence in the ADR mechanisms in Mexico.[66] Indeed, the vicious cycle at the origin of the institutional dysfunction of Mexico's judicial legal system often permeates many of the projects controlled, administered or sponsored by the State.

But the government alone should not be blame for the slow pace at which the use of ADR mechanisms augments in Mexico. Many legal practitioners in the country still endorse a legal culture that encourages litigation and disfavors ADR.[67] The business community has also failed to see the advantages of ADR.[68]

Domestic arbitration remains small when compared to the big amount of international arbitration cases with seat in Mexico or involving Mexican parties. One can wonder about the reasons why domestic arbitration matters are still much less than the international ones: the cost of arbitration proceedings (in a country where litigation before State courts is "free"), the deep-rooted court litigation culture, the lawyers' unsound suspicion about the one-instance process offered by arbitration, insufficient education and training on arbitration, etc.[69]

In the case of commercial arbitration however, these assumptions should not be valid. The business lawyers' community in México is a sophisticated one. Many lawyers are usually members of middle size or big law firms accustomed to deal with complex contractual, financial and corporate matters. Price of arbitration proceedings is not therefore a concerned. In the same line of thought, the one instance nature of arbitration will always make sense for business who allocated more value to financial and legal cost predictability.

The ultimate answer may lie on the fact that little has been taught about the specific advantages offered by arbitration and other ADR for the business community.

VI. Conclusion

Promotion and use of ADR is one of the various public policies that the Government of Mexico is currently attempting to apply to tackle the current barriers to access justice that are mainly due to the institutional dysfunction of its judicial system. ADR mechanisms offer parties the possibility to obtain a solution to their dispute that is enforceable in considerable less time than in traditional State court proceedings. Even arbitration is by far faster than litigation in light of its one instance nature of arbitral proceedings without the possibility to appeal an award.[70] The speediness of ADR allows parties to access justice without having to bear the high legal cost and uncertainty of lengthy court proceedings.

In lieu of fearing that the judge may be unduly influenced or bribed by the opposing party, mediation and conciliation offers the parties a mechanism to be authors of the solution to its dispute, which leaves in the parties a feeling of satisfaction about the outcome of the proceedings and that overcomes the obstacle of distrust in a judicial system impose on parties seeking to access justice. Also in arbitration, where a fair decision making process requires awards to be made by a majority of the arbitrators or by a sole arbitrator chosen between the parties or appointed by an institution, corruption is not an issue.

In addition, flexibility is key for obtaining the high-quality level proceedings offered by ADR methods. Parties may not only choose the most appropriate method according to the nature of the issue and the peculiarities of its dispute, *i.e.* mediation, conciliation or arbitration, it also offers the possibility to tailor made their proceedings by agreeing on certain rules, choosing the right mediator, conciliator or arbitrators for their dispute, etc. Likewise, the settlements or solutions that can be achieved through mediation, conciliation or *ex aequo et bono* arbitration are not limited to the catalogue of legal remedies provided by the otherwise applicable law. Parties may arrive, conciliators may propose and e*x aequo et bono* arbitrators may render a wide variety of solutions not limited by law that may increase the chances of having an amicable and satisfactory solution to the conflict.

Likewise, the public nature of State courts adjudication exacerbates adversarial and inflexible positions. Usually, parties in dispute will not make concessions that it the eyes of the public or even the adjudicating judge could look like weakness. Some parties may also get injured by the public exposure of their dispute. ADR allows more control over confidentiality. This can be an important factor to take into account in sensitive areas such as intellectual property, delicate business transactions or family matters.

Finally, this chapter has intended to furnish a brief analysis about the benefits of ADR to overcome barriers to access justice and institutional dysfunction in Mexico. However, additional discussion and promotion is necessary in Mexico in order to make ADR an effective tool to tackle those problems. Empirical research about the perception and use of ADR among the general public may be still needed. The results of such empirical research would clear out any wrong assumptions regarding the effectiveness of ADR as tool overcome Mexico´s obstacles to access justice and its judicial system's institutional dysfunction.

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1 Professor of Law, Universidad Panamericana, Guadalajara. Ph.D. (Basel), LL.M. (UC Berkeley), LL.M. (Liverpool), Graduated in Law, (UIA Mexico).
2 Cf. OECD, Economic Surveys - Mexico 22, para. 32 (OECD ed., January 2015). document available at http://www.oecd.org/eco/surveys/Mexico-Overview-2015.pdf. Also see World Justice Project, Rule of Law Index 30 (2015). document available at http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf: Mexico ranks 82 out of 102 countries in Factor 7: Civil Justice of the World Justice Project's Rule of Law Index 2015 which examines whether court proceedings are conducted without unreasonable delays, and if decisions are enforced effectively. It also measures the accessibility, impartiality, and effectiveness of alternative dispute resolution mechanisms.
3 In the OECD area, the average length of civil proceedings is around 240 days in first instance, but in countries like Mexico it takes 342 days to be resolved. Final disposition of cases may involve a long process of appeal before the higher courts, which in some cases can average more than 7 years. Cf. OECD, Judicial performance and its determinants: a cross-country perspective - A Going for Growth Report 38 (OECD June 2013). Document available at http://www.oecd.org/eco/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf
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5 Cf. OECD, Judicial performance and its determinants: a cross-country perspective - A Going for Growth Report 13. June 2013.
6 Miguel Carbonell, *Corrupción judicial e impunidad: el caso de México*, *in* Lo que todos sabemos sobre la corrupción y algo más 4, 5, (Ricardo Méndez-Silva ed. 2010). stating than in 2010 surveys reported that only 10 per cent of the population had trust in Mexico's Supreme Court that enjoys more reputation than lower courts. Mariana Hernandez-Crespo, *A systemic perspective of ADR in Latin America: enhancing the shadow of the law through citizen participation*, 10 Cardozo Journal of Dispute Resolution 91, 98, fn 22 (2008).
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10 Julinda Beqiraj & Lawrence McNamara, International Access to Justice: Barriers and Solutions 29 (International Bar Association ed., October 2014).
11 There are numerous examples of corruption practices by Court clerks and other admistrative staff. In one occasion one court clerk was investigated for holding around USD 30 million on its bank account, Cf. Gustavo Castillo-García, *Acumula secretario de juzgado más de $432 millones en siete años*, La Jornada, 28 May 2011.
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16 This reform was published on 18 June 2008 in the Official Gazette. The changes concerned articles 16, 17, 18, 19, 20, 21, 22, 73 (XXI) (XXIII), 115 and 123 (XIII) of the Mexican Constitution. Cf. Generally, Óscar Vázquez-Marín, *La Implementación De Los Juicios Orales En El Sistema De Justicia Penal Mexicano: ¿Qué Sigue Después De La Reforma Constitucional?*, Revista Mexicana de Justicia (2008). available at http://www.juridicas.unam.mx/publica/rev/refjud/cont/12/rjf/rjf10.htm
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19 Mexico still makes a distinction between business transactions (mercantiles) and personal (civil) transactions. The former are governed by the code of commerce, while the latter are governed by the civil code and the code of civil proceedings. Generally, a business transaction pursues a goal of economic speculation or a profit purpose (cf. Arts. 75 (XIV), (XXIV) Mexico Code of Commerce), which does not need to be expressed in the contract but which is rather assessed on a case by case basis.
20 Cf. Secretaría de Economía, et al., Diagnóstico de Cumplimiento de Contratos Resumen Ejecutivo (2014). based on oral trials implemented in Mexico City, document available at http://www.cofemer.gob.mx/imagenesUpload/20156231349Diagn%C3%B3stico%20Cumplimiento%20de%20Contratos%20DF.pdf
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24 Since 2008, article 17 of Mexico Constitution requires the States and the Federation to legislate on alternative dispute resolution. Twenty Five Mexican States have enacted ADR laws to adjudicate civil disputes. Cf. Rosalía Buenrostro Báez, Justicia Alternativa y el Sistema Acusatorio 230 (Secretaría

Técnica Del Consejo De Coordinación Para La Implementación Del Sistema De Justicia Penal 2014)., document available at http://setecc.egobierno.gob.mx/files/2013/03/Justicia-alternativa-y-el-sistema-acusatorio.-Buenrostro-Baez-Pesqueira-Leal-Soto-Lamadrid.pdf

25 Id. at, 210.

26 Nuria González-Martín, *El ABC de la mediación en México (Capítulo X)*, *in* Temas Selectos de Derecho Internacional Privado y de Derechos Humanos. Estudios En Homenaje A Sonia Rodríguez Jiménez 229, 232, (Juan Vega ed. 2014).

27 Id. at, 217, 218, 236. available at http://biblio.juridicas.unam.mx/libros/8/3647/15.pdf

28 CANACO stands for Mexico's National Chamber of Commerce with offices in the main business centers of the country.

29 IBA Arbitration Committee International Bar Association, Arbitration Guide - Mexico 1 (Claus Von- Wobeser ed., 2013). available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=8A7876EB-EBB9-4D5F-B073-24618471E911

30 Nuria Gonzalez Martin, *Mexico and Civil, Family and Commercial Mediation: A Search for Complementary Routes to the State Courts*, *in* New Developments in Civil and Commercial Mediation: Global Comparative Perspectives 483, 484, (C.E. Mota & L. Marquis eds., 2015). reporting that the Mexico City's Alternative Dispute Resolution Centre controlled by the Superior Tribunal had 2013 6,812 meditations ended in an enforceable settlement.

31 Francisco Gonzalez-De-Cossio, *Amendments to the Mexican Arbitration Statute*, 1 International Commercial Arbitration Brief, 1, 2 (2011).

32 Beqiraj & McNamara, International Access to Justice: Barriers and Solutions 6. October 2014.

33 Id. at, 22, 27.

34 The authors' translation. The original in Spanish reads: "La voluntad de los particulares no puede eximir de la observancia de la ley, ni alterarla o modificarla. Sólo pueden renunciarse los derechos privados que no afecten directamente al interés público, cuando la renuncia no perjudique derechos de tercero".

35 In particular, the jurisdiction to decide a divorce is not arbitrable. However, the decision as to the quantum of alimony or allowance due by a former spouse may be arbitrable.

36 Art. 2946 FCC Mexico.

37 Art. 2947 FCC Mexico.

38 Art. 2948 FCC Mexico.

39 Art. 2950 (I) (II) FCC Mexico.

40 Art. 2950 (V) FCC Mexico. However, the determination of the amount of alimony may be arbitrable according to the Art. 2949 FCC Mexico.

41 Art. 2950 (III) FCC Mexico.

42 Art. 2950 (IV) FCC Mexico.

43 Arts. 1368 and 1372 FCC Mexico.

44 Art. 1415 Mexico Code of Commerce reads Mexican arbitration law applies "unless […] other acts provide for a different procedure or that certain disputes are not arbitrable".

45 The Mexican Hydrocarbons Act of 2014 available at http://www.diputados.gob.mx/LeyesBiblio/pdf/LHidro_110814.pdf

46 González-Martín, El ABC de la mediación en México (Capítulo X) 217, 218, 236. 2014.

47 Báez, Justicia Alternativa y el Sistema Acusatorio 60, 61. 2014. González-Martín, El ABC de la mediación en México (Capítulo X) 215. 2014.

48 Báez, Justicia Alternativa y el Sistema Acusatorio 46, 47. 2014.

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50 In Mexico the usual practice is to talk to the court clerks about the proceedings not to the judge.

51 Báez, Justicia Alternativa y el Sistema Acusatorio 56, 57. 2014.

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53 Id. at, 223.

54 Jean Francois Poudret & Sebastien Besson, Comparative Law of International Arbitration 1-3 (Thomson 2nd ed. 2007).

55 It has been reported that arbitration proceedings in Mexico normally last a year, plus the enforcement stage. Cf. International Bar Association, Arbitration Guide - Mexico 2, 21. 2013.

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57 Alan Redfern, et al., Redfern and Hunter on International Arbitration 34 (Oxford University Press Fifth ed. 2009).: "Although the initial cost is not likely to be less than that of proceedings in court, the award of the arbitrators is unlikely to be followed by a series of costly appeals to superior local courts."

58 Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, Revista para el Análisis del Derecho (INDRET), 8 (2008).

59 Julian D. M. Lew, et al., Comparative International Commercial Arbitration 522 (Kluwer Law International. 2003).

60 Id. at, 4.

61 Redfern, et al., Redfern and Hunter on International Arbitration 32. 2009.

62 Id. at, 33.

63 Lew, et al., Comparative International Commercial Arbitration 8. 2003.

64 Redfern, et al., Redfern and Hunter on International Arbitration 32. 2009.

65 Bosques-Hernández, Revista para el Análisis del Derecho (INDRET), 5 (2008).

66 Brown Scott, et al., Alternative Dispute Resolution Practitioners Guide 38 (Conflict Management Group ed., Conflict Management Group 1998). document available at https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf

67 Carlos Rodriguez-Gonzalez-Valadez, ADR At The International Oil & Gas Industry - The Pemex Case (A Legal And Socio-Legal Analysis) (2012) Università degli Studi di Milano). PHD thesis available at https://air.unimi.it/retrieve/handle/2434/214753/241550/phd_unimi_R07956.pdf

68 Id. at, 280, 281., reporting that big State companies like PEMEX do not have a positive view about ADR.

69 Id. at, 311, 312.

70 However, parties may start setting aside proceedings under the limited grounds set out in Arts. 1457 and 1462 CCom Mexico, which includes evidence of lack of arbitration agreement among the parties, non arbitrability of the claims at stake, incapacity of one of the parties to submit to arbitration, improper constitution of the arbitral tribunal, ultra petita or infra petita decisions, failure to provide proper notice of the proceedings infringement of public policy and application of mandatory rules.

ENHANCING MORE PERMISSIVE APPROACH TO COUNTERCLAIMS BY HOST STATES TO INVESTORS AS A TOOL TO IMPROVE INVESTOR-STATE ARBITRATION

By Elena Burova

Introduction

Investor-State arbitration currently attracts a considerable amount of public scrutiny. It is commonly perceived as one-sided road, where only investors can bring claims against host states, which raises certain degree of criticism of ISDS today. The role of states in this system is often characterized as "perpetual respondents"[1], with the only possible successful scenario – to rebut claims raised by investor and to recover legal costs.

However, the founders of the ICSID bore in mind the need to maintain a careful balance between the interests of investors and those of host states, permitting the institution of arbitration proceedings by both investors and host states.[2] Allowing counterclaims brings several benefits from procedural and substantive standpoints both for states and investors. Firstly, hearing counterclaims by arbitral tribunal, as neutral forum, is more preferable than exposing investors to the same claims in host states' courts. Moreover, tribunals composed of international arbitrators specialized in ISDS can be more well-positioned to consider the counterclaims related to international investment projects than the judges of national courts.

Secondly, bringing counterclaims connected with the original claim of investor in the same proceedings, rather than initiating separate litigation or arbitration, can enhance procedural efficiency, saving time and money to the parties. Thirdly, permitting counterclaims may deter investors from bringing frivolous claims against states, as well as states from raising frivolous jurisdictional objections.

Finally, it might be beneficial for enhancing the rule of law and legitimacy in investment arbitration, as it can call investors

to account for their wrongdoings, which is particularly acute today in light of environmental, human rights, labor law and corporate responsibility considerations.

1. Regulatory framework of counterclaims in investment arbitration

This being said, counterclaims of host states have rarely succeeded so far, as the practice of both ICSID and non-ICSID arbitration evidences. The number of cases involving counterclaims of states have amounted approximately to 30. However, only a few of them have resulted in a relatively successful outcome for respondents: in those cases, tribunals reduced the amount of damages awarded to investor as a set-off.

In order to identify main jurisdictional and substantive law hurdles preventing counterclaims from succeeding, it is necessary to firstly address the relevant provisions of the most frequently applied investment arbitration instruments – the ICSID Convention and applicable arbitration rules (the ICSID Arbitration Rules and the UNCITRAL Arbitration Rules).

1.1. ICSID Convention and ICSID Arbitration Rules

Article 46 ICSID Convention expressly confirms the right of host states to bring counterclaims, which is reiterated in Rule 40 (1) ICSID Rules of Arbitration:

> *Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly* out *of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.*

The first requirement for counterclaim – (i) 'otherwise within the jurisdiction of the Centre' – relates to the general jurisdictional requirements of Article 25 (1) ICSID Convention. So far it has not provoked any considerable controversy in its interpretation by arbitral tribunals. What has led to interpretative debates among arbitrators and commentators are the two remaining requirements of Article 46 ICSID Convention – (ii) consent and (iii) connectedness with the subject-matter of the dispute.

1.2. UNCITRAL Arbitration Rules

The 1976 and 2010 versions of the UNCITRAL Arbitration Rules set forth different provisions regarding counterclaims. The relevant part of Article 19 (3) 1976 Rules provides:

> *[...] the respondent may make a counter claim arising out of the same contract.*

The need to change the 1976 version was dictated by its primary orientation on the international commercial arbitration, rather than investment treaty arbitration: UNCITRAL recommended it for *'the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts'*.[3] The present wording adopted in Article 21 (3) 2010 Rules provides:

> [...] *the respondent may make a counter-claim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.*

Most of the UNCITRAL Investor-State disputes involving counterclaims to date were conducted under the 1976 Rules, save for a few awards, eg, *Oxus Gold v. Uzbekistan*[4]*, Al-Warraq v. Indonesia*[5]. The 1976 UNCITRAL Rules will still govern a considerable portion of future investment disputes, since most of the BITs concluded so far refer to the 1976 version (except for those stating that arbitrations are to be conducted under the UNCITRAL Rules 'as then in force').

2. Main reasons for the rejection of counterclaims in investment arbitration

2.1. "Within the scope of consent of the parties"

Generally, consent is "the cornerstone for the jurisdiction"[6] of arbitral tribunals over Investor-State disputes. In order to identify whether counterclaim falls under the scope of consent, tribunals most frequently referred to the dispute resolution provisions in international investment agreements (IIAs).

There are two main hurdles emanating from the language of dispute resolution and applicable law provisions in IIAs:

(i) dispute resolution provisions covering disputes arising out of the violations of host states' obligations (jurisdiction *ratione materiae*) and giving the right to raise claims only to one party - investor (jurisdiction *ratione personae*).

(ii) applicable law provisions referring only to the treaty or/and international law.

The award in *Roussalis v. Romania*[7], rejecting jurisdiction over counterclaims, illustrates both hurdles. The counterclaim of Romania arose out of the alleged Claimant's failure to make certain payments that were a part of post-investment commitments of investor. The majority of the tribunal based its decision on the interpretation of Article 9 (1) Greece- Romania BIT:

> *Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement [...].*

They found it to "undoubtedly limit jurisdiction to claims brought by investors about obligations of the host State" and not providing "for counterclaims to be introduced by the host state in relation to obligations of investor".[8]

One of the members of the tribunal, Prof Michael Reisman contested this conclusion of the majority and argued in his separate declaration that "consent component of Article 46 of the ICSID Convention is ipso facto imported into any ICSID arbitration which an investor elects to pursue". He also explained his position by general policy considerations related to the benefits of hearing counterclaims by neutral ICSID tribunal.

The debate between arbitrators in *Roussalis* demonstrates the conflict between different interpretations of consent requirement: on the one hand, the scope of consent as expressed in dispute resolution provision of the BIT and, on the other hand, the implications of consent arising from the submission of a dispute to ICSID arbitration. Policy considerations of allowing counterclaims in investment arbitration taken alone seem to be insufficient to resolve this conflict, since the restrictions in the language of the relevant IIAs, as the basis of consent, can be overcome only with some solid legal arguments.

The majority in *Roussalis* also motivated their conclusion with the reference to applicable law clause of the Greece-Romania BIT:

> "*The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law*".

It was held that "the BIT imposes no obligations on investors, only on contracting States. Therefore, where the BIT does specify that the applicable law is the BIT itself, counterclaims fall outside the tribunal's jurisdiction". [9]

This problem becomes particularly pertinent in treaty-based arbitration, as opposed to the contract-based arbitration. Some treaties direct tribunals to apply the treaty itself and relevant international law, whereas others designate the domestic law of the host state as one of the sources of applicable law. In the former case, it is more problematic for a state to succeed with its counterclaims against the investor, as investors are unlikely to have explicit obligations towards host state under the treaty or international law. Unlike IIAs, investment contracts are bilateral in their nature and impose rights and obligations on both parties, i.e. investor and state, which makes it less problematic to raise a counterclaim in this context.

This brings the discussion to the next point - relatedness of counterclaim to the subject-matter of the dispute.

2.2. "Arising directly out of the subject-matter of the dispute"

Unlike in domestic law, in international adjudication the connection between a counterclaim and original claim is compulsory because of the consensual nature of the jurisdiction of arbitral tribunals and, secondly, of specific class of disputes resolved by a number of tribunals.[10] The requirement of Article 46 ICSID Convention that counterclaims "*arise directly out of the subject matter of the dispute*" is satisfied when "*the factual connection between the original claim and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose all grounds of dispute arising out of the same subject matter*".[11]

There are different views among tribunals and scholars on whether this requirement is a matter of jurisdiction or admissibility. The tribunals in *Paushok v. Mongolia*[12] and *Saluka v Czech Republic*[13] considered this requirement as a matter of jurisdiction. It seems more accurate to characterise this requirement as a matter of admissibility, as the tribunal in *Goetz v. Burundi*[14], as well as the vast majority of commentators did[15]. A counterclaim may be well within the tribunal's jurisdiction, but not arise directly from the subject-matter of a particular investment project between the same investor and the same host state.[16]

Moreover, the language of Article 46 ICSID Convention makes it clear that this requirement shall be fulfilled in addition to the jurisdictional requirements, as it is stipulated as distinct and separate condition. The interrelation between these two requirements is best characterized as a two-stage test: the criteria of connectedness presupposes jurisdiction of the tribunal and shall be analysed after satisfying first two jurisdictional requirements of Article 46.[17]

Although this issue does not seem to stand as an unsurmountable wall on the way of states' counterclaims, a more coherent and straight-forward approach would only add to the predictability of the framework in general. What seems to raise most of the difficulties is the nature of connection that should solidarize an original claim by investor and counterclaim by state to make the latter admissible. The question that arises is whether it implies a legal or factual nexus?

As it follows from the reasoning in *Saluka v Czech Republic*, dismissing counterclaim for the lack of sufficient connection, it interpreted this requirement as implying the same legal instrument as a ground for both claim and counterclaim: "*The legal basis on which the Respondent has itself relied ... is to be found in the application of Czech law, and involves rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic's jurisdiction*".[18]

This interpretation has provoked a huge wave of critical commentaries: the test established in *Saluka v Czech Republic* leads to it being near-impossible for states to succeed.[19]. Even if the reference to "the same contract" in Article 19 (3) 1976 UNCITRAL Arbitration Rules is interpreted as the reference to investment treaty, tribunals most likely will not be able to decide upon the states' counterclaim. The investors are not parties to IIAs and bear no obligations arising directly out of them. Thus, state's counterclaims in principle cannot be based on the same instrument, in contradiction with the connectedness requirement if interpreted as presupposing legal nexus.

3. The need to rebalance the system of investment arbitration: why?

Due to the jurisdictional and substantive law hurdles, current regime discourages states to raise counterclaims, which indicates an asymmetry between the ways how the investors and states can realize in practice their inherent rights. The careful balance between the interests of investors and host states was in mind of the ICSID founders: explicit permission of states' counterclaims confirms that this system grants reciprocal, rather than unilateral, rights to arbitrate. This basic principle should be restored with a view to make the system friendlier to counterclaims.

Main counterarguments against a more permissible regime to states' counterclaims relate to the traditional understanding of investment arbitration as a mechanism for the sole protection of foreign investors. It is often stated that host state already possesses a power that the foreign investor lacks, by its ability to dictate its own rules of the game for investing in its territory. The classic paradigm of investment disputes would reflect that it is the conduct of host states, rather than of investors, that needs to be kept in check.[20] Based on that, it can be questioned whether there is a need to any rebalance at all?

The answers to this line of counterarguments are based on two premises. First, the function of counterclaims in ISDS is supposed to be defensive, rather than offensive, "a shield rather than a sword"[21]. This tool is not intended for attacking investors and achieving victory in the form of monetary compensation, but rather for setting-off any sum awarded to states to reduce the amounts awardable to investors.

Moreover, the system of ISDS emerged in the context, different from the present one in many aspects. What distinguishes the present period is the step-in of human rights, sustainable development, corporate responsibility concerns. The increased momentum to move from a resource-inefficient and polluting socio-economic model to one with a lower environmental footprint is resulting in significant regulatory change, and much more is coming.[22]

The crucial task today is to introduce a balance between protecting foreign investors, while simultaneously preserving the host states' margin of manoeuvre regarding regulatory activities.[23] While it seems true that these considerations do not require a fundamental redesign of the entire system of international investment protection[24], they prompt a call to accommodate into the system the needs of states to defend their own interests as major stakeholders of international investment projects.

A recent example of positive development in the direction of integrating counterclaims based on environmental considerations has been demonstrated in the pending arbitration *Perenco v. Ecuador*[25]. Respondent state raised counterclaims related, inter alia, to environmental damage caused due to the oil spill on the extraction field operated by claimant, based on Ecuadorian environmental law. The way tribunal dealt with this counterclaim deserves particular attention: in its interim decision, dedicated solemnly to environmental counterclaim, tribunal indicated that "proper environmental stewardship has assumed great importance in today's world"[26] and acknowledged that environmental counterclaim entitles state to full reparation. This decision can be understood as a step further in the change of mindset of tribunals.

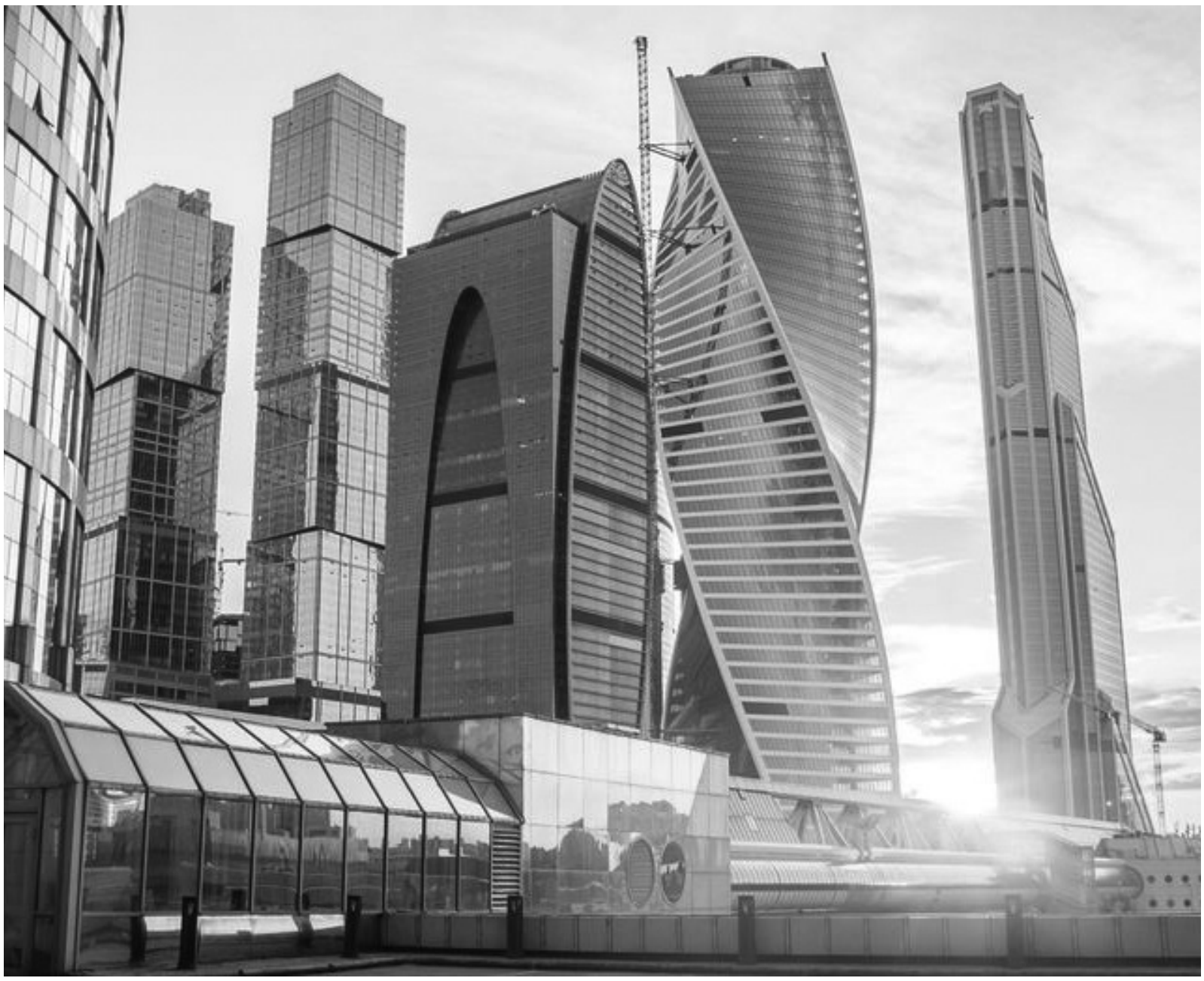
4. The need to rebalance the system of investment arbitration: how?

The analysis of arbitral practice reveals that the most serious obstacles faced by counterclaims arise out of the narrow and restrictive interpretation of either arbitration clause IIAs, or relevant provisions of arbitration rules. Two potential directions in which the current regime can develop to overcome these obstacles can be suggested: one relates to the interpretation of existing treaties and arbitration rules, the other – to the future treaty drafting.

4.1. Shifting away from overrestricive treaty interpretation by arbitral tribunals

Dispute resolution clauses in IIAs are potentially capable of grounding the right of host states to raise claims against investors. The arbitration clauses with broad wordings (e.g., "disputes with respect to investments", "all/any disputes") allow the interpretation that extends the scope of consent to counterclaims.

Even if the arbitration clause in IIA has rather narrow wording (e.g., in *Roussalis v. Romania*, limiting disputes to those related to the violations of host state's obligations



under the relevant treaty), there is still place for a more liberal interpretation covering counterclaims. In investment arbitration the scope of consent to arbitrate a counterclaim cannot be properly determined only by the reference to BIT/MIT, absent a provision expressly excluding counterclaims.[27] Both IIA and the ICSID Convention should be construed and harmonized to appropriately analyse the issue of the consent to counterclaims.

One of the ways to reconcile the ICSID Convention and the relevant treaty is the interpretation of Article 46 ICSID Convention, as adopting a rebuttable presumption of the consent to counterclaims. The ordinary meaning of its text "except as the parties otherwise agree" suggests that implied consent should be sufficient for the purposes of establishing jurisdiction over counterclaims. If the parties to IIA intent to opt out of the possibility to raise counterclaims, they should expressly provide this exclusion in the language of the treaty. Otherwise, consent to the jurisdiction of the ICSID implies a submission to all relevant rules of the ICSID Convention.[28]

A potential counterargument of investor would be that he accepted the offer to arbitrate according to its narrow formulation in the treaty. However, the meaning of "dispute" might be construed simply to define the general limits of contentions to be submitted to arbitration in ICSID. A limitation upon the scope of the host state's consent to arbitration in respect of investor's claims does not necessarily apply to the host state's counterclaim. If a counterclaim is sufficiently factually linked with the main claim, it ipso facto falls within the jurisdiction of the arbitral tribunal.[29]

4.2. The interpretation of connectedness criterion as requiring factual, rather than legal, nexus

There appears to be no reasons to imply a requirement of a legal connection into the term "subject-matter" used in Article 46 ICSID Convention. The subject-matter of the dispute is defined by the rights comprising the investment and the disagreement between the investor and host state on questions of law and fact relating to those rights.[30] *Travaux preparatoires* confirm that this requirement was meant to be satisfied in the presence of "the factual connection".

The treaty commitments of host states towards investors are unilateral and no symmetry should be required in the legal foundations of the original claim and the counterclaim. State's counterclaims in investment treaty arbitration in principle cannot be based on the same instrument. Therefore, the test for this criterion should be the factual relationship between the original claim and counterclaim, rather than the same legal instrument giving the base for the dispute.

4.3. Suggestions about drafting future treaties

It is uncommon for the treaties in force to contain provisions expressly stating the right to bring closely related counterclaims. A look at the model BITs, as well as a few treaties in force can be helpful in this regard.

In particular, one of the first drafts of the Model Indian

BIT[31], published in 2015, included a provision allowing for the state party to make a counterclaim for breach by investors of several articles of the BIT, imposing on them obligations in relation to corruption, disclosure, taxation and compliance with host state laws. However, during the public consultations it was met by a heavy wave of opposition: it was criticized as "inappropriate in a BIT" and "deviation" from the strong practice.[32] The opponents also alleged that "the concept of counterclaim by the State" is brought "on grounds which should not ideally be a subject matter of international treaty", but rather "always remain within the sovereign reach of domestic courts and not international tribunals"[33]. As it comes from the text of the adopted Model Indian BIT[34], the attempt to introduce express provisions entitling states to assert counterclaims has failed.

A more positive example is dispute resolution provision of Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area 2007 stipulates the right of a Member State to assert a counterclaim:

> *A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.*

Trans-Pacific Partnership (TPP) Agreement, article 9.18 (2), provides another example:

> *When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.*

This provision sets forth a rather limited scope of types of counterclaims potentially to be raised by respondents, as it follows from the first part, referring only to claims submitted by claimant in relation to either an investment authorisation or an investment agreement. Thus, it does not appear to open the prospect of counterclaims where an investor is merely claiming for breach of the substantive obligations in the TPP investment chapter (i.e., expropriation, most-favoured nation, etc.).[35]

The next proposition on how to cure the asymmetry enshrined in investment treaties goes to the root of this problem and suggests bestowing rights in treaties upon host States, as well as imposing obligations on investors. This proposition can be realised through the two following options.

First option introduces treaty provisions requiring investors and investment to comply with domestic law of host state. Thereby, the general obligation of investors to comply with national law is raised to the international level. In order to make this obligation actionable, it should be accompanied by the applicable law clause in the BIT/MIT designating domestic law of the host state as one of the sources of applicable law

A potential counterargument to this option can state that such treaty clause is redundant since investors are already obliged to comply with local law of host state by virtue of the international law principle of territorial sovereignty. However, the purpose of inserting these provisions is to make a violation of those laws actionable on the international plane, rather than solemnly in domestic courts. It puts investor's obligations on an equal footing with the host state's obligations and, thereby, gives jurisdiction over the possible counterclaims to an investment tribunal constituted under the treaty.[36]

The second option would suggest imposing on investors more specialized obligations that would allow to make them accountable for violations in the areas of environmental protection, human rights, anti-corruption and labour law. However, the predominant position that investors cannot be made bound by the treaties, not being a party to them, makes this option rather contestable. The debate whether investment arbitration is a proper framework to address human rights or environment protects obligations adds to the controversy of this option

Concluding remarks

There is nothing within the system of investment arbitration that would fundamentally rule out a more permissive approach to counterclaims. To the contrary, a friendlier approach to counterclaims has the potential to extinguish some points of criticism surrounding the system nowadays. This tool can make the road of investment arbitration move in both directions – shifting away from its focus on investors to a more careful look at the interests of other stakeholders, be it local population or host states' governments.

While advocating for rebalancing the system, this article admits that there is no need for revolution: the potential options for making it more permissible to counterclaims by states are primarily based on the existing practices. The practical suggestions put forward here relate either to the interpretation of the treaties in force and applicable arbitration rules, or look to the future and relate to treaty drafting. It can increase the legitimacy and rule of law of the system, answering the recent backlash against it and increasing states' support to investment arbitration.

Elena Burova

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NEW RULES FOR INVESTMENT ARBITRATION COMPARED: The SIAC Investment Arbitration Rules 2017 and The SCC Arbitration Rules 2017

By Jonathan Lim*

Two arbitration institutions – the Singapore International Arbitration Centre ("SIAC") and the Swedish Chamber of Commerce ("SCC") – issued new rules for investment arbitration that came into force on 1 January 2017: the SIAC Investment Arbitration Rules 2017 (the "SIAC IA Rules") and the SCC Arbitration Rules 2017 (the "SCC Rules") with an Appendix III that applies to investment treaty disputes. They are the product of careful consideration by the revision and drafting committees constituted by SIAC and SCC, who also took into account comments received in response to draft versions of the rules that were released for public consultation.

This is the first time that private arbitral institutions have promulgated special-purpose investment arbitration rules that compete with other special-purpose arbitration rules traditionally used for investment arbitration, such as the Arbitration Rules of the International Centre for Settlement of Investment Disputes ("ICSID"), or the Arbitration Rules of the Permanent Court of Arbitration ("PCA"). The Arbitration Rules of the International Chamber of Commerce ("ICC") and the SCC Rules have been used in investment arbitration cases, but the past practice of the ICC and SCC has been to administer both commercial and investment arbitrations under the same set of rules. Likewise, the UNCITRAL Rules have been used for both commercial and investment arbitration cases.

Both sets of new rules address recent developments and issues in investment arbitration, including concerns that investment arbitration proceedings cost too much or take too long, or perceptions that the process is not transparent and does not sufficiently take into consideration a diversity of viewpoints on issues of public interest. However, they do not, for the most part, address these issues in the same manner. The key elements

of both sets of new rules are described and compared below

A. When do they apply?

The SIAC IA Rules are a standalone set of rules that apply where parties "have agreed to refer a dispute to arbitration in accordance with the SIAC Investment Arbitration Rules."[1] They adopt a broad definition of such an agreement, although it must specifically refer to the "SIAC Investment Arbitration Rules." Rule 1.2 provides that an agreement to refer a dispute to arbitration under the SIAC IA Rules may be expressed in a contract, treaty, statute or other instrument, or through an offer by a party in a contract, treaty, statute or other instrument, which is subsequently accepted by the other party by any means, including the commencement of arbitration.[2]

The SCC Rules also apply by the agreement of the parties, but Appendix III on investment treaty disputes applies to cases under the SCC Rules that are "based on a treaty providing for arbitration of disputes between an investor and a state."[3] This is a narrower scope of application, given that the SIAC IA Rules expressly contemplate that they may be agreed to in contracts, treaties, statutes or other instruments that involve a state, a state-owned entity or an intergovernmental organization.[4]

Unlike the SIAC IA Rules, the parties do not have to specifically refer to Appendix III of the SCC Rules for it to apply – it is enough that they refer to the application of the "SCC Rules," and Appendix III will apply so long as the criteria under Article 1.1 of Appendix III is satisfied. It is not clear whether parties can agree for Appendix III to apply when the qualifying criteria under Article 1.1 of Appendix III is not satisfied (i.e., the case is not based on a treaty providing for the arbitration of disputes between an investor and a state); or whether parties can agree for the SCC Rules to apply without Appendix III, when the qualifying criteria is not satisfied.

Both the SIAC IA Rules and the SCC Rules may be agreed to and applied in any arbitration, without such application being subject to additional jurisdictional criteria, such as the requirement of the existence of qualifying "investor" or "investment. The SIAC IA Rules have express language to this effect in the "Introduction."[5] The SIAC IA Rules also clarify that parties may in any event be bound by any jurisdictional criteria contained in their underlying contract, treaty, statute or other instrument.[6]

B. Provisions to Enhance Efficiency of Proceedings

The SIAC IA Rules and the SCC Rules both include a number of provisions that are aimed at enhancing the efficiency of investment arbitration proceedings, particularly as compared to proceedings conducted under the ICSID Rules or PCA Rules. These address perceptions by users that investment arbitrations, particularly under the ICSID Rules, are not conducted cost-effectively and take too much time.[7]

(1) Memorial-Style Submissions

Both sets of new rules provide for memorial-style submissions, meaning that the parties are required to submit with their initial written submissions any factual and expert evidence relied on. Rule 17 of the SIAC IA Rules provides that parties are required to submit comprehensive written submissions in support of their case, in the form of Memorials or Counter-Memorials, which must include a statement of facts, legal arguments and authorities and supporting factual evidence, including witness statements and expert reports.[9] Rule 17.1 makes clear that this is a default procedure that applies unless the parties agree otherwise or the arbitral tribunal otherwise determines.[9]

Article 29 of the SCC Rules adopts the same approach and requires parties to submit a Statement of Claim or Statement of Defence that includes "any evidence" the Claimant or Respondent relies on.[10] However, unlike the SIAC IA Rules, Article 29 of the SCC Rules does not specify whether witness statements and expert reports must be submitted with the written submissions, or whether the parties need only submit documentary evidence with their written submissions. Article 29 also does not expressly provide that the procedure set out for written submissions in the form of a Statement of Claim and Statement of Defence can be deviated from, whether by agreement of the parties or a determination by the arbitral tribunal.[11]

Both sets of rules empower the tribunal to order parties to submit additional written submissions, if deemed necessary.[12] Under the SIAC IA Rules, however, Rule 17.4 specifies that where such further submissions are allowed, it is presumed that they will take the form of "a Reply and Rejoinder," allowing each party to make a further submission in the additional round.[13]

(2) Early Dismissal or Summary Judgment

The SIAC IA Rules provide for the early dismissal of a claim or defense under Rule 26 where an arbitral tribunal finds that such claim or defense is: (i) manifestly without legal merit; (ii) manifestly outside the jurisdiction of the arbitral tribunal; or (iii) manifestly inadmissible.[14] Rule 26 is modelled on Rule 41(5) of the ICSID Arbitration Rules, which provides for the early dismissal of a claim on the basis that it is "manifestly without legal merit,"[15] although Rule 26 sets out more specific grounds for early dismissal that relate to inadmissibility or a lack of jurisdiction. Rule 26 also expands the applicability of the procedure to the early dismissal of defenses, not just claims, and makes an application for early dismissal available at any time during the arbitration, rather than limited to a period of time after the constitution of the arbitral tribunal.

Rule 26.3 provides that the arbitral tribunal has complete discretion in deciding whether to allow a Rule 26 application to proceed.[16] This is intended to allow the arbitral tribunal to prevent abuse of the procedure, and to consider the timing of the application and whether it is likely that the application is being used to improperly derail proceedings. Should an arbitral tribunal allow an early dismissal application to proceed, Rule 26.4 provides that it must render its decision in an order or award within 90 days of the date of application, and that such decision may be in summary form.[17]

In the same vein, SCC has introduced a new summary

procedure under Article 39, which allows a party to request that the arbitral tribunal decide "one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration."[18] The arbitral tribunal may apply such a procedure to any issue concerning jurisdiction, admissibility or the merits.[19] Unlike the SIAC IA Rules, Article 39 of the SCC Rules does not set out criteria for the application of a summary procedure, nor does it specify the form that the summary procedure will take.[20] This leaves considerable flexibility and discretion with the arbitral tribunal to fashion the procedure in each case, depending on what "it deems appropriate."[21]

Article 39(2) of the SCC Rules also sets out a number of examples of "assertions" that parties might make as a basis for a request for summary procedure.[22] Parties may request a summary procedure where: an allegation of fact or law material to the outcome of the case is manifestly sustainable; even if the facts alleged by the other party are assumed to be true, no award could be rendered in favor of that party under the applicable law; or any issue of fact or law material to the outcome of the case is, for any other reasons, suitable for summary determination.[23] Article 39(2) makes clear that these are merely examples, and not an exhaustive set of grounds for applying the summary procedure.

In contrast to the SIAC IA Rules, if the request for summary procedure is granted, an arbitral tribunal under the SCC Rules is not required to make its order or award within a set deadline. Instead, Article 39(6) of the SCC Rules provides that the arbitral tribunal "shall seek to determine the issues in an efficient and expeditious manner, while giving each party a reasonable opportunity to present its case."[24]

(3) Closure of Proceedings and Awards

Both sets of new rules provide a timeline for the arbitral tribunal to render its final award, although the timelines operate differently under the SIAC IA Rules and under the SCC Rules.

The SIAC IA Rules define a point in time by which proceedings are to be declared closed, the arbitral tribunal has a 90-day time limit to issue a draft award to SIAC from that date.[25] The SIAC IA Rules do not set out a timeline by which proceedings have to be declared close, although they provide that arbitral tribunal shall, as promptly as possible, although not within any time fixed by the SIAC IA Rules, declare its proceedings closed after consulting with the parties and being satisfied that there is no further evidence or submissions to be presented.[26] Also, provided that an award has not yet been issued, the proceedings may be re-opened on the tribunal's own motion or upon a party's application.[27] The 90-day time limit can only be extended by the parties or the SIAC Registrar. [28]

The SCC Rules do not set any deadlines for the issuance of an award that depend on the time that proceedings are closed.[29] However, the SCC Rules provide that an arbitral tribunal is required to make a final award no later than six months from the date the case was referred to it.[30] Article 43 provides that the SCC Board may extend this time limit "upon a reasonable request" from the arbitral tribunal or if it otherwise deems necessary.[31]

(4) Emergency Arbitrator Provisions

Emergency arbitrator provisions are available under most commercial arbitration rules and permit a party to seek interim relief prior to the constitution of the tribunal. However, their suitability for investment arbitration disputes, particularly disputes arising out of an investment treaty, is not well settled for several reasons, including potential conflicts with mandatory cooling-off periods under particular investment treaties.[32]

The SIAC IA Rules provide for emergency arbitrator provisions to apply on an "opt-in" basis. They provide that the emergency arbitrator provisions set out in Schedule 1 will apply only where parties have expressly agreed that they will apply.[33] Emergency interim relief is therefore not available in all cases under the SIAC IA Rules; whether they will be available will depend on whether, under particular treaties, states wish to confer particular protections on investors in the form of the right to obtain expedited interim relief, and under what circumstances.

By contrast, under the 2017 SCC Rules, the emergency arbitration mechanism under Appendix II is applicable even in investment treaty cases that fall within the scope of new Appendix III. Indeed, the previous version of the SCC Rules, the 2010 SCC Rules, also provided that emergency arbitrator provisions apply in cases arising out of an investment treaty. In fact, the only five reported instances of the use of emergency arbitrator provisions in the context of investment treaty claims have been cases under the 2010 SCC Rules.[34]

C. How Is the Arbitral Tribunal Constituted?

On the procedures for constituting the arbitral tribunal, there are a number of noteworthy differences between the two sets of new rules.

(1) Number of Arbitrators and Time limits

Both the SIAC IA Rules and the SCC Rules, Appendix III, provide that the arbitral tribunal shall comprise three arbitrators by default, unless the parties agree otherwise.[35] In addition, under both sets of rules, the sole or presiding arbitrator must be of a different nationality than the parties, unless the parties otherwise agree, or unless the SIAC Court or SCC Board otherwise deems to be appropriate.[36]

The SIAC IA Rules set slightly longer time limits for party appointments than under the SCC Rules. Rule 6.2 of the SIAC IA Rules gives parties 42 days (as opposed to 21 days in the 2016 SIAC Rules for commercial arbitration) to reach consensus on a sole arbitrator. For a three-member panel, Rule 7.2 gives parties 35 days from the date of receipt of the other party's nomination (as opposed to 14 days in the 2016 SIAC Rules for commercial arbitration) to nominate its arbitrator. The longer time limits under the SIAC IA Rules are intended to accommodate the fact that certain procedures involving states, state-controlled entities and intergovernmental organizations may impact their ability to

act with the same speed as commercial parties.

The SCC Rules do not provide for different time limits to apply in commercial and investment arbitration cases, and have generally shorter time limits than those provided under the SIAC IA Rules. Where a sole arbitrator is to be appointed, Art. 17(3) of the SCC Rules gives parties 10 days to jointly appoint a sole arbitrator, failing which the SCC Board will make the appointment.[37] When three or more arbitrators are to be appointed, the SCC Rules provide that the Board shall stipulate a time period for parties to agree, where parties have not agreed on such time period.[38]

(2) 'List-Procedure' for SIAC Court Appointments

The SCC Rules do not provide for a different appointment procedure to apply where Appendix III applies (i.e. in the context of cases providing for arbitration between investors and states). Where the parties fail to agree, or where the parties' agreed procedure for appointing an arbitrator fails, the SCC Board will make the appointment.[39]

In contrast to the SCC Rules, the SIAC IA Rules set out a list procedure as a default appointment mechanism whenever the SIAC Court makes an appointment,[40] i.e., where the parties or their agreed procedures do not result in the nomination of a sole arbitrator, a presiding arbitrator, or any of the parties' co-arbitrators.[41] The list procedure under Rule 8 is modelled on Article 8 of the PCA Arbitration Rules. The list procedure is intended to allow the parties the opportunity to participate in the constitution of the tribunal even if they cannot agree on specific candidates.

Under the list procedure as set out in Rule 8 of the SIAC IA Rules, the SIAC Court provides parties with identical lists of five candidates, taking into account the circumstances of the case and the parties' views, if any, on the qualifications of the arbitrators.[42] Within 15 days of receiving the list, the parties are entitled to strike any names suggested and list the remaining candidates in order of preference.[43] The SIAC Court must make its appointment based on the lists submitted by the parties.[44] If for any reason an appointment cannot be made pursuant to the list procedure, for example, through non-participation of a party, the SIAC Court may then make appointments independently of the parties, including by appointing an arbitrator from outside the list communicated to the parties.[45]

(3) Multi-Party Appointments

Both sets of rules provide for similar rules on multi-party appointments. They provide for the SIAC Court or the SCC Board to appoint all the arbitrators in the event either side fails to make an appointment. This is intended to avoid the situation

in the notorious *Dutco* case, where the French Court of Cassation set aside an award on the basis that the appointment process, where an appointing authority made an appointment for one side that had failed to agree and not the other side, was contrary to public policy.[46]

Under the SIAC IA Rules, where an arbitration involves either multiple claimants or multiple respondents, Rule 9.2 requires the claimants and/or respondents to make their respective joint nominations for each side within 42 days.[47] In the event either side fails to make a joint nomination, the SIAC Court will appoint all the arbitrators on the basis of the list procedure in Rule 28, notwithstanding that one of the sides successfully made a joint nomination.[48] Under the SCC Rules, the SCC Board may appoint the entire arbitral tribunal, should either side fail to make a joint appointment.[49]

D. Transparency

In the context of investment arbitration disputes, particularly where issues of public interest are involved, arbitral tribunals have to consider from time to time whether parties' expectations of confidentiality are outweighed by the need or perceived need for arbitrators to consider a diversity of viewpoints, as well as desires by some users for greater public participation and transparency. In line with recent developments in this area, such as the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, both sets of rules provide, although to different degrees, for the publication of information on the dispute and submissions by non-disputing parties to the arbitration.

(1) Confidentiality Rules and Publication of Information on the Dispute

The default position in the SIAC IA Rules is that all matters relating to the arbitration proceedings and the award are confidential, subject to defined exceptions.[50] This applies to parties, emergency arbitrators, arbitrators and any person appointed by the tribunal, as well as non-disputing contracting parties or non-disputing parties as defined in Rule 1.5 (which are discussed further below).[51]

By contrast, Article 3 of the SCC Rules provides for the confidentiality of the arbitration and the award, but states that only the SCC, the arbitral tribunal and any administrative secretary of the arbitral tribunal must maintain confidentiality. The SCC Rules do not provide that the parties are bound by a duty of confidentiality, and this is consistent with the position under Swedish law, which provides that arbitrations seated in Sweden are not confidential, unless parties have expressly agreed for them to be confidential.[52]

The SIAC IA Rules provide that the SIAC may publish information on proceedings conducted under the Rules.[53] Rule 38.2 defines what information SIAC may publish under the Rules, without needing further consent from the parties, namely: the nationality of the parties; the identity and nationality of the tribunal; the treaty, statute or other instrument under which the arbitration has been commenced; the date of commencement of the proceedings; whether the proceedings are on-going or have been terminated; and redacted excerpts of the Tribunal's and SIAC Court's reasoning.[54] Under Rule 38.3, if parties agree, SIAC may also publish further information on: the identity of the parties; the contract under which the arbitration has been commenced; the identity of the parties' counsel; the sector to which the dispute relates; the value of the dispute; details of the procedural history; and any orders or awards rendered.[55]

To allow the publication of information about proceedings, the Rules do not provide that the fact and existence of the proceedings is confidential, unlike Rule 39.3 of the 2016 SIAC Rules for commercial arbitration.

By contrast, the SCC Rules have not adopted any provisions allowing SCC to publish information on arbitration proceedings when Appendix III applies.

(2) Participation of Third Parties

Both sets of rules have provisions that allow non-disputing parties to participate in the arbitration by filing written submissions and, where parties so request or the arbitral tribunal so decides, attending a hearing to elaborate on or be examined on its written submissions.

Both the SIAC IA Rules and the SCC Rules, Appendix III, permit submissions by "non-disputing contracting parties" on questions of treaty interpretation that are directly relevant to the dispute, although they use different terminology to refer to such submissions.[56] Rule 1.5 of the SIAC IA Rules defines a "non-disputing contracting party" as a party to a treaty pursuant to which the dispute has been referred to arbitration in accordance with the Rules and that is not a party to the arbitration.[57] Under the SIAC IA Rules, such parties may make submissions within the scope of Rule 29.1, without the leave of the Tribunal or the consent of the parties.[58] Article 4(1) of the SCC Rules, Appendix III, similarly provides that the arbitral tribunal "shall allow" such submissions by "non-disputing treaty Parties," although Article 4(1) of the SCC Rules, Appendix III, qualifies that the submissions must be "material to the outcome of the case."[59] Also, under both sets of rules, the arbitral tribunal also may invite written submissions from a non-disputing contracting party.[60]

Both sets of rules also provide a different mechanism for other non-disputing parties (i.e., those that are not non-disputing contracting parties to any applicable treaty) to make submissions, although the SIAC IA Rules also makes such a mechanism available to non-disputing contracting parties while the SCC Rules do not.[61] Under both sets of rules, submissions through mechanism have to be allowed by the arbitral tribunal, in its discretion, which has to have regard to a number of factors. The factors to be considered by the arbitral tribunal are different under the two sets of rules.

Rule 29.2 of the SIAC IA Rules provides that the submissions will have to be on matters "within the scope of the dispute."[62] Rule 29.3 provides that the arbitral tribunal must consider a number of factors, including: whether the non-disputing party's submissions would assist the arbitral tribunal in the determination of a factual

or legal issue by "bringing perspective, particular knowledge or insight that is different" from that of the parties; whether the non-disputing party's submissions would only address a matter within the scope of the dispute; whether the non-disputing party has a "sufficient interest" in the arbitral proceedings and/or related proceedings; and whether allowing the written submissions would violate the parties' right to confidentiality.[63]

By contrast, the SCC Rules only permit submissions on a "material factual or legal issue" in the arbitration.[64] The arbitral tribunal, in deciding whether to permit such submissions, would consider: the nature and significance of the interest of the non-disputing party, whether the submission would assist the arbitral tribunal in determining a material factual or legal issue in the arbitration by bringing a perspective, particular knowledge that is distinct from or broader than that of the disputing parties; and any other relevant circumstances.[65] These factors are different from, and in some senses, more restrictive, than those under the SIAC IA Rules. For example, under the SIAC IA Rules, a relevant factor is whether a party has a "sufficient interest in the arbitral proceedings and/or any other related proceedings,"[66] whereas the equivalent factor under the SCC Rules is "the nature and significance of the interest" of the relevant non-disputing party in the arbitration, and not any other related proceedings.

Under both sets of rules, the parties to the dispute shall be given an opportunity to comment on any submission made and they may request the third party to attend a hearing to elaborate or be examined on its submission.[67] The arbitral tribunal is also obliged, under both sets of rules, to ensure that participation by the non-disputing party would not unduly burden or prejudice the parties to the dispute[68] and violate their right to confidentiality.[69] Under Rule 29.6 of the SIAC IA Rules, the arbitral tribunal is further empowered to set time limits for submissions to avoid unnecessary delays.[70] The SCC Rules do not provide for such time limits, although they provide that the arbitral tribunal may require the successful third party under Article 3 of the SCC Rules, Appendix III, to provide security for "reasonable legal or other costs expected to be incurred by the disputing parties as a result of the submission."[71]

E. Other Aspects of the Rules

Sovereign Immunity

Rule 1.3 of the SIAC IA Rules expressly provides that, by agreeing to refer a dispute to arbitration under the SIAC IA Rules the State, State-owned entity or intergovernmental organization have waived any right to immunity from jurisdiction. Rule 1.3, however, recognizes that waiver of immunity from jurisdiction is without prejudice to immunity from execution. The SCC Rules do not contain any provisions on immunity.

Third-Party Funding

Only the SIAC IA Rules address third-party funding; the SCC Rules, in their latest revision, did not include such provisions. In fact, SIAC is the first major arbitral institution to include provisions on third-party funding in its rules.

Under the SIAC IA Rules, the arbitral tribunal is expressly empowered to order the disclosure of the existence of a third-party funding arrangement and/or the identity of the third-party funder.[72] The arbitral tribunal may also order, where appropriate, disclosure of the funder's interest in the outcome of the proceedings and whether the funder has committed to undertake adverse costs liability.[73] Although some investment tribunals have relied on their inherent powers to make similar orders in particular cases, especially where there is a potential conflict of interest,[74] the decisions in this area are few and not fully reconcilable. Rule 24.l thus provides further clarity, in the form of an express provision, on whether an arbitral tribunal has the power to order disclosure in proceedings under the rules, although whether to exercise such power is for the arbitral tribunal's discretion.

Rule 33.1 of the SIAC IA Rules also empowers the Tribunal to take into account any third-party funding arrangements in apportioning the costs of the arbitration. The SCC Rules do not include any such express power, although such power would fall arguably fall within the arbitral tribunal's general discretion to apportion the costs of the arbitration between the parties;[75] indeed, one SCC tribunal has taken into account third-party funding arrangements in deciding the allocation of costs between the parties.[76]

Availability of Joinder or Consolidation

The SIAC IA Rules have not included the provisions on joinder or consolidation that are found in the 2016 SIAC Rules for commercial arbitration. The rationale is that those provisions and the criteria for their application were designed to apply in the context of commercial contracts between private parties, and they may not be apposite in the context of a dispute arising out of an investment treaty or in a dispute involving a state, state-owned entity or intergovernmental organization.

By contrast, the SCC Rules stipulate that provisions on joinder and consolidation apply *mutatis mutandis* to disputes based on a treaty to which Appendix III applies.[77] Thus, while joinder and consolidation provisions are excluded under the SIAC IA Rules, unless parties otherwise agree for them to apply, the SCC Rules appear to leave the application of such provisions to be decided on a case-by-case basis.

F. Conclusion

Both sets of new rules, the SIAC IA Rules and the SCC Rules, are hybrids between commercial arbitration rules and specialized arbitration rules used for investment disputes. Even though they may address individual issues differently, both sets of rules tackle a range of important issues in investment arbitration, and represent innovative alternatives to arbitrations administered by other established centers for the resolution of investment disputes, such as ICSID or the PCA.

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1 SIAC IA Rules, Rule 1.1.
2 SIAC IA Rules, Rule 1.2.
3 2017 SCC Rules, Appendix III, Article 1(1).
4 SIAC IA Rules, Introduction, para. (i).
5 SIAC IA Rules, Introduction, para. (ii).
6 SIAC IA Rules, Introduction, para. (ii).
7 For example, reported statistics show that, out of the 19 ICSID investment arbitration awards issued in 2012, the average award took 4 years and 11 months from the commencement of the arbitration. *See* A Raviv, *Achieving a Faster ICISD*, in J. Kalicki and A. Joubin-Bret (eds.), Reshaping the Investor-State Dispute Settlement System (Brill Nijhoff, 2015), at p. 9.
8 SIAC IA Rules, Rule 17.2 and Rule 17.3.
9 SIAC IA Rules, Rule 17.1.
10 2017 SCC Rules, Arts. 29(1), 29(2).
11 2017 SCC Rules, Arts. 29(1), 29(2).
12 SIAC IA Rules, Rule 17.4, SCC Rules, Art. 29(3).
13 SIAC IA Rules, Rule 17.4.
14 SIAC IA Rules, Rule 26.1.
15 ICSID Rules, Rule 41(5).
16 SIAC IA Rules, Rule 26.3.
17 SIAC IA Rules, Rule 26.4.
18 SCC Rules, Art. 39.
19 SCC Rules, Art. 39(2).
20 SCC Rules, Art. 39.
21 SCC Rules, Art. 39(4).
22 SCC Rules, Art. 39(2).
23 SCC Rules, Art. 39(2).
24 SCC Rules, Art. 39(6).
25 SIAC IA Rules, Rule 30. [Footnotes 26-30 are missing]
26 SIAC IA Rules, Rule 30.1.
27 SIAC IA Rules, Rule 30.2.
28 SIAC IA Rules, Rule 30.3.
29 SIAC IA Rules, Rule 40.
30 SCC Rules, Art. 43.
31 SCC Rules, Art. 43.
32 *See e.g.* S. Koh, *The Use of Emergency Arbitrators in Investment Treaty Arbitration*, ICSID Rev. 31(3) 534.
33 SIAC IA Rules, Rule 27.4.
34 *See e.g.* S. Koh, *The Use of Emergency Arbitrators in Investment Treaty Arbitration*, ICSID Rev. 31(3) 534, at p. 536.
35 SIAC IA Rules, Rule 5.2; SCC Rules, Appendix III, Art. 2.
36 SIAC IA Rules, Rule 5.7; SCC Rules, Art. 17.6.
37 SCC Rules, Art. 17(3).
38 SCC Rules, Art. 17(2).
39 SCC Rules, Art. 17(2)-(5), 17(7).
40 SIAC IA Rules, Rule 8.
41 SIAC IA Rules, Rules 6.2, 7.3, 9.1-2.
42 SIAC IA Rules, Rule 8(a).
43 SIAC IA Rules, para. 8(c).
44 SIAC IA Rules, Rule 8(d).
45 SIAC IA Rules, Rule 8(e).
46 *Siemens AG and BKMI Industrieanlagen GmbH v Dutco Construction Co*, French Cour de Cassation decision of January 7, 1992, Revue de l' arbitrage 470 (1992).
47 SIAC IA Rules, Rule 9.2.
48 SIAC IA Rules, Rule 9.2.
49 SCC Rules, Art. 17(5).
50 SIAC IA Rules, Rule 37.
51 SIAC IA Rules, Rule 37.1.
52 *See Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*, Supreme Case No NJA 2000 p. 538.
53 SIAC IA Rules, Rule 38.1.
54 SIAC IA Rules, Rule 38.2.
55 SIAC IA Rules, Rule 38.3.
56 SIAC IA Rules, Rule 29.1; SCC Rules, Appendix III, Art. 4.
57 SIAC IA Rules, Rule 1.5.
58 SIAC IA Rules, Rule 29.1.
59 SCC Rules, Appendix III, Art. 4(1).
60 SIAC IA Rules, Rule 29.1; SCC Rules, Appendix III, Art. 4(1).
61 SIAC IA Rules, Rule 29.2; SCC Rules, Appendix III, Art. 3.
62 SIAC IA Rules, Rule 29.2.
63 SIAC IA Rules, Rule 29.3.
64 SCC Rules, Appendix III, Art. 3(4).
65 SCC Rules, Appendix III, Art. 3(3).
66 SIAC IA Rules, Rule 29.3(c).
67 SIAC IA Rules, Rules 29.5, 29.7. SCC Rule, Appendix III, Arts. 3(7)-(8), 4(4).
68 SIAC IA Rules, Rule 29.9. SCC Rules, Appendix III, Arts. 3(9), 4(4).
69 SIAC IA Rules, Rule 29.3(d). SCC Rules, Appendix III, Arts. 3(6), 4(4).
70 SIAC IA Rules, Rule 29.6.
71 SCC Rules, Appendix III, Art. 3(10).
72 SIAC IA Rules, Rule 24.l.
73 SIAC IA Rules, Rule 24.l.
74 *See Muhammet* Çap *& Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, Procedural Order No. 3, ICSID Case No. ARB/12/6* and *South American Silver Limited v. The Plurinational State of Bolivia*, *Procedural Order No. 10, PCA case No. 2013-15.*
75 SCC Rules, Art. 49(6) empowers the arbitral tribunal, at the request of a party, to apportion the costs of the arbitration between the parties, having regard to the any other relevant circumstances of the case.
76 *See Quasar de Valores SICAV S.A. et al v. The Russian Federation,* SCC Arbitration No. 24/2007, Award of 20 July 2012, para. 223.
77 SCC Rules, Appendix III, Art. 1(2).

[BIOGRAPHIES]

PEDRO SOUSA UVA

Pedro Sousa Uva has over 12 years of experience. His practice is focused on Dispute Resolution, notably Arbitration, Litigation and Negotiation.

Pedro is a Graduate of the Lisbon Law School of the Portuguese Catholic University (2003). Pedro was admitted at the Portuguese Bar in 2006.

Before joining Miranda in May, 2013, Pedro worked for practically ten years as an Associate at Abreu Advogados, where he focused his practice in the areas of litigation and arbitration.

Between 2009 and 2010, Pedro participated in the International Arbitration Group's Intern Program, in London, at Wilmer Cutler Pickering Hale and Dorr LLP.

Pedro is a former scholarship student of the Katolieke Universiteit Leuven, Belgium, where he pursued studies in International Arbitration (2001/2002). He completed with merits an LL.M in Comparative and International Dispute Resolution at Queen Mary University of London (2008/2009), where he focused on International Commercial Arbitration, International Trade and Investment Dispute Settlement and Alternative Dispute Resolution.

He is a member of the Portuguese Bar Association, a member of the Alumni & Friends of the School of International Arbitration (AFSIA), University of London. He is co-founder of AFSIA Portugal (created in June, 30 2010).

Pedro authored "A *Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*", American Review of International Arbitration, 20, 4, 2010, pages 479-511; He also co-authored: "*Getting the Deal Through - Arbitration 2016*", Portugal; 11th Edition, Pages 281 - 287 (ISSN 1750 – 9947); "*World Arbitration Reporter - 2nd Edition*", Jurisnet 2014; "*Interim Measures in International Arbitration* - Chapter 30 (Portugal), Jurisnet 2014; *"Portuguese Chamber of Commerce and Industry Arbitration Centre approves new institutional rules*", Arbitration News (International Bar Association), Volume 20, No. 1, March 2015, pages 81-83; "*As Diretrizes da IBA sobre Conflitos de Interesses na Arbitragem Internacional: 10 anos depois*", Estudos de Direito da Arbitragem em Homenagem a Mário Raposo, UNIVERSIDADE CATÓLICA EDITORA – Portuguese (ISBN: 9789725404492) and "*Portugal finally approves its new arbitration law*", Revue de Droit Des Affaires Internationales / International Business Law, no. 3, June 2012, Sweet & Maxwell.

Pedro co-Chairs the Sub40 Committee of the Portuguese Association of Arbitration (APA) and a member of the latter's Ethics Council (Conselho de Deontologia). He participated in the 3rd Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry (April 2015).

GONÇALO MALHEIRO

Gonçalo Malheiro is Junior Partner at PBBR Law Firm and co-head of its Litigation and Arbitration Department, currently acting as counsel in both ad hoc and institutional arbitration proceedings (domestic and international arbitration).

He is a graduate from the Catholic University Law School of Lisbon. He has an LL.M from Queen Mary - University of London, School of Law, where he focused on the following subjects: International Commercial Arbitration, International Commercial Litigation, Alternative Dispute Resolution and International Trade and Investment Dispute Settlement (subject grouping: Commercial and Corporate Law).

Gonçalo is a member of the Portuguese Bar Association, the Catholic University Alumni Association, the Chartered Institute of Arbitrators and the Alumni & Friends of the School of International Arbitration (AFSIA), University of London. He is also a co-founder of AFSIA Portugal.

Gonçalo was Chairman of the Young Member Group of the Chartered Institute of Arbitrators.

Besides publishing in English and Portuguese on different arbitration subjects, Gonçalo is also Co-Founder of YAR - Young Arbitration Review.

Gonçalo published his LLM dissertation "Interim Measures in Arbitration Proceedings" (2008).

Gonçalo participated in the 1st Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry in 2003.

JOHN FELLAS

John Fellas is a partner in the New York office of Hughes Hubbard & Reed LLP. He is Co-Chair of the firm's International Arbitration and Dispute Resolution Practice and Co-Chair of the International Practice. Mr. Fellas focuses on the areas of international litigation and arbitration.

Mr. Fellas has practiced in both the U.S. and England, and as well as being a member of the New York Bar, he is also a Solicitor of the Supreme Court of England and Wales. He has served as counsel, and as chair, sole arbitrator and co-arbitrator, in arbitrations under the AAA, ICC and ad hoc rules. He also serves on the Mediation Panel of the District Court for the Southern District of New York. He has also been retained to act as an expert witness on U.S. law in proceedings in other countries.

He has been recognized for his practice in international arbitration by: Who's Who Legal – The International Who's Who Of Business Lawyers; Chambers USA – Guide to America's Leading Business Lawyers; Chambers Global; The Best Lawyers In America; Euromoney Expert Guides – Best of the Best USA. The most recent editions of Chambers Global and Chambers USA noted that he is considered "a wonderful lawyer with very thorough legal knowledge," and that he is "one of the best – his reputation is phenomenal and deserved."

He has also been recognized for his practice in commercial litigation by: Who's Who Legal – The International Who's Who of Business Lawyers; New York Super Lawyers.

John is co-editor of International Commercial Arbitration in New York (Oxford University Press 2010).

He received a B.A. (Hons.) from the University of Durham, England, and both an LL.M. and an S.J.D. from the Harvard Law School.

REBECA MOSQUERA

Rebeca Mosquera is an associate in Hughes Hubbard's Litigation and Arbitration Groups. She is dual-qualified attorney in the Republic of Panama and in New York and is fluent in Spanish. Ms. Mosquera represents U.S. and international clients, including energy, maritime transportation, construction, and telecommunication services companies, in complex commercial disputes.

She brings strong experience in the oil and gas industry stemming from her work with Royal Dutch Shell's Upstream-Americas segment. Her logistics, regulatory, and HSSE responsibilities included strict scrutiny and clearance of vendor compliance with security safety requirements, and management, movement, and tracking of maritime and aerial assets in connection with Shell's Alaskan exploration activities.

Rebeca has been involved in a variety of disputes involving Latin American countries, including Honduras, Uruguay, Argentina, and Venezuela, among others. Ms. Mosquera is currently engaged in an ICSID arbitration arising out of the revocation of rights to wireless spectrum frequencies and related violations to the United States-Uruguay Bilateral Investment Treaty.

NICOLÁS J. CAFFO

Nicolás Caffo has participated as of counsel in international commercial and investment arbitrations under the arbitration rules of the ICSID and ICC, and in proceedings conducted in Spanish and English. Besides, Mr. Caffo is the corporate legal expert of the Buenos Aires Bar Association, in charge of advising lawyers about all matters related to corporate law and arbitrations. Since 2013 Mr. Caffo is Executive Director and Co-founder of BA Arbitration Review (BAAR), an international academic publication whose purpose is provide the specialized audience of the international arbitration field through articles written by the most highly regarded scholars, holding international conferences, and promoting student participation in arbitration events. Finally, Mr. Caffo is also founder of the Argentine Association of Entrepreneurs (Asociación de Emprendedores de Argentina, ASEA) in Argentina.

SHIVANSH JOLLY

Shivansh Jolly is currently pursuing an undergraduate degree in law from Gujarat National Law University, India. He holds keen interest in the areas of International Commercial Arbitration, Investment Treaty Arbitration and International Trade Law. His practical experience in the area of domestic and international arbitration is sourced from his involvement in several cases while working in the capacity of an intern in law firms and in chambers of independent practitioners.

He has attended additional academic courses on the said fields, including the International Arbitration Training Course organized by the Leiden University in collaboration with the Permanent Court of Arbitration, in August 2016. He has also participated in several moot court competitions, including the Willem C. Vis International Commercial Arbitration Moot 2012-2013, Vienna and the ELSA Moot Court Competition on WTO Law, 2015 in which he qualified as a Semi-Finalist in the Asia Pacific Round to argue at the Final Oral Rounds, held at Geneva, Switzerland.

Shivansh is also a regular contributor of articles on international arbitration to the Blog named International Law Square (https://ilsquare.wordpress.com/).

SOMA HEGDEKATTE

Soma Hegdekatte is currently pursuing an undergraduate degree in law from Gujarat National Law University, Gandhinagar, India. Her areas of interest include International Commercial Arbitration, Investment Treaty Arbitration, International Law and Mediation.

Her interest in international arbitration began when her team participated in and was conferrred with the 'Best Asia-Pacific team' award at the Frankfurt Investment Arbitration Moot Court Competition 2014. Post this, she has extensively written, worked with and studied the subject of international arbiration. Her internships include practicing arbitration counsels, working with the dispute resolution team in law firms and a private mediation center. In July 2016, she attended the International Academy for Arbitration Law/Academie internationale du droit de l'arbitrage, Paris, France.

JOHN MCMILLAN

John McMillan is an associate in the London office of Wilmer Cutler Pickering Hale and Dorr LLP. His practice focuses on international arbitration and litigation. He has acted in cases under a variety of institutional rules (including the ICC and LCIA rules) and has represented clients in the construction, energy, technology, aviation, media and financial services sectors.

CHARLIE CAHER

Charlie Caher is a counsel who focuses his practice on international arbitration and dispute resolution. Mr. Caher's international arbitration practice includes representation in both institutional and ad hoc arbitrations (including under the ICC, LCIA, SIAC, DIS, PCA and UNCITRAL rules) sited in both common and civil law jurisdictions (including London, Bermuda, Munich, The Hague and Singapore). Mr. Caher's international commercial arbitration practice covers a wide range of industries, including construction, insurance, financial services, telecommunications, oil and gas, aerospace and energy.

Charlie has also represented a major international construction company in a series of complex and high profile construction litigation disputes before the English High Court and Court of Appeal, and represented the Sudan People's Liberation Movement/Army (SPLM/A) in the public international law Abyei Arbitration.

JULIETTE FORTIN

Juliette Fortin is a Managing Director in the FTI Economic and Financial Consulting practice and is based in Paris. Since 2006, Juliette has specialised in valuation issues such as the quantification of damages claims in domestic and international commercial and investment disputes, accounting issues and post-transaction disputes. Ms. Fortin joined FTI in September 2010, having previously worked for at PwC in Paris (in Transaction Services from 1999 to 2006 then in Disputes from 2006 to 2010) and prior to that at PwC in London (in Audit from 1996 to 1999).

She has assisted French and multinational companies, and leading law firms, in various countries around the world including the United States, Latin America, Africa, Eastern Europe, and continental Europe. Her experience covers many different industry sectors including mining, energy, distribution, services, hotel, construction, telecommunications, wines, education, automotive, food.

In the context of national disputes, Juliette intervenes regularly as an expert in litigation before the French Commercial Courts, in the context of judicial appraisals (''expertises judiciaires') or in ad-hoc expert appraisals. Juliette has also been involved in litigation before the Center of Arbitration and Mediation of Paris (CMAP).

In the context of international arbitration disputes, Juliette has been appointed as testifying expert in disputes before the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Centre for the Settlement of Investment Disputes (ICSID), and in independent expert procedures. She has also acted as expert at advocacy workshops organised by the Foundation for International Arbitration Advocacy (FIAA), which train lawyers to advocates in international arbitration proceedings, and at workshops organised by the CIArb and other various international law firms in Paris.

Juliette has also conducted numerous post-acquisition litigation assignments, both in France and internationally.

Juliette is a graduate of CESEM, Reims Management School and ICADE, Madrid (1996). She qualified as a Chartered Accountant with Coopers & Lybrand and as a French Expert-comptable. She is fluent in English, French and Spanish. She is Board Member and Treasurer of ArbitralWomen.

MARGHERITA MAGILLO

Margherita Magillo since January 2017 works as an in house counsel at the Italian EPC company Tecnimont S.p.a., where she deals with claim management.

In the previous years, she dealt with litigation and international arbitration at the Milan offices of Jones Day and BonelliErede, after an experience with the London based International Arbitration team of WilmerHale and with the Milan office of HoganLovells, where she dealt with IP litigation.

She qualified as an Italian lawyer in 2010. In 2009 she achieved an LLM, with Distinction, at Queen Mary University of London, focusing on international commercial arbitration and conflict of laws issues and, in 2007, she obtained her Law Degree cum laude at Bocconi University of Milan."

JOSÉ MARIA DE LA JARA

José María de la Jara is Associate at Bullard Falla Ezcurra +. Since joining the firm in 2011, he is focused in both Domestic and International Arbitration, especially in the Construction and Energy markets.

José María is a graduate from the Pontifical Catholic Law School of Perú and teaches Law & Psychology at Pacific University. His research is focused on the intersection between Psychology, Evolution, Neuroscience and Arbitration, with recurring topics such as persuasion advocacy, counsels' cognitive bias and the influence of emotion on arbitrator decisions. He also founded and is the Executive Director of PsychoLAWgy, a think tank commited to the introduction of psychology to public policy, persuasion and consumer protection.

ELENA BUROVA

Elena Burova holds an LL.M. degree in Investment Treaty Arbitration from Uppsala University (Swedish Institute scholar 2015-2016), as well as bachelor's and master degrees from Moscow State Institute of International Relations (MGIMO University).

Elena focuses on international commercial and investment arbitration and worked/trained in international law firms in Stockholm and Moscow. She is a currently a researcher and contributor with the CIS Arbitration Forum – online portal on Russia and CIS-related international dispute resolution.

EDGARDO MUÑOZ

Dr. Edgardo Muñoz is Professor of Law at Panamericana University in Guadalajara, Mexico. After completing his law studies in Mexico and France, Dr. Muñoz obtained an LL.M. from the University of Liverpool, England, an LL.M. from the University of California Berkeley, US, and his Ph.D. summa cum laude from the University of Basel, Switzerland. He has been Visiting Scholar at Columbia University Law School, New York and McGill Law Faculty in Montreal.

Dr. Muñoz spent several years working in Switzerland within the international arbitration and sports law group of a leading law firm, as well as in the Global Sales Law project led by Prof. Ingeborg Schwenzer of the University Basel. Before that time, Dr. Muñoz served as an associate in a Mexican law firm advising and representing local and foreign companies in business law related matters.

Dr. Muñoz frequently acts as arbitrator, counsel and legal expert in domestic and international arbitral proceedings. He also regularly publishes books and journal articles in the field of international business law and arbitration.

JONATHAN LIM

Jonathan Lim is a Senior Associate with WilmerHale's International Arbitration Group in London. His practice focuses on international arbitration and dispute resolution. He has experience with representation of both private sector and government clients in ad hoc and institutional arbitrations (including under the SIAC, ICC, LCIA and UNCITRAL Rules) sited in various jurisdictions, including both common law and civil law jurisdictions in Asia, Europe and North America. His practice covers a wide range of industries, including construction, financial services, telecommunications, oil and gas. Jonathan also publishes regularly on international arbitration and financial regulation, and is a Visiting Senior Fellow at the National University of Singapore, where he teaches a course on international arbitration. He is dual-qualified in New York and Singapore, and was educated at the National University of Singapore (LLB) and the Harvard Law School (LLM).

NICHOLAS ASHCROFT

Nicholas Ashcroft is Managing Associate of the International Arbitration Department for Addleshaw Goddard LLP.

Nick acts for a wide range of clients including leading FTSE 100 corporates, international clients and high net worth individuals. He advises on a wide range of disputes including warranty claims, contractual disputes, contract termination, and complex fraud claims. Nick has acted on a number of major AAA, ICC and LCIA arbitrations and regularly provides clients with specialist advice on the drafting of arbitration agreements. He is also a specialist in dispute funding, particularly in the international arbitration context.

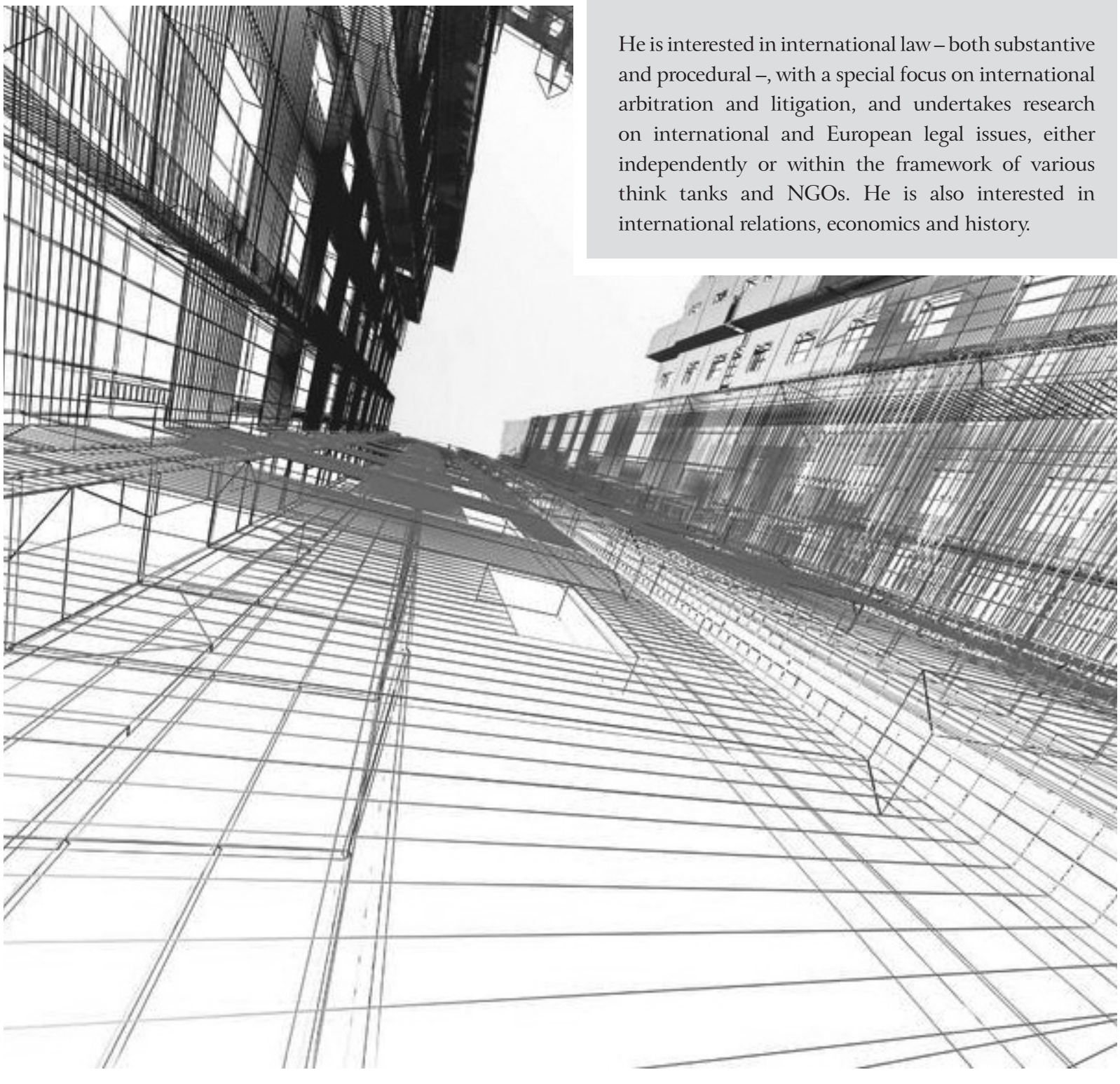
BOGDAN FLORIN NAE

Bogdan-Florin Nae graduated from the Faculty of Law of the University of Bucharest in 2016.

He participated/is currently participating in various capacities in a number of national and international moot court competitions, writing competitions, courses and research projects in fields such as international commercial arbitration, international investment arbitration, mediation, civil procedure, private international law, international commercial law, human rights law and European Union Law.

Additionally, Bogdan is a lawyer, member of the Bucharest Bar, working in an international law firm on a range of private and public law issues, both contentious and transactional.

He is interested in international law – both substantive and procedural –, with a special focus on international arbitration and litigation, and undertakes research on international and European legal issues, either independently or within the framework of various think tanks and NGOs. He is also interested in international relations, economics and history.



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