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Editorial

This is my last issue as Editor, a position I have been privileged to hold for eight years in total, including a one-year stint in 1999–2000, prior to the hugely successful period 2000–2010 during which my good friend Professor Derek Roebuck was at the helm. I now leave the task of maintaining this Journal as a key reference source for academic and practical learning on dispute management and resolution in the extremely capable hands of Professor Stavros Brekoulakis of Queen Mary College London. He will, I am sure, ensure that its standing in the field remains in the ascendant.

During my time as Editor, international arbitration has gone from strength to strength. Nonetheless, there remain some significant issues with which the arbitral community must still grapple. These include the establishment of even clearer and stronger guidance on ethical standards, transparency and conflicts. In addition, uncertainty over costs—their amount, costs shifting principles, the question of proportionality and the issue of third party funding—needs to be addressed on a global basis to avoid what many see as a costs lottery. I am sure that this Journal will continue to play its part in supporting the debate over these issues.

Other forms of dispute resolution, such as mediation and dispute boards, have also gone from strength to strength. And adjudication in construction has become a feature of a number of jurisdictions. All in all, the future for non-court based dispute resolution seems bright.

In this issue, we are fortunate to have a series of presentations to the hugely successful conferences held this year, based on a theme suggested by the President, Professor Nayla Comair-Obeid, namely the relationship, distinctions and synergies between the Common Law and Civil Law traditions in arbitration. I would like to thank the President personally for her assistance in ensuring that we have a strong selection reflecting the ideas which were developed during these conferences. I need not identify each article individually, but invite the reader to turn to them directly.

In addition, we present a number of case notes provided by three long-standing contributors, for whose constant and continuing support I am grateful, especially Hew Dundas and Kenneth Salmon. I would also like to thank the Editorial Board, especially Gordon Blanke who has been the Book Review Editor throughout my time. Susan Faircloth, our text editor throughout this time has done an amazing job, for which I cannot say thank you enough. Finally, I would like to thank the Trustees, successive Presidents and the Secretariat of the Chartered Institute who have been fully supportive throughout my tenure.

Michael O'Reilly
Editor

Lectures and Presentations

Presentations from CIArb Conferences on the Synergy and Divergence between Civil Law and Common Law in International Arbitration

Synergy and divergence between civil and common law in international arbitration: Introduction

Nayla Comair-Obeid

This year's fourth issue of the CIArb Academic Journal is designed to showcase the theme of the *Synergy and Divergence between Civil Law and Common Law in International Arbitration*, examined in three conferences organised by the CIArb in 2017, as part of my Presidential programme.

Taking place in Dubai, Johannesburg and Paris, the three conferences all focus on the same theme, but from the perspective of different regions of the world. While the Dubai conference analysed the topic with a focus on the Asian and Middle Eastern region, the Johannesburg conference focused on Africa and the Paris conference will take a European and American perspective on the topic. As the year's final closing event, the Paris conference, scheduled in December, will draw together all the issues, problems and proposals identified at the Dubai and Johannesburg conferences so that tangible ways to bridge the gap between civil and common law in international arbitration are identified.

The present Special Issue gathers articles from authors who participated in the Dubai and Johannesburg conferences as speakers, and whose contributions reflect key issues to approach and comprehend the above-mentioned theme. A Special Issue at the beginning of next year will be dedicated to the Paris conference and will include articles by prominent authors of the arbitration and legal world, sharing their experience and views on how to alleviate the effects of the civil-common law dichotomy in international arbitration.

1. Why focusing on the civil-common law dichotomy in international arbitration?

I have been asked a number of times why I chose to hold three conferences on the *synergy and divergence between civil and common law in international arbitration*.

In fact, the idea to explore more thoroughly this topic ripened over the course of my years of practice in arbitration. My experience as both a counsel and an arbitrator showed me that the cultural diversity characterising international arbitration is as much a source of enrichment as it is sometimes a source of practical difficulties affecting both the arbitration procedure and the application of substantive law. As we know, the issues of increased time and costs affecting arbitration proceedings represent a threat to its development. The common law-civil law dichotomy is one of the best examples of how different legal traditions can sometimes adversely impact on international arbitration, notably through divergent expectations of the participants in the arbitration process.

As Pierre Tercier explained in a lecture at the American University Washington College of Law, justice is not dispensed in the same way everywhere around the globe, meaning

that the preferred way of applying the law in one legal system can be unconceivable in another legal system. This implies that arbitrators, facing the inherent diverse backgrounds of parties and of their representatives in international arbitration, should be ready to understand and apply rules with which they are not necessarily familiar. This also implies that counsels should be ready to adapt to a different way of approaching the legal proceedings from the other party's side. National legislators, government representatives and judges as well, will have to understand the divergent approaches to certain legal notions in different legal traditions, in order to understand fully the scope and potential impact of a particular legislation.

My aim for this year was therefore to facilitate the creation of a dialogue between professionals from common and civil legal backgrounds, and to tackle the practical difficulties created by the divergences between these two legal traditions.

2. The diversity reflected through the contributors to the Special Issue

As is visible in the London Centenary Principles of 2015, identifying the conditions for an effective, efficient and "safe" seat for the conduct of international arbitration, a number of key players, beyond the arbitral tribunal, are involved in securing an appropriate and efficient arena for arbitration.

Taking into consideration this fact, the three conferences' panels have been organised with the objective to include all the categories of actors involved in bringing international arbitration to life. From those who influence *arbitration laws* to the drafters of *arbitration clauses*; from those who represent parties in arbitration proceedings to those who *resolve arbitration disputes*; and from those who *administer* the arbitration proceedings to those who are the *guardians of the public policy and of the law* of the arbitration seat, namely the national judges.

Whilst building the panels in each conference's programme, we also considered the importance of maintaining a civil/common law balance in order to have a dialogue between practitioners from these two legal traditions who could together find solutions to the issues identified.

The contributors to this Special Issue, just as the speakers in the CIArb conferences of 2017, reflect the diversity which characterises this year's CIArb events, whether in terms of profession, country of practice, legal tradition, or gender.

Before ending this introductory note, I would like to express my gratefulness to Michael O'Reilly, Editor-In-Chief of the Journal, without whom this project would not have existed. I would also like to thank Sabina Adascalitei and Claudia Pharaon for their efforts in working towards the success of the publication. I will conclude by wishing the readers of our Journal a good read and I do hope the articles will help in triggering reflections and initiatives on how to ensure a harmonised coexistence of the civil and common law approaches in international arbitration.

Opportunities for Young Practitioners in International Arbitration

Fan Yang*

1. Introduction

First of all, please allow me to thank the organisers and especially President Professor Dr Nayla Comair-Obeid for inviting me to join the Panel Discussion on *Young Members Groups in Civil and Common Law Systems: Challenges and Opportunities*. It was such a great pleasure to be here in Dubai.

In the following 10 minutes, my task is to identify and present opportunities for young practitioners in international and cross-border arbitration law and practice.

For the purpose of today's discussions, I would like to focus on three main kinds of opportunities for young practitioners, namely, (a) opportunities brought by the harmonization of international trade law and arbitration in particular; (b) opportunities to meet the increased market needs for diversity in the relevant professions; and (c) opportunities created by professional young members groups and global training and accreditation bodies, such as the Chartered Institute of Arbitrators (CI Arb).

At the end, I will conclude that young practitioners are facing unprecedented opportunities to practice in the areas of international and cross-border commercial and investment arbitration today.

2. Opportunities brought by harmonization

More than 2,000 years ago, Cicero famously said:

“[T]here shall not be one law at Rome, another at Athens, one now, another hereafter, but one everlasting and unalterable law shall govern all nations for all time.”¹

Although not everyone shares Cicero's aspiration² and the modern process of harmonization of law, which is built on mutual respect with the deliberate aim of establishing shared law between multiple jurisdictions,³ is to be contrasted with historical legal uniformity such as Roman law, Common Law, or other colonial laws, which imposed laws, the fact is that today the law at Rome has increasingly become harmonised with the law in Athens perhaps more than ever before. As a result of the policy of the European Community to facilitate free movement of goods, workers, services and capital, harmonization and uniformity in the laws of member states of the European Union has been achieved to a large extent, particularly in the areas of cross-border trade and commercial law.

Other examples that illustrate the harmonization of the law landscape are the accession to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the adoption of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). As of 1 March 2017, 156 countries have acceded

* The author would like to thank José Miguel Figueiredo and Cylum Leung for their research and editorial support.

¹ See Cicero, *De Republica*, 3.22.33, also quoted in Ewan McKendrick, *Goode's Commercial Law*, 5th edn (London: Penguin, 2017), p.1212.

² See e.g. Peter De Cruz, *Comparative Law in a Changing World*, 3rd edn, (London: Routledge-Cavendish, 2006), para.8.11, p.257: “In a world which is beginning to demonstrate a remarkable similarity of economic needs, values and interests, convergence will continue to occur, but true assimilation and wholesale integration of judicial styles appear, at the present time, to be an extremely remote possibility”.

³ See e.g. Camilla Andersen, “The Global Jurisconsultorium of the CISG Revisited” (2009) 13 *Vindobona Journal of International Commercial Law & Arbitration* 43–70.

to the New York Convention.⁴ Legislation based on the UNCITRAL Model Law has been adopted in 74 States in a total of 104 jurisdictions.

Given that we are in Dubai today, let's first look at MENA countries. Here, out of the 19 jurisdictions (Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, State of Palestine, Syrian Arab Republic, Tunisia, United Arab Emirates, and Yemen, only three (Iraq, Libya and Yemen) have not yet acceded to the New York Convention. Although, on the other hand, only six out of the 19 have adopted legislation based on the UNCITRAL Model Law. These UNCITRAL Model Law jurisdictions are Bahrain, Egypt, Iran, Jordan, Oman and Tunisia.

Moving towards Central Asia countries, among Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan, only Turkmenistan has not yet acceded to the New York Convention. However, interestingly, Turkmenistan is also the only one out of the five that has adopted the UNCITRAL Model Law.

For Eastern Asia countries, among China, Hong Kong Special Administrative Region, Macao Special Administrative Region, Democratic People's Republic of Korea, Japan, Mongolia, and Republic of Korea, only Democratic People's Republic of Korea has not yet acceded to the New York Convention. China and Democratic People's Republic of Korea are the only two jurisdictions in Eastern Asia that have not yet adopted the UNCITRAL Model Law.

For Southern Asia countries, among Afghanistan, Bangladesh, Bhutan, India, Iran, Maldives, Nepal, Pakistan, and Sri Lanka, only Maldives has not yet acceded to the New York Convention. Afghanistan, Nepal, and Pakistan are the only three jurisdictions there that have not yet adopted the UNCITRAL Model Law.

For South-Eastern Asia countries, among Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, and Vietnam, only Timor-Leste has not yet acceded to the New York Convention. Indonesia, Lao People's Democratic Republic, Timor-Leste, and Vietnam are the only four jurisdictions there that have not yet adopted the UNCITRAL Model Law.

For Western Asia countries, Armenia, Azerbaijan, Bahrain, Cyprus, Georgia, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, State of Palestine, Syrian Arab Republic, Turkey, United Arab Emirates, and Yemen, only Iraq and Yemen have not yet acceded to the New York Convention, although only eight out of 18 of these jurisdictions have adopted the UNCITRAL Model Law. Those UNCITRAL Model Law jurisdictions are Armenia, Azerbaijan, Bahrain, Cyprus, Georgia, Jordan, Oman, and Turkey.

In addition to the New York Convention and UNCITRAL Model Law, it is also important to remember the proliferation of guidelines and best practices from a variety of non-governmental sources, including, for example, the following "Soft Law" in international arbitration: IBA Guidelines on Conflicts of Interest in International Arbitration; IBA Rules on the Taking of Evidence in International Arbitration; UNCITRAL Notes on Organizing Arbitral Proceedings; IBA Guidelines on Party Representation; ICC Techniques for Controlling Time and Cost; ICDR Guidelines for Arbitrators Concerning Exchanges of Information; as well as numerous Chartered Institute of Arbitrators (CIArb) publications and many other pending proposals. All these efforts have contributed to the harmonization and further development of the law and practice in international arbitration.

Thanks to the increasing harmonization of international arbitration law and practice across the globe, the developments over the past 30 years reflect the enduring popularity of international arbitration. We have witnessed the increasing caseloads at leading arbitral institutions. Take the caseload number of the International Chamber of Commerce (ICC) for example. In 1993, ICC had 352 arbitration cases. In 2013, ICC's caseload number was more than doubled and reached 767. The new cases filed with the ICC in 2016 reached 966, an increase of 20 per cent and a massive growth by 165 new cases from 801 in 2015.

⁴ As of 26 June 2017, 157 countries have acceded to the New York Convention.

According to ICC, those new cases came from Latin America, Asia and Africa.⁵ Another well-known institution, China International Economic and Trade Arbitration Commission (CIETAC) had 486 arbitration cases in 1993. In 2013, CIETAC's caseload number was more than doubled (2.6 times) and reached 1,256. In 2016, CIETAC received 2,183 new cases involving a total amount in dispute of RMB 58.66 billion (USD 8.5 billion).⁶

Over the last 30 years, we have also witnessed the continuing expansion of use of international arbitration in new fields involving new types of disputes; and a very significant increase in investor-state arbitrations (and investment treaties). In 1993, the International Centre for Settlement of Investment Disputes (ICSID) had only one case. In 2013, ICSID's caseload number reached 40. Its caseload numbers in the last five years, between 2012 and 2016, seems to be stable. ICSID saw a new record of 52 cases in 2015 and 48 cases in 2016.

The increasing harmonization of international trade law and international arbitration law and practice in particular and the increasing number of international arbitration cases have provided young professionals today with tremendous opportunities.

Firstly, it provides opportunities for young practitioners to study arbitration law in one jurisdiction and practice in other jurisdictions that share the same or similar arbitration law regimes, particularly those that have adopted the UNCITRAL Model Law. Effectively, young professionals today can study UNCITRAL Model Law in Hong Kong, for example, but practice international arbitration in Bahrain, Egypt, Iran, Jordan, Oman, Tunisia, Turkmenistan, Macao Special Administrative Region, Japan, Mongolia, Republic of Korea, Bangladesh, Bhutan, India, Maldives, Sri Lanka, Brunei Darussalam, Cambodia, Malaysia, Myanmar, Philippines, Singapore, Thailand, Armenia, Azerbaijan, Cyprus, Georgia, and Turkey, as well as the rest of the 74 States in the total of 104 jurisdictions where their domestic legislation is based on the UNCITRAL Model Law.

Secondly, it provides opportunities for young professionals to participate and engage in international comparative study and analysis of the law and practice of international arbitration within the legal frameworks of diverse legal traditions and systems. Harmonisation is by no means synonymous with unification.⁷ Even though 157 countries have acceded to the New York Convention and 74 countries in a total of 104 jurisdictions have based their domestic legislation on the UNCITRAL Model Law, the understanding, application and interpretation of these two instruments among all the countries and jurisdictions are still far from uniform. It remains important for young professionals to be proficient in the relevant areas of law and practice in their home jurisdiction so that they can engage in the international comparative law study and debates in a meaningful way.

Thirdly, it provides opportunities for young professionals across the globe to contribute to the further development of international arbitration law and practice. Because there is no one body charged with the task of monitoring international commercial laws and there is no International Commercial Court competent to monitor the application and interpretation of shared global instruments like the New York Convention and the UNCITRAL Model Law, in the application and interpretation of these instruments, the community of states depends upon national judges to realise that the law being applied is a shared multi-jurisdictional law which should be applied with a high degree of uniformity, and to treat these international instruments in an autonomous way, and not follow the path of domestic law. It is a challenging and ongoing process to ensure a common approach to similar problems, and to ensure that the shared international law instruments such as the New York Convention and the UNCITRAL Model Law evolve as they were meant to. Young professionals, therefore have ample opportunities to “shop” for precedents and scholarship as widely as possible, so as to provide the judge/arbitrator with all available

⁵ See <https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016> [Accessed 8 September 2017].

⁶ See <http://www.cietac.org/index.php?m=Article&a=show&id=14107> [Accessed 8 September 2017].

⁷ Loukas Mistelis, *Foundations & Perspectives of International Trade Law* (London: Sweet & Maxwell, 2001), p.4.

transnational sources and let him or her determine the persuasive weight of each source. By research in and using a wealth of potentially persuasive case law and scholarly authority, young professionals today will help contribute to and shape the further development of international arbitration law and practice in the future.

To summarise, the harmonisation of commercial law and international arbitration law and practice in particular has given not only immediate economic benefits to the community of states by removing barriers to international trade and investment, but also ample opportunities for young professionals to study, research, and engage in the further development of the relevant areas of law and practice.

3. Opportunities to meet market demands for diversity

The second kind of opportunities come from the world we live in today that is increasingly aware of, respect for and appreciate the differences in ethnicity, gender, age, national origin, disability, sexual orientation, education, and religion.

No doubt that we all bring with us diverse perspectives, work experiences, life styles and cultures. With demographic shifts, advances in technology and communications, and globalization, diversity is quickly becoming a driver of growth around the world. As a source and driver of innovation, diversity is now a “big idea” in business and in society.

As we all know, people are the most important asset of any company. For law firms to succeed in the global marketplace, they must make the most of the full range of their people, including young people and people from diverse backgrounds. Maximizing the potential of a diverse workforce is not only a social imperative, but is also a competitive advantage.

I would like to focus on particular opportunities to meet the market demands for racial and ethnic equality, gender equity, and social inclusion in international arbitration.

As mentioned above, according to ICC’s statistics, most of those new cases that were filed in 2016 at the ICC came from Latin America, Asia and Africa. To best serve these markets, institutions and law firms must “employ the market”. In other words, there are ample opportunities for young practitioners from those emerging and developing jurisdictions to be employed to support and serve the growth in those jurisdictions.

According to Berwin Leighton Paisner’s Survey on diversity on arbitral tribunals released on 10 January 2017, a perceived lack of diversity among arbitrators was confirmed by the available statistics. For example, the SIAC’s Annual Report for 2015 reports that the number of women appointed as arbitrators accounted for just under a quarter of appointments. The ICC data on arbitral appointments for 2016 shows that, to November 2016, only 20 per cent of arbitrators appointed were women. SCC statistics indicate that, in 2015, 14 per cent of arbitrators appointed were women, although the percentage fell to 6.5 per cent where the parties themselves made the appointment. Statistics from the Chartered Institute of Arbitrators indicate that, of the 222 arbitrators qualified to be on the panel from which presidential appointments are made, only 16 (7 per cent) are women.⁸

There is a dearth of statistics on minority ethnic and racial representation on tribunals, but looking at the region from which appointed arbitrators are chosen in ICSID arbitrations, it was found that in 289 closed cases from January 1972 to May 2015, in nearly half of cases (45 per cent), the tribunals were composed of all Anglo-European arbitrators.⁹ In 84 per cent of the cases, two or more of the tribunal members were Anglo-European, or the sole arbitrator was Anglo-European. Only 11 cases (4 per cent) were arbitrated by entirely non-Anglo-European tribunals.¹⁰

⁸ See <http://www.blplaw.com/expert-legal-insights/articles/diversity-on-arbitral-tribunals-are-we-getting-there> [Accessed 8 September 2017].

⁹ See <http://www.ciarb.org/news/ciarb-news/news-detail/features/2017/02/03/icsid-improvements-in-diversity> [Accessed 8 September 2017].

¹⁰ See <http://blogs.lexisnexis.co.uk/dr/diversity-on-arbitral-tribunals-the-blp-international-arbitration-survey-2016/> [Accessed 8 September 2017].

Interestingly, according to Berwin Leighton Paisner's Survey on diversity on arbitral tribunals, 80 per cent of respondents thought that tribunals contained too many white arbitrators, 84 per cent thought that there were too many men, and 64 per cent felt that there were too many arbitrators from Western Europe or North America. On the assumption that all potential candidates have the necessary level of expertise and experience, 50 per cent of respondents thought it was desirable to have a gender balance on arbitral tribunals and 54 per cent thought it was desirable that the tribunal should come from a diverse range of ethnic and national backgrounds.¹¹

Another noteworthy initiative in pursuing increased diversity among ADR practitioners is JAMS' Diversity and Inclusion Brochure. According to JAMS, the same obstacles that keep many women and minorities from reaching the partner level at law firms or attaining the general counsel title at corporations reduce the pool of candidates that transition to a career as a mediator or arbitrator. As stated in the JAMS' Diversity and Inclusion Brochure, equally important is retaining diverse talent by supporting their efforts to build a viable practice. JAMS believes that success hinges upon the ability of diverse neutrals to break into the "short list" of neutrals that clients consult or circulate within their firms.¹²

Therefore, JAMS invites law firms, corporations, and legal organizations to consider at least these four aspects in addressing the ADR diversity challenge, namely:

- Reach outside of your firm's typical pool of neutrals. When evaluating your case, consider women and ethnically diverse neutrals. Diverse perspectives can be advantageous to case outcomes.
- Track your firm's neutral selection process in order to measure progress. By measuring your firm's ADR selection process, you can bolster diversity and inclusion data provided to current and prospective clients.
- Legal organizations with a diversity focus can provide information on preparing for a successful career in ADR. Make available a list of ADR volunteer programs, solicit diverse neutrals for speaking and writing opportunities, and host ADR related networking events.
- Corporate clients can strongly encourage outside counsel to consider diversity in their selection of ADR professionals.¹³

Another more recent and very well-known initiative is the Equal Representation in Arbitration (ERA) Pledge that was officially launched on May 18 at Freshfields Bruckhaus Deringer in London.

The Equal Representation in Arbitration Pledge is a call for the international arbitration community to commit to increase, on an equal opportunity basis, the number of women appointed as arbitrators. It aims to achieve fair representation as soon as practically possible, with the ultimate goal of full parity.¹⁴

According to the Pledge, women should be appointed as arbitrators on an equal opportunity basis. To achieve this, the Pledge encourages counsel, arbitrators, representatives of corporates, states, arbitral institutions, academics and others involved in the practice of international arbitration to take steps to ensure that, wherever possible:

- Committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;

¹¹ For the survey report, see http://www.blplaw.com/media/download/BLP-Diversity_on_Arbitral_Tribunals_-_Survey_Report.pdf [Accessed 8 September 2017]. For the background note, see https://www.blplaw.com/media/download/Diversity_on_arbitral_tribunals_-_background_note.pdf [Accessed 8 September 2017].

¹² See <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Diversity-Inclusion.pdf> [Accessed 8 September 2017].

¹³ See <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Diversity-Inclusion.pdf> [Accessed 8 September 2017].

¹⁴ See <http://www.arbitralwomen.org/Media/AW-News/PostId/13/launch-of-the-equal-representation-in-arbitration-era-pledge> [Accessed 8 September 2017].

- Lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;
- States, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;
- Where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;
- Gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and
- Senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.¹⁵

The Pledge is accompanied with a commentary, which includes a list of the Pledge Steering Committee members. Both the Pledge and its commentary are available online.¹⁶

The above-mentioned efforts are just a few examples of diversity and inclusion efforts and advantages in the area of international arbitration law and practice. All these efforts aim to encourage the appointment of more women as well as under-represented groups. In addressing diversity issues in international arbitration and ADR practices, it is foreseeable that there will be more opportunities for young and international arbitration and ADR practitioners to meet the increased market demands for racial and ethnic equality, gender equity, and social inclusion in international arbitration.

4. Opportunities for young members groups and global professional arbitration and ADR training

Now, let me quickly turn to the third kind of opportunities that are created and supported by global professional training and accreditation bodies such as the Chartered Institute of Arbitrators.

As we all know, CI Arb supports young and international professionals by providing them with worldwide and standardised training, accreditation and networking opportunities.

Although the age limit for the Young Members Group of the CI Arb is 40, there is no age requirement or limitation for our young members to become members or fellows of the CI Arb before they are 40. Many of our young members have already achieved membership or even fellowship at a much younger age than previous generations, which means that young professionals today can have much earlier entrance and easier access to the market than before.

It is important to appreciate that international dispute resolution and international arbitration in particular is a multi-generation profession that benefits in a multitude of ways from all of the relevant stakeholders: policy makers, judges, arbitrators, counsels, experts, clients, arbitral institution personnel, relevant regulators, and law students. Collectively, these members of the international arbitration communities are becoming known as what the author of this article would call it, “the international arbitration ecosystem”.

The ecosystem for international arbitration services are regularly involved in the provisioning of various international arbitration related services, which I propose to be grouped into four broad categories: (i) provisioning, such as retired judges, engineers, accountants and scientists, in addition to lawyers, who can function as independent, impartial

¹⁵ See <http://www.arbitralwomen.org/Media/AW-News/PostId/13/launch-of-the-equal-representation-in-arbitration-era-pledge> [Accessed 8 September 2017].

¹⁶ See <http://www.arbitralwomen.org/Media/AW-News/PostId/13/launch-of-the-equal-representation-in-arbitration-era-pledge> [Accessed 8 September 2017].

and competent arbitrators in various fields; as well as competent arbitration practitioners to act as counsels in international arbitration proceedings; (ii) regulating, such as policy makers, legislators and [members of] judiciaries who can control, moderate and modify a legal system that is friendly and conducive for the smooth and effective operation of international arbitration proceedings; (iii) supporting, such as experts, funders, and professionals who run arbitration institutions; and (iv) cultural, such as professional training, legal education service providers.

Young professionals are the key to the success of all these four broad categories of arbitration related services that contribute to the healthy development and success of the international arbitration ecosystem. Thus, it is no surprise that there are many initiatives focusing on supporting the development of our young members in the international arbitration ecosystem.

For example, the CIArb Young Members Group (YMG) has over 3,000 members in over 90 countries. It has its own annual conference, social media groups and regular e-newsletter. All CIArb regions are represented on the Steering Committee.¹⁷

The LCIA Young International Arbitration Group (YIAG) was established in 1997. It is an LCIA sponsored association for practitioners, students and younger members of the arbitration community. It aims to promote the understanding and use of international arbitration law and practice by providing opportunities for its members to exchange views on topical issues in international commercial arbitration. Currently, there are over 9,500 members from more than 140 countries. Membership is open to students, practitioners and younger members of the arbitration community. The upper age limit for membership is 40 years, the same as the CIArb YMG.¹⁸

The ICC Young Arbitrators Forum (YAF) is also open to those aged 40 and under. It provides a variety of opportunities for individuals to gain knowledge, develop their skills and understand ICC's arbitral procedure and other dispute resolution services. Throughout the world, the YAF holds a number of educational and social events that give young professionals the chance to discover best practices, discuss topical issues and network with experienced practitioners.¹⁹

Young International Council for Commercial Arbitration (Young ICCA) is a worldwide arbitration knowledge and skills network for young practitioners. Established in 2010, it aims to provide a forum for young students and professionals to exchange ideas about international arbitration; provide young professionals interested in dispute resolution with access to each other and to the international arbitration community; promote the use of arbitration and other forms of dispute resolution by introducing new practitioners from all corners of the globe into the practice of arbitration. Participation in Young ICCA is open to law students, faculty members and young practitioners.²⁰

Last but not least, coming all the way from China, please allow me to also quickly share with you some observations there.

According to the Chinese Government's official data, in 2015 the total number of arbitration cases processed by the 244 arbitration commissions in China reached 136,924, a 20 per cent increase from 2014. The total value of disputes in arbitration in China reached CNY 4,112 billion, a 55 per cent increase from the previous year.²¹

With the continued increase in Chinese outbound investment as well as the further development of the Chinese government's Belt and Road initiative, the Chinese Government

¹⁷ See <http://www.ciarb.org/branches/young-members> [Accessed 8 September 2017].

¹⁸ See http://www.lcia.org/membership/yiag/young_international_arbitration_group.aspx [Accessed 8 September 2017].

¹⁹ See <https://iccwbo.org/dispute-resolution-services/professional-development/young-arbitrators-forum-yaf/> [Accessed 8 September 2017].

²⁰ See <http://www.arbitration-icca.org/YoungICCA/AboutYoungICCA.html> [Accessed 8 September 2017].

²¹ See <http://blogs.lexisnexis.co.uk/dr/training-the-future-generation-of-international-arbitration-in-china-and-beyond/> [Accessed 8 September 2017].

has flagged the need for professionally trained lawyers and arbitrators who can competently deal with international and cross-border disputes. So, what do you see there? Opportunities!

In response to the need in China to train lawyers and arbitrators in international arbitration law and practice, the International Dispute Resolution Academy (IDRA) was established in Hong Kong and is dedicated to providing a wide range of individuals across the globe with access to educational resources in the areas of international contracts and dispute resolution.

The mission of the IDRA is to support and complement the goals of our global partners, including the UNCITRAL RCAP and CIArb, by facilitating the delivery of professional training courses on international arbitration and dispute resolution in China and other emerging markets.²²

5. Conclusion

The three broad categories of opportunities as I identified in this article include: (i) those opportunities for young professionals to study, research, and engage in the further development of the relevant areas of law and practice in international arbitration brought by the increasing harmonization of international trade law and international arbitration law and practice in particular and the increasing number of international arbitration cases; (ii) the opportunities to meet the market demands for racial and ethnic equality, gender equity, and social inclusion in international arbitration; and particularly opportunities brought by those efforts aim to encourage the appointment of more women as well as under-represented groups; and (iii) opportunities created by various young members groups and global professional arbitration and ADR training programmes and service providers to facilitate young professionals' access to educational and professional training and networking resources.

In conclusion, I believe that young practitioners nowadays are facing unprecedented opportunities in international arbitration particularly and in international and cross-border dispute resolution law and practice generally.

²² See www.idracademy.org [Accessed 8 September 2017].

The Synergy between Common Law and Civil Law under UNCITRAL and CRCICA Rules

Ismail Selim*

1. Introduction

The prevalence of the well-established *summa divisio* between the common law and civil law¹ demands that counsels belonging to either system be open to the advantages offered by the other procedural tradition² to make a strategic use of both.³

Scholars broadly describe the different procedural regimes, stating that the common law involves a “search for the truth” while the civil law is merely based on the overarching principle that “the claimant brings his/her claim”. It is a fair description to consider that common law jurisdictions rely on an adversarial process to ensure that all relevant facts of the dispute are disclosed, whereby the judge or arbitrator has a limited role as this system was created because of historical mistrust of judges, especially in the US where the judges were English.⁴

However, in a civil law jurisdiction, a lawyer expects to plead before an active judge and in accordance with an inquisitorial system. This distinction appears logical, based on the deep-rooted assumption that a shrewd judge, rather than an unsavvy jury, decides upon the case. Therefore, the procedural rule of law must ensure that the judge is empowered to proactively gather all the information.⁵

In the field of international arbitration, the parties, their counsels and the arbitrators often belong to different legal backgrounds, their expectations vary and they need to understand and be familiar with the applicable procedures. Accordingly, a flexible procedure is preferred so that the dispute can be resolved in a manner consistent with the parties’ expectations of *procedural fairness and efficiency*.⁶

In spite of the differences between common law and civil law in their approaches to procedures, especially the adversarial versus inquisitorial approach, the United Nations Commission on International Trade Law (UNCITRAL) Working Group on International Arbitration succeeded in providing a neutral framework, thereby creating a synergy between both legal systems in order to fulfil the needs of the various users of the UNCITRAL Arbitration Rules.

Accordingly, the UNCITRAL Arbitration Rules (as adopted in 1976 and amended in 2010) offer a comprehensive set of procedural rules upon which the parties may agree for

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¹ The Sharia law is considered as a third major and separate legal system but will not be dealt with in this article given that it has not significantly influenced the UNCITRAL Arbitration Rules.

² Javier H. Rubinstein, “International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions” (2004) 5 *Chicago Journal of International Law* 303.

³ Lara M. Pair, “Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?” (2002) 9 *ILSA Journal of International & Comparative Law* 57.

⁴ Lara M. Pair, “Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?” (2002) 9 *ILSA Journal of International & Comparative Law* 57, 62.

⁵ Lara M. Pair, “Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?” (2002) 9 *ILSA Journal of International & Comparative Law* 57, 62.

⁶ Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (New York: Lexis Nexis, 2010), pp.2–5.

the conduct of the proceedings.⁷ It also played a pivotal role towards the harmonisation of the international arbitral procedures.

This is further manifested by the constant growth of arbitral institutions. Whilst each institution has its own rules, those provisions are becoming remarkably similar in their content.⁸ By way of example, the Rules of the Cairo Regional Center for International Commercial Arbitration (CRCICA) of 2011 are also based upon the UNCITRAL Arbitration Rules as revised in 2010. However, CRCICA has adapted its UNCITRAL based rules in order to accommodate the needs of its users and in light of its role as an arbitration institution and appointing authority.⁹

In this article, the author shall provide succinct findings on the influence of the UNCITRAL Arbitration Rules, as well as the influence of the CRCICA Arbitration Rules, in building a synergy between civil and common law cultures, including a synergy between the inquisitorial and adversarial systems.

2. The principle of party autonomy as a major means of procedural flexibility

An arbitration agreement is the foundation of almost every arbitration. Unlike national court systems provided by States, arbitral tribunals derive their jurisdiction from the parties' agreement. Therefore, the arbitration agreement becomes the primary source of the rights, powers and duties of the tribunal,¹⁰ including in its conduct of the proceedings. The international arbitration practice promotes this flexibility by acknowledging the ultimate power of the parties to control the arbitral process. Within the parameters of the arbitration agreement, arbitral tribunals can decide how the arbitration should be conducted, subject to requirements of fairness and due process.¹¹

Party autonomy and flexibility are the hallmarks of international arbitral proceedings. This approach of promoting and favouring party autonomy is a manifestation of the harmonisation efforts, given that it has been adopted by most national arbitration laws, especially following the adoption of the UNCITRAL Model Law and because of the growing use of institutional arbitration¹² and the UNCITRAL Arbitration Rules.

To that end, Article 1(1) of the UNCITRAL Arbitration Rules¹³ defines the permissible scope of an arbitration agreement and establishes the clear primacy of party autonomy, allowing parties to modify the rules governing their arbitration in any way they see fit. The scope of the agreement is determined by its wording and is limited by the national mandatory

⁷ See Peter Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules* (London: Sweet & Maxwell, 2013), pp.10–11; Lara M. Pair, "Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?" (2002) 9 *ILSA Journal of International & Comparative Law* 57.

⁸ Richard Garnett, "International Arbitration Law: Progress towards Harmonisation" (2002) 3 *Melbourne Journal of International Law*.

⁹ The introduction of CRCICA's Arbitration Rules provides that: "CRCICA has amended its Arbitration Rules in 1998, 2000, 2002 and 2007 to ensure that they continue to meet the needs of their users, reflecting best practice in the field of international institutional arbitration". The present CRCICA Arbitration Rules (entered into force as from 1 March 2011) are based upon the UNCITRAL Arbitration Rules, as revised in 2010, with minor modifications emanating mainly from the Center's role as an arbitral institution and an appointing authority. Also see Gary Born, *International Commercial Arbitration*, Volume I, 2nd edition (Alphen aan den Rijn: Wolters Kluwer, 2014), p.195.

¹⁰ Richard Garnett, "International Arbitration Law: Progress towards Harmonisation" (2002) 3 *Melbourne Journal of International Law* 1, 3.

¹¹ Javier H. Rubinstein, "International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions" (2004) 5 *Chicago Journal of International Law* 303, 310.

¹² Richard Garnett, "International Arbitration Law: Progress towards Harmonisation" (2002) 3 *Melbourne Journal of International Law* 1, 11.

¹³ Article 1(1) UNCITRAL Arbitration Rules: "Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules *subject to such modification as the parties may agree*" (emphasis added).

laws from which the parties cannot derogate.¹⁴ The parties can agree on the details of the procedure in the arbitration agreement or after the proceedings have started. The tribunal often invites the parties to agree or comment on the proposed procedure either prior to or during an initial procedural hearing.¹⁵

Article 18 of the UNCITRAL Model Law is the most important limitation to that freedom as it provides that “parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”. This provision emphasises the importance of natural justice and equal treatment¹⁶ that must be followed by the arbitrators. Article 17(1) of the CRCICA and UNCITRAL Arbitration Rules limits the power of the arbitral tribunal in the same way. Indeed, the similar natural justice, due process, *le contradictoire* and *le droit d’être entendu* concepts, deriving from English, US, French and Swiss laws respectively, pertain to transnational procedural public policy.¹⁷

In my view, the UNCITRAL Rules per se are relatively closer to the inquisitorial approach of the civil law systems than the adversarial approach of the common law. However, by broadening the ambit of party autonomy through Article 1(1) of the UNCITRAL Arbitration Rules, parties are enabled to merge the adversarial and inquisitorial approaches. The influence of common law techniques would then be perceivable as party autonomy can then diminish arbitrators’ powers during the oral hearings by allowing the parties’ counsels to interrogate the factual and expert witnesses through “direct examination, cross examination, re-direct and re-cross”.¹⁸ Such liberty granted to the parties’ counsels is in contrast with Article 17(3) which entitles the arbitral tribunal to decide upon the case on the basis of the written submissions and documents only without a hearing insofar as holding such a hearing has not been requested by a party.

Party autonomy can also mitigate the civil law tradition’s influence on some of the UNCITRAL rules which enshrine a proactive role of the tribunal. By way of example, Article 27(3) of both the UNCITRAL and CRCICA Arbitration Rules entrusts the arbitral tribunal with a proactive role as to document production, as it provides that “at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine”. Yet, through party autonomy, it is not uncommon in international arbitration that the process of document production is agreed to be mainly in the hands of the parties including through seeking guidance from the IBA Rules for the Taking of Evidence.

3. Provisions for both detailed and succinct opening pleadings

In common law jurisdictions, a claimant generally keeps its initiatory pleading to the minimum necessary, with a strategic view that it will develop its case as evidence is disclosed in the course of the proceedings. Therefore, few documents, if any, are attached to a request for arbitration.¹⁹ In English procedures, pleadings must state only material facts with sufficient, although not excessive, detail.²⁰

¹⁴ See Article 1(3) of both the UNCITRAL Arbitration Rules and the CRCICA Arbitration Rules.

¹⁵ Thomas H. Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (London: Sweet & Maxwell, 2010), pp.32–48.

¹⁶ Richard Garnett, “International Arbitration Law: Progress towards Harmonisation” (2002) 3 *Melbourne Journal of International Law* 1, 9.

¹⁷ Fernando Mantilla-Serrano, “Towards a Transnational Procedural Public Policy” (2004) 20 *Arbitration International* 333, 335–336.

¹⁸ P. Fouchard, E. Gaillard and B. Goldman, *Traite de l’arbitrage commercial international* (Paris: Litec, 1996), pp.705–706.

¹⁹ Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

²⁰ P. M. Patocchi and I. L. Meakin, “Procedure and the Taking of Evidence in International Arbitration: The Interaction of Civil Law and Common Law Procedures” (1996) 7 *International Business Law Journal* 884.

In civil law jurisdictions, the “*act introductif d’instance*” is more detailed compared to the “initiatory pleading”, as the former articulates the claim in detailed facts and most of the evidentiary documents are attached thereto, owing to the risk of being denied from raising arguments or producing documents later in the proceedings.²¹ The French Code of Civil Procedure provides that the *act introductive d’instance* submitting the claims to the judge²² is used by the claimant to initiate the proceedings generally through an act of bailiff.²³ To be valid, the *act introductif d’instance* must indicate specific information, in addition to the mandatory mentions of the acts of bailiff. It shall contain a statement of the facts, the legal grounds and arguments supporting the claim. Article 20(2)(3)(4) of the UNCITRAL Arbitration Rules provides similar requirements for a Statement of Claim, as it requires the making of a reference to the documents and other evidence relied upon by the claimant as well as the enclosure of same.²⁴

In international arbitration practice, opening pleadings generally extend to a request for arbitration, an answer together with any counterclaims, and a reply to the answer. The request can be made through a Notice of Arbitration for which the arbitration rules generally specify the bare minimum that a party must assert in order for a respondent to provide an answer. The rest of the proceedings are within the control of the parties. Typically, a claimant stipulates the full text of the arbitration clause in its request for arbitration, and attaches the entire contract as an exhibit, even if there is no strict requirement to do so,²⁵ except under CRCICA Rules where Article 3(3)(h) thereof provides that “The notice of arbitration shall include the following: ... h. A copy of the arbitration agreement and a copy of any contract or other legal instrument out of which the dispute arises”.

At the beginning of the proceedings, a party will have to decide whether there is a strategic advantage to adopting a common law or a civil law approach as to the elaboration of the Notice of Arbitration. Civil law traditions can be advantageous if the respondent responds in kind. If not, the respondent might lose the opportunity to present a convincing case after the claimant has just done so. It is also a risk as the respondent will have the opportunity to develop its position in the course of the proceeding, which might be strategically advantageous to the latter. In any event, a party will need to produce its fully articulated case at an early stage of the arbitral proceedings, either in the Notice of Arbitration or Statement of Claim.²⁶

The common law approach influences Article 3(3) of UNCITRAL Arbitration Rules as it requires a notice of arbitration containing a “brief description of the claim” which does not necessarily set out the factual details of the claim nor all the arguments relating to the claim.²⁷ Article 3(3) of CRCICA’s Arbitration Rules is drafted in the same manner but, as mentioned above, provision (h) adds a requirement to accommodate the needs of civil law

²¹ Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

²² Article 53 of Code de Procédure Civile: “the initial request is used by a party to initiate a trial by submitting its claims to the court. It initiates the proceedings”.

²³ Article 55 of Code de Procédure Civile: “the subpoena to appear in court is used by the claimant to summon the defendant to appear before the judge”.

²⁴ Article 56 of Code de Procédure Civile: “the subpoena contains, under penalty, in addition to the requirements of the act of bailiff: an indication of the court before which the claim is brought; the claim with the arguments in fact and in law; the conditions of appearance before the court and the mention that, if the respondent does not appear, the decision can be made against him based solely on the arguments of the claimant; [...] Without a legitimate reason holding to emergency or public order, the subpoena precise the diligences made in order to resolve the dispute amicably.”

²⁵ Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

²⁶ Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

²⁷ Thomas H. Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (London: Sweet & Maxwell, 2010), p.79.

jurisdictions which is the enclosure of “a copy of the arbitration agreement and a copy of any contract or other legal instrument out of which the dispute arises”. Such provision (h) of Article 3(3) of the CRCICA’s Arbitration Rules parallels Article 20(3) of the UNCITRAL Arbitration Rules but at the later stage of submitting the Statement of Claim.²⁸

Article 20(1) of the UNCITRAL Arbitration Rules provides that “the claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article”. A claimant may do so to expedite the procedure, save costs, exert pressure on the respondent to respond on the merits, provide more information regarding the dispute prior to the constitution of the tribunal and for interim measures of relief.²⁹ Civil law influences such choice to treat the Notice of Arbitration as a Statement of Claim since it is required that the latter submission provides a complete overview of the factual allegations, legal allegations, legal issues and link these to the relief sought.

In this regard, it is submitted that Article 20(1) of the UNCITRAL Arbitration Rules together with Article 3 create a synergy between both legal systems. This synergy appears through granting the claimant the option of submitting a succinct Notice of Arbitration—similar to the practice in the common law jurisdictions—as well as the option of initiating the proceedings by submitting a detailed Statement of Claim—similar to the practice in civil law systems.

4. Limited document production versus fully fledged discovery

Under the common law system, each party is entitled to request from the other the documents relevant to the case that the other party has not placed on the case records. Accordingly, discovery and pre-hearing procedure are deemed as one of the most important tools in dispute resolution.³⁰ This process is called “disclosure” under English Law and “discovery” under US law. American procedures allow parties to request the production of evidence in advance of trial³¹ but are the less present discovery tools in international arbitration, being the extreme case of fully fledged disclosure of documents.³²

The US Federal Rules of Civil Procedure³³ provide for five discovery mechanisms in addition to document production: (i) pre-hearing oral testimony of witnesses; (ii) written interrogatories; (iii) physical inspections of objects or property; (iv) physical and mental examination of persons and (v) requests for admissions.

While attempting to receive as much information as possible before the hearing, common law lawyers will delay rendering information to obtain a strategic benefit, which might upset the civil law arbitrator who seeks prompt disclosure of all relevant information.³⁴

In civil law countries, the evidence laws entail that each party to a dispute shall submit the proof supporting its position to support its claim or defence (as the case may be). Such maxim is reflected in Article 27(1) of both the UNCITRAL and the CRCICA Arbitration Rules which reads as follows: “Each party shall have the burden of proving the facts relied on to support its claim or defence”.

²⁸ See Article 20 of the UNCITRAL Arbitration Rules.

²⁹ Thomas H. Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (2010), pp.302–310.

³⁰ Lara M. Pair, “Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?” (2002) 9 *ILSA Journal of International & Comparative Law* 57, 64.

³¹ Javier H. Rubinstein, “International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions” (2004) 5 *Chicago Journal of International Law* 303, 304.

³² Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

³³ Rules 26–37 of the Federal Rules of Civil Procedure.

³⁴ Lara M. Pair, “Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?” (2002) 9 *ILSA Journal of International & Comparative Law* 57, 64.

Accordingly, discovery is not permitted in the civil law system and can be viewed as an affront to the privacy and confidentiality of the parties' business information.³⁵ Unlike the common law legal systems, the courts do not recognise the disclosure of documents as an element of a pre-trial fact-finding process. The legislations exceptionally allow the parties to request the production of specific documents by their counterparty if they demonstrate the need for the document, its relevance to the dispute and give proof that the requested document exists and is in the possession of the other party.³⁶

Historically, the Egyptian legal system has adopted the Roman law maxim *Nemo tenetur odere contra se*, by virtue of which no one shall be compelled to provide evidence against himself.³⁷ As an exception to such maxim, Article 20 of the Code of Evidence³⁸ lays down an exclusive list of cases where a party may request its counter party to produce documents.³⁹ Article 20 provides the grounds under which the request may be granted⁴⁰ and Article 21 sets out the requirements for the request to be considered by the court.⁴¹ Judges do not have a discretionary power with relation to such request and have to order the immediate production of documents if it complies with the mandatory requirements of Articles 20 and 21.⁴² Article 27 of the Code of Evidence establishes a wider spectrum for production of documents and applies when the requirements of Article 20 are not satisfied.⁴³ Under this Article, the request has to be material to the claim, sufficiently specific and the document(s) sought must have an impact on the outcome of the case. However, the disclosure cannot prejudice a legitimate interest of the other party, such as the right to confidentiality.⁴⁴ Those provisions are similar to the requirements provided in the IBA Rules on Evidence which pertain to the specificity, materiality and relevance of the requested documents.⁴⁵

The international arbitration system recognises that limited disclosure of documents may serve a valuable function in giving the parties a meaningful opportunity to present their case, and in helping arbitral tribunals to evaluate the parties' positions. The disclosure process strikes a balance between common law and civil law traditions and is today well accepted and quite successful.⁴⁶

To that effect, the CRCICA and UNCITRAL Arbitration Rules create this balance by allowing a limited amount of disclosure tools under the discretion of the arbitral

³⁵ Javier H. Rubinstein, "International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions" (2004) 5 *Chicago Journal of International Law* 303, 304.

³⁶ Michael McIlwrath and Henri Alvarez, "Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives" in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

³⁷ Al Sanهوري, *Al Wasit Fi Sharh Al Qanun Al Madani (A Treatise on the Explanation of the Civil Code)*, Vol. II, (2010), pp.35–42; Egyptian Court of Cassation, Hearing held on 11 April 1940, Judicial Year No. 90/9.

³⁸ Egyptian Code of Evidence, Law No. 25 of 1968.

³⁹ Salma Kebeish, "Dispute Resolution: An Overview of Document Production in Egypt" Law Update October 2016, <http://www.tamimi.com/en/magazine/law-update/section-14/october-6/dispute-resolution-an-overview-of-document-production-in-egypt.html> [Accessed 8 September 2017].

⁴⁰ Pursuant to Article 20 of the Egyptian Code of Evidence, such grounds are as follows: (1) if the law permits the request for providing or delivery of a document; (2) if the requested document is common between the parties. In other words, if the document is in the interest of the parties or serves as a proof of their obligations and their mutual rights; (3) if the document subject to request was relied on by the opposing party at any stage of the proceedings.

⁴¹ Pursuant to Article 21 of the Egyptian Code of Evidence such requirements are as follows:

- The description of the requested document.
- The subject of the requested documents in detail.
- The fact that is alleged to be proved by the requested document.
- The circumstances which prove that the requested document is under the possession of the opposing party.
- The reason for which the opposing party shall produce the requested document.

⁴² Salma Kebeish, "Dispute Resolution: An Overview of Document Production in Egypt" Law Update October 2016, <http://www.tamimi.com/en/magazine/law-update/section-14/october-6/dispute-resolution-an-overview-of-document-production-in-egypt.html> [Accessed 8 September 2017].

⁴³ Fathi Wali, *Civil Justice Law*, 2nd edn (Cairo: Cairo University, 1981), p.583.

⁴⁴ Fathi Wali, *Civil Justice Law*, 2nd edn (1981), p.583.

⁴⁵ Salma Kebeish, "Dispute Resolution: An Overview of Document Production in Egypt" Law Update October 2016, <http://www.tamimi.com/en/magazine/law-update/section-14/october-6/dispute-resolution-an-overview-of-document-production-in-egypt.html> [Accessed 8 September 2017].

⁴⁶ Javier H. Rubinstein, "International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions" (2004) 5 *Chicago Journal of International Law* 303, 305.

tribunal.⁴⁷ Article 27(3)⁴⁸ of those Rules allows the tribunal to require the production of documents according to its own discretion, but does not provide nor prohibit a party to request the production of documents.⁴⁹ Therefore, it is not uncommon in arbitral proceedings governed by the UNCITRAL or CRCICA Rules that a round of requests to produce documents by the parties takes place pursuant to the IBA Rules and/or the Egyptian Code of Evidence and based on party autonomy (as per Article 1(2) of the UNCITRAL/CRCICA Rules) as well as the Tribunal's power to conduct the arbitration in such manner as it considers appropriate, under Article 17(1) of the UNCITRAL/CRCICA Rules.⁵⁰

In light of the foregoing, we are of the view that in terms of the production of documents, Articles 1(1), 17(1) and 27(3) of the UNCITRAL/CRCICA Rules create a synergy between the civil law and common law systems. The proactive role of the arbitrators complies with the civil law's mechanism where the judge has the discretion to order whatever procedures it considers appropriate while the common law influence allows the parties to request documents and to use specific disclosure tools. Although the degree to which it is followed will depend on the background of those involved in the proceeding.⁵¹

5. Technical experts appointed by the tribunal versus technical experts appointed by the parties

In common law countries, experts are mainly appointed and paid by the party presenting the evidence. Exceptionally, they can also be appointed by the court following the application of a party. According to Section 37 of the English Arbitration Act of 1996, arbitral tribunals "may appoint experts or legal advisers to report to it and the parties".⁵² The expert is expected to be independent given that his duty is to advise the court. Parties usually produce an expert report followed by cross examination at an evidentiary hearing.⁵³

In civil law countries, the prevailing practice is that courts appoint their own experts which leads to a completely different set of procedures. Parties may be expected to make their own "party experts" available for providing technical views, answer the questions of the court appointed expert or be available for cross-examination by the parties' counsel provided that the court will permit it.⁵⁴

Here, the UNCITRAL Arbitration Rules do also create a synergy between both legal systems. Article 28(2)⁵⁵ is more civil law oriented as it gives a proactive role to the arbitrators

⁴⁷ Javier H. Rubinstein, "International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions" (2004) 5 *Chicago Journal of International Law* 303, 304 (2004).

⁴⁸ Article 27(3) of the UNCITRAL Arbitration Rules provides: "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine".

⁴⁹ Salma Kebeish, "Dispute Resolution: An Overview of Document Production in Egypt" Law Update October 2016, <http://www.tamimi.com/en/magazine/law-update/section-14/october-6/dispute-resolution-an-overview-of-document-production-in-egypt.html> [Accessed 8 September 2017].

⁵⁰ Article 17(1) UNCITRAL Arbitration Rules stipulates: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute".

⁵¹ Michael McIlwrath and Henri Alvarez, "Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives" in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

⁵² P. M. Patocchi and I. L. Meakin, "Procedure and the Taking of Evidence in International Arbitration: The Interaction of Civil Law and Common Law Procedures" (1996) 7 *International Business Law Journal* 884.

⁵³ Michael McIlwrath and Henri Alvarez, "Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives" in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

⁵⁴ Michael McIlwrath and Henri Alvarez, "Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives" in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

⁵⁵ Article 28(2) UNCITRAL Arbitration rules provides that: "Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal".

to decide the conditions under which the witnesses are heard. Yet, it does not prevent the tribunal from enabling each party to cross-examine the expert appointed by the other party.

Further, whilst Article 27(2) appears to be more common law oriented as it provides that expert witnesses may be “presented by the parties”, Article 29(1)⁵⁶ provides that experts may be appointed by the tribunal. The civil law effect on the latter is mitigated given that such appointment follows a consultation with the parties on the choice of the expert and the establishment of the terms of reference of the tribunal-appointed expert with greater precision. Yet, the position of each party following such consultation does not bind the tribunal.⁵⁷

Finally, Article 29(5) is common law oriented as it stipulates that “the expert, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert”, thereby allowing the cross-examination mechanism practiced before common law courts.

6. A balance in the weight of oral testimony and written evidence

The weight and admissibility of written witness statements depends on the procedure chosen and the legal culture of the arbitrator. While the position under the common law may be that documents can only be considered if they are introduced through a witness, the extreme corollary of the civil law is that a witness is not needed if a document exists.⁵⁸ Moreover, while exchange of written pleadings is a key stage in civil law proceedings, in the common law jurisdictions, the trial is the key stage.⁵⁹

Before common law courts, testimony is principally presented through live oral testimony of witnesses being more persuasive than written evidence for a jury of laypersons. Written declarations are permissible in certain pre-trial settings but cannot be offered at a trial in lieu of oral testimony.⁶⁰ The exchange of written pleadings and documents which make up the pre-trial stage are merely preparatory.⁶¹ Cross-examination and re-direct examinations remain the best tools to test witness credibility and to bring out facts not otherwise presentable.⁶²

In contrast, civil law judges are seen as the fact finders and are deemed to assess the witness credibility. Evidence and testimony are generally presented in written form.⁶³ If hearings are conducted, it is often to fill gaps in the documentary evidence.⁶⁴ Direct, adversarial cross-examination of witnesses by counsel is not permitted and the questioning

⁵⁶ Article 29(1) UNCITRAL Arbitration Rules stipulates that: “After consultation with the parties, the arbitral tribunal *may* appoint one or more independent experts to report to it in writing on specific issues to be determined by the arbitral tribunal. A copy of the expert’s terms of reference, established by the arbitral tribunal, shall be communicated to the parties” (emphasis added).

⁵⁷ Thomas H. Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL Based Arbitration Rules* (2010), pp.414–415.

⁵⁸ Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

⁵⁹ P. M. Patocchi and I. L. Meakin, “Procedure and the Taking of Evidence in International Arbitration: The Interaction of Civil Law and Common Law Procedures” (1996) 7 *International Business Law Journal* 884.

⁶⁰ Javier H. Rubinstein, “International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions” (2004) 5 *Chicago Journal of International Law* 303, 308.

⁶¹ P. M. Patocchi and I. L. Meakin, “Procedure and the Taking of Evidence in International Arbitration: The Interaction of Civil Law and Common Law Procedures” (1996) 7 *International Business Law Journal* 884.

⁶² Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

⁶³ Lara M. Pair, “Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?” (2002) 9 *ILSA Journal of International & Comparative Law* 57, 63.

⁶⁴ Michael McIlwrath and Henri Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

of witnesses is conducted by the court which retains the sole authority to determine which questions will be presented to the witness.⁶⁵

The UNCITRAL Rules neither require witness evidence nor prohibit it. If there is no specific party agreement, the tribunal will be free to give directions. Arbitration practice generally operates a synergy between legal traditions as witnesses' testimonies are expected but are given less weight than their contemporaneous documents.⁶⁶

UNCITRAL Arbitration Rules create a synergy between the common law and civil law systems as Article 28(2) provides that the conduct of hearings are set by the arbitral tribunal, whilst Article 17(3)⁶⁷ provides that hearings can be requested by the parties or held at the tribunal's own initiative.

Pursuant to Article 27(2) of the UNCITRAL Rules, witnesses' testimony may be presented in the first instance through written statements. Such provision reflects the influence of the civil law tradition.⁶⁸ However, Articles 1(2), 28 and 29 of the UNCITRAL Rules leave room to conduct witness testimonies as practiced in the common law jurisdictions. In this way, the UNCITRAL rules strike a balance between the common law and civil law traditions.

7. The influence of common law over parties' testimony

Generally, whilst the common law allows a party to be called as a witness, civil laws do not usually permit this, owing to the perception that the position of the parties will be amply provided through other documents such as written evidence.⁶⁹ In those systems, legal representatives of juristic persons (i.e. chairman of a joint stock company) would be considered parties.⁷⁰

That being said, whilst this distinction remains palpable in the two legal systems, it is immaterial in the realm of international commercial arbitration, due to the fact that the common law approach generally prevails.⁷¹

Although the early versions of the UNCITRAL Arbitration Rules were silent on this matter, the last version adopted the common law approach. To that effect, Article 27(2) of the UNCITRAL Arbitration Rules states that: "witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party". In order to accommodate the needs of civil law parties, the equivalent Article of the CRCICA Arbitration Rules adds the following requirement: "to the extent permitted under the law governing the relevant issues". Therefore, parties to arbitrations under the auspices of the CRCICA are permitted to testify at hearings as long as such practice is allowed under the applicable law.

⁶⁵ Javier H. Rubinstein, "International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions" (2004) 5 *Chicago Journal of International Law* 303, 308.

⁶⁶ Michael McIlwrath and Henri Alvarez, "Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives" in Paul Mason and Horacio Naon (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (2010).

⁶⁷ Article 17(3) UNCITRAL Arbitration Rules provides that: "If at an appropriate stage of the proceedings any party so requests the arbitral tribunal shall hold hearings for the presentation of evidence *by witnesses, including expert witnesses, or for oral argument*. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials" (emphasis added).

⁶⁸ Javier H. Rubinstein, "International Commercial Arbitration: Reflections at The Crossroads of the Common Law and the Civil Law Traditions" (2004) 5 *Chicago Journal of International Law* 303, 308.

⁶⁹ Egyptian Court of Cassation, Civil Circuit, Hearing held on 3 February 1969, Judicial Year No.593/34.

⁷⁰ Lara M. Pair, "Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?" (2002) 9 *ILSA Journal of International & Comparative Law* 57, 65.

⁷¹ Lara M. Pair, "Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?" (2002) 9 *ILSA Journal of International & Comparative Law* 57, 65.

The above provision is a clear epitome of the synergy between the common law and the civil law systems and applies to arbitrations located in a common law jurisdiction or in a civil law one.

8. Conclusion

There is indisputably a growing trend towards the harmonisation of the international arbitral proceedings. This has been arguably fuelled by the broad application of the UNCITRAL Model Law and the UNCITRAL Arbitration Rules. Both apply to the procedures rather than the substance of the arbitration. We have also seen in this article that the CRCICA Arbitration Rules went even further in the embodiment of the synergy between the common law and the civil law systems where the UNCITRAL Arbitration Rules adopted a common law approach. Within such harmonisation and synergy, the field of international arbitration is continually evolving at the intersection of the common law and civil law traditions.

Ascertaining the Content of the Applicable Law in International Arbitration: Converging Civil and Common Law Approaches

Mohamed S. Abdel Wahab

1. Introduction

Arbitration, as a mechanism of private justice and a prominent out-of-court dispute settlement option, is destined to be a bespoke process that caters for the needs of the business community and the disputing parties. However, there are golden pillars which shape the edifice of the system. Amongst such pillars are the following: (i) the finality of arbitral awards and non-review of awards on the merits; (ii) the autonomy of the parties, including the freedom to choose both the *lex arbitri* and *lex causae*¹; (iii) the arbitral tribunal adhering to and not exceeding its mandate, jurisdiction and/or authority, noting the possible inherent, implied and discretionary powers that arbitrators may have²; (iv) the arbitral tribunal's due observance of the requisites and requirements of due process; and (v) the arbitral tribunal is expected to confine itself to the facts presented to it and not resolve the dispute on the basis of issues not raised by the parties and/or claims not invoked or argued thereby.

In international arbitration, it is not uncommon to have many different legal systems and traditions at play, and so uncertainty reigns with respect to the limits and boundaries of ascertaining and applying the content of the *lex causae* (i.e. the law governing the merits of the dispute). Whilst, in the first place, the parties bear the primary burden of establishing the content of the applicable law, it is unequivocal that the arbitrators have powers to determine and ascertain the content of the applicable law.

Nevertheless, pertinent questions arise as to: (i) the existence of limits, boundaries and/or principles that prudently guide arbitral tribunals' powers in determining the applicable law and ascertaining the content thereof, without surprising the parties; (ii) how should arbitral tribunals proceed if the parties fail to fully or adequately establish the content of the applicable law?; (iii) can arbitral tribunals raise legal issues *ex officio* to ascertain the content of the applicable law?; and (iv) whether a recast of the role and limits of *iura novit arbiter* ought to be considered in light of the reality and necessities of an efficient and functional arbitration system.

It is in this context that legal systems, notably civil and common law systems, offer different approaches and tools to strike a proper balance between law/justice on one hand and due process and party autonomy on the other hand.

That said, this article aims at scrutinizing whether, and to what extent, the principle of *iura novit curia* (or indeed *iura novit arbiter*) applies to propositions of law. And to what extent, if at all, *iura novit curia* (or indeed *iura novit arbiter*) can be utilized in the law and practice of international arbitration to thwart deplorable practices without encroaching upon the principles of party autonomy, due process, and legitimate expectations.

However, for the avoidance of doubt, this article is not about discerning the boundaries of law as a system and justice as a concept constituting the foundation of that system, and is thus not concerned with a purely justice-based analysis.³

¹ Doug Jones, "Choosing the law or Rules of Law to Govern the Substantive Rights of the Parties" (2014) 26 *SacLJ* 911.

² International Law Association (ILA), ILA Report on Inherent and Implied Powers of International Arbitral Tribunals (2014) and the ILA Resolution No.4/2016 on the Inherent and Implied Powers of International Arbitral Tribunals (2016), http://www.ila-hq.org/images/ILA/docs/No.4_Resolution_2016_InternationalCommercialArbitration.pdf [Accessed 8 September 2017].

³ For a detailed account of the connection between law and justice, see Anthony D'Amato, "On the Connection between Law and Justice" (1992–1993) 26 *U.C. Davis L. Rev.* 527. Martin Luther King, Jr once stated that "law and

It is unequivocal that the principle of *iura novit curia*⁴ allocates the burden of establishing the applicable law and ascertaining its content, and the outcome will largely depend on whether, and to what extent, a jurisdiction follows the principle of *iura novit curia*.⁵

In international arbitration, three approaches in determining the contents of the *lex causae*—noting that an arbitral tribunal does not render its award in the name of a specific state—could be distinguished. According to the first civil law-oriented approach, an arbitral tribunal may treat the *lex causae* as law to be discerned by the arbitral tribunal. Pursuant to the second common law-oriented approach, an arbitral tribunal would treat the *lex causae* as a fact to be established and proven by the parties. Regarding the third approach, an arbitral tribunal may opt for a hybrid methodology combining the first and second approaches.⁶

2. Arbitral tribunals and the applicable laws dilemma

Initially, *iura novit curia* arises in the context of the judicial application of foreign law in state litigation. In civil law jurisdictions, the judge is generally obliged to research the law and apply the correct legal basis *ex officio* under the legal maxim *iura novit curia*. “There is an assumption that ‘knowing the law’ means that the court will research and find the ‘foreign’ law. It is primarily for the court to take the necessary action to find the law in whatever way it considers appropriate.”⁷

In common law jurisdictions, the parties are generally responsible for researching the law and presenting legal arguments with “material truth-finding in the adversarial procedural relation between the parties, without a substantive intervention of a judge”.⁸ Under the adversarial principle, the judge refrains from ascertaining the content of the applicable law and from raising legal issues *ex officio*.

Nevertheless, the approaches of civil and common law systems are not diametrically polarized when it comes to *iura novit curia*; there is some degree of overlap. For example, the court has a duty in common and civil law systems: (i) to observe principles of public policy (*ordre public*), (ii) to oust attempted evasion of law and (iii) address, *sua sponte*, issues of illegality that are driven by sovereign policy considerations, to uphold overriding mandatory norms aimed at protecting weaker parties such as employees and consumers, and to avert going beyond the parties’ claims, the relief sought, and/or the parties’ quantification of damages under the relief sought.

It is this very commonality and overlap that created a *terra nova* to scrutinize the nature of *iura novit curia* in both systems beyond the traditional polarization. In international arbitration, it is not uncommon for the arbitrators and the parties to share the burden of

order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress”. See Martin Luther King, Jr., *Letter from Birmingham City Jail*, 16 April 1963 (American Friends Service Committee 1963), <http://www.thekingcenter.org/archive/document/letter-birmingham-city-jail-0> [Accessed 8 September 2017].

⁴ *Iura novit curia* or “the court knows the law” is a concept initially derived from civil law and continental legal systems. It is a legal maxim that gives judges the authority to “conduct [their] own legal analysis outside the parties’ pleadings”. David M. Bigge, “Iura Novit Curia in Investment Treaty Arbitration: May? Must?”, *Kluwer Arb. Blog* (12 December 2011), <http://kluwerarbitrationblog.com/2011/12/29/iura-novit-curia-in-investment-treaty-arbitration-may-must/> [Accessed 8 September 2017]. In other words, *iura novit curia* gives the judge the right to apply the law *sua sponte*, without being bound by the legal arguments represented by the parties. *Iura novit curia* is also derived from the principle *da mihi facta dabo tibi ius*, that is, “give me the facts, and I shall give you the law”. This entails that the parties provide the facts, and the court applies the legal reasoning it finds appropriate.

⁵ Lisa Spagnolo, “Jura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole” in I. Schwenzer and L. Spagnolo (eds), *Towards uniformity: the 2nd Annual MAA Schlechtriem CISG Conference, 2010, Hong Kong* (The Hague: Eleven International Publishing, 2011), pp.185–186.

⁶ Gisela Knuts, “Jura Novit Curia and the Right to be Heard—An Analysis of Recent Case Law” (2012) 28(4) *Arb. Int’l* 671.

⁷ Julian D.M. Lew, “Iura Novit Curia and Due Process”, Queen Mary University of London, *School of Law Legal Studies Research Paper No.72/2010*, p.4, <http://ssrn.com/abstract=1733531> [Accessed 8 September 2017].

⁸ Joanna Jemielniak, Stefanie Pfisterer, “Should Arbitrators Know the Law? The Jura Novit Curia Principle in International Commercial Arbitration”, http://www.kozminski.edu.pl/fileadmin/www/seminarium_interdyscyplinarne/iura_novit_arbiter.pdf [Accessed 8 September 2017].

ascertaining the content of the applicable law(s) and raise certain legal issues *ex officio*, subject to the parties' right to be heard on points of law.

Whilst *iura novit curia* predominantly pertains to the applicable substantive law, it is worth noting that commonality and convergence between legal systems is all the more visible in relation to the arbitration related applications of *iura novit curia* in the context of the applicable procedural law(s). It is manifestly unequivocal that arbitrators, whether from civil or common law backgrounds, tend to proactively engage with the parties and raise, *sua sponte*, procedural legal issues without being influenced by the traditional civil-common law divide.

The author submits that this overlooked, yet visible, procedural dimension of *iura novit curia* (*iura novit arbiter*) bears witness to the convergence between civil and common law systems and is undisputed for two principal reasons: (i) arbitrators get seriously concerned about the procedural validity and well-being of their awards and so take a proactive role to ensure compliance with overriding mandatory norms at the seat of arbitration; and (ii) vacatur motions are primarily procedure-based, given the non-review of awards on their merits, and so it is not uncommon that sometimes more attention is given to compliance with procedure over substance.

National laws and arbitration rules

National arbitration laws and institutional rules infrequently address the extent to which arbitrators may, *ex officio*, apply and ascertain, *sua sponte*, the contents of the *lex causae*. However, some exceptions do exist.

For example, section 34(2)(g) of the English Arbitration Act (1996) explicitly empowers the tribunal to consider "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and law". However, this sheds no light on how the initiative can be implemented in practice and leaves unanswered the questions of boundaries, conditions and constraints.

Similarly, Article 22(3) of the London Court of International Arbitration (LCIA) Rules (2014) equally affords the tribunal the authority to determine and apply the applicable rules of law, explicitly providing that the tribunal:

"shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate."

This clearly implies that the arbitral tribunal is bound to determine and ascertain the content of the applicable law or rules of law which it intends to apply, either as chosen by the parties or as deemed appropriate by the tribunal in the absence of the parties' choice. However, the provision does not clarify how such application is to be undertaken or implemented, especially in the case of "arbitral unpreparedness", i.e. where the tribunal does not possess the knowledge of the applicable law.

Similarly, Article 21(2) of the ICC Arbitration Rules (2012) provides that "the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate". Thus, the arbitral tribunal must either apply the law/rules chosen by the parties or determine and apply the rules of law it deems appropriate.

In an *ad hoc* context, Article 35(1) of the UNCITRAL Arbitration Rules (2010) provides that "the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate".

In parallel, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) Rules (2011), which are principally derived from and inspired by the UNCITRAL Rules, have adopted Article 35(1) of the UNCITRAL Rules with a minor variation. Article 35(1) of the CRCICA Rules states that:

“the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which has the closest connection to the dispute.”

Both the UNCITRAL and the CRCICA Rules require the arbitral tribunal to either apply the law/rules chosen by the parties, or, in the absence of such choice, apply the law (i.e. a national law rather than rules of law) determined by the tribunal. The difference between the UNCITRAL Rules and the CRCICA Rules is that whilst the former has opted for a more liberal approach that involves avoiding traditional conflict-of-laws analysis, the latter has adopted a more restrictive, yet expectedly more predictable approach involving an analysis of the diverse connecting factors to determine the law with the closest connection to the dispute. Again, neither provision illuminates how the contents of such law shall be ascertained and applied in practice.

The CRCICA’s approach is similar to that of the Egyptian Arbitration Act (1994), which states under Article 39(2) that “[i]f the parties did not agree on the applicable rules of law governing the merits of the dispute, the arbitral tribunal shall apply the substantive rules of the law it deems to have the closest connection to the dispute”. The only difference, possibly unintended, between Article 39(2) of the Egyptian Arbitration Act and Article 35(1) of the CRCICA Rules is the implicit subjectivity underlying the arbitral tribunal’s assessment of the law that has the closest connection under Article 39(2) of the Arbitration Act, as the words “it deems” may imply an unintended degree of subjectivism not present under Article 35(1) of the CRCICA Rules.

Ascertaining the content of the applicable law and its procedural treatment

It is evident from the above that the national laws and arbitration rules are primarily concerned with the question of “determination of the law/rules governing the dispute”, which is distinct from the issue of “ascertaining the content of the applicable law(s)”.

There is indeed scarcity in the specific provisions that deal with “ascertaining the content of the applicable law(s)”. Surprisingly, the legislative and institutional response to the dire need of regulating this matter came from common law oriented systems. The English Arbitration Act (1996), in section 34(2)(g), explicitly empowers an arbitral tribunal to consider “whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and law”. Similarly, the LCIA Arbitration Rules specifically and separately deal with this matter in Article 22(1)(iii), which reads:

- “(1) The Arbitral Tribunal shall have the power, upon the application of any party or ... 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 the Arbitral Tribunal may decide:
- ...
- (iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties’ dispute.”

On the specific issue of procedural treatment of the applicable law, it is necessary to shed light on the matter from a conflict of laws perspective prior to considering the matter in the specific context of international arbitration.

In the specific context of conflict of laws before national courts, where the forum is bound to apply a foreign law, some jurisdictions apply foreign law in the same manner national law is applied,⁹ and others treat foreign law as a mere fact to be established and proven by the parties.¹⁰ Third jurisdictions adopt a hybrid or intermediate approach, where the court has discretion either to investigate the content of foreign law *ex officio* or to call upon the parties to do so. According to this approach, depending on the discretion of the court, the treatment of foreign law swings between treating it as a law, ascertained in form and content by the court, and a fact, to be established by the parties.¹¹

By and large, the general prevailing view is that once the applicable foreign law has been determined according to the pertinent choice of law rules, the manner in which its content would be ascertained would turn on whether the *forum*'s procedural rules treat foreign law as law or fact.¹²

In international arbitration, arbitral tribunals are forumless and do not form part of a particular legal order; they do not render justice in the name of a specific jurisdiction. Accordingly, international arbitration is primarily consent-based, consent-oriented and consent-driven, and party autonomy provides the limits within which the arbitral tribunal may rule. This also entails that the parties can agree on the procedural treatment of the applicable law and how the content thereof is to be ascertained. Absent such agreement, arbitral tribunals have, subject to the applicable procedural rules, the power to disambiguate and select the methodology and means to be followed in ascertaining the content of the applicable law.

Methodology and means of ascertaining the content of the applicable law: The limits of arbitral discretion

Apart from the traditional adversarial v inquisitorial methodologies, the means by which the content of the applicable law could be ascertained remains, absent the parties' agreement, subject to the arbitral tribunal's discretion.

That said, the means by which the contents of the applicable law may be ascertained include: (a) ordering the parties to assist the tribunal in this regard, (b) appointing a legal expert to ascertain the contents of the law, and/or (c) relying on the tribunal's knowledge of the law, if it possesses such knowledge. However, such diverse means remain subject to the overarching principle of "legitimate expectations", which entails affording the parties

⁹ For example, it is understood that Article 293 of the German ZPO provides that the judge is expected to apply foreign law *ex officio* and so this includes the duty to ascertain the *ex officio* ("Grundsatz der Amtsermittlung"). "In order to comply with this duty it is not enough to find out the relevant foreign statutes and to interpret them according to their wording, but the German judge is obliged to apply foreign law the same way as it is being applied in the country of its origin. Therefore, he has to refer to the foreign judicial practice, in particular to relevant court rulings". See Rainer Hausmann "Pleading and Proof of Foreign Law—a Comparative Analysis" European Legal Forum, (E) 1-2008, (Munich: Verlag GmbH, 2008), p.7.

¹⁰ On the treatment of foreign law in civil litigation, see Sofie Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford: Oxford University Press, 2004); Rainer Hausmann, "Pleading and Proof of Foreign Law—A Comparative Analysis" (2008) 1 Eur. Leg. Forum 1; Shaheez Lalani, "Establishing the Content of Foreign Law: A Comparative Study" (2013) 20(1) Maastricht J. Eur. & Comp. L. 75; and Louise E. Teitz, "Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation" (2013) N.Y.U. J. Int'l L. & Pol. 1081.

¹¹ The Egyptian Court of Cassation held that: "It is established by this Court that invoking a foreign law is a mere fact that must be proven, since practical considerations militate against the judge's knowledge of the foreign law. Accordingly, the gist of such rule is the alienability of the foreign law to the judge in a manner that would make it difficult to discern its norms and unveil its sources. However, if the judge knows, or is presumed to know, its content then this rule shall not apply". Egyptian Court of Cassation Challenge No.2317 of the Judicial Year (59), Hearing Session of 8 February 1996. See also Egyptian Court of Cassation, Challenge No.8 of Judicial Year (35), Hearing Session of 26 July 1967.

¹² Lisa Spagnolo, "Jura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole" in Schwenzer and Spagnolo (eds), *Towards uniformity: the 2nd Annual MAA Schlechtriem CISG Conference, 2010, Hong Kong* (2011), p.196; Shaheez Lalani, "Establishing the Content of Foreign Law: A Comparative Study" (2013) 20 MJ 1, 80, 85.

an adequate opportunity to address, comment on, and analyze the legal issues that have arisen out of the tribunal's findings of the *lex causae*.

Whilst national laws and procedural rules seem to offer little, if anything at all, in relation to the scope and conditions of *iura novit arbiter*, case law precedents from Egypt, Switzerland, France, and the UK may be of assistance in this regard.

Under Egyptian law, the Cairo Court of Appeal in a very recent decision confirmed that "it is established that when an arbitrator applies the law chosen by the parties, he is not limited to the legal provisions submitted by them".¹³ The Court further stated that arbitral tribunals have broad discretion, within the scope of the applicable law, to rely on any provisions or evidence at its disposal.¹⁴

The Egyptian Court of Cassation also held that tribunals have the right to re-characterize the contract¹⁵ and to determine the proper branch of law governing the dispute.¹⁶ Furthermore, arbitral tribunals seated in Cairo have held that they retain the authority to determine the legal nature of the contract and to provide the correct legal characterization thereof.¹⁷

Whilst the above confirms the liberal approach adopted by Egyptian courts in affording arbitral tribunals a broad authority under the governing law, it is worth noting that this does not entail: (a) exclusion or manifest distortion of the *lex causae*, (b) exceeding the parties' claims and defenses, (c) exceeding the claimed quantum, (d) making arguments or claims on behalf of a party, and/or (e) considering facts or matters not raised or argued by the parties.

Similarly, in Switzerland, the Swiss Federal Tribunal held that *iura novit curia* also applies to arbitration and that the parties are not required to prove the content of the applicable law.¹⁸ However, the Swiss Federal Supreme Court held that the arbitral tribunal may exceptionally be under a duty to advise the parties when it considers basing its decision on a provision or a legal consideration that was not raised during the proceedings nor established in the facts.¹⁹

In France, it appears that arbitral tribunals have the right (and even duty) to base the award on reasons derived from the *lex causae* included (even implicitly) in the debate without an explicit invitation of the parties to comment upon them. In *SGL v Ewbank*, the Paris Court of Appeal ruled that arbitrators can apply relevant foreign law, chosen in the agreement and the terms of reference, even if the parties have refrained from discussing it in any detail during the course of the proceeding.²⁰ More specifically, the Court held:

“Lorsque les arbitres font référence aux dispositions tirées d'un droit étatique pour vérifier la compatibilité des stipulations contractuelles et des usages du commerce international avec les dispositions de ce droit—dont l'application aux contrats avait été expressément rappelée dans l'acte de mission—il en résulte qu'une telle référence apparaît non seulement logique et légitime, mais impliquée par la mission même des arbitres, de sorte que ce droit faisait nécessairement partie du débat. Aucune circonstance relative à la procédure de l'instance arbitrale n'ayant par ailleurs empêché les parties de présenter leurs observations sur ce point, la prise en considération du droit étatique, dans ces conditions, ne saurait caractériser une atteinte aux droits de la défense et en particulier au principe de la contradiction.”

¹³ Egyptian Court of Appeal, Challenge No.55 of Judicial Year (128), Hearing Session of 8 May 2013.

¹⁴ Egyptian Court of Appeal, Challenge No.55 of Judicial Year (128), Hearing Session of 8 May 2013.

¹⁵ Egyptian Court of Cassation, Challenges Nos 9540 & 9584 of Judicial Year (80), Hearing Session of 13 November 2012.

¹⁶ Egyptian Court of Cassation, Challenge No.86 of Judicial Year (70), Hearing Session of 26 November 2002.

¹⁷ Cairo Regional Centre for International Commercial Arbitration (CRCICA) Case No.633 of 2009, Hearing Session of 16 March 2010.

¹⁸ Swiss Federal Tribunal, Decision 4P.114/2001 of 19 December 2001, (2002) 20 ASA Bull. 493, 510 (2002).

¹⁹ Swiss Federal Supreme Court, Decision 4A.538/2012 of 17 January 2013.

²⁰ See *Société Générale pour l'Industrie v Ewbank & Partners Ltd* Paris Court of Appeal (1st Ch. suppl.) (28 May 1993), (1993) Revue de l'Arb. 664 and following, affirmed, *Société générale pour l'industrie v Société Ewbank*, French Court of Cassation (1st Ch. civ.) (28 February 1995), 1995 Revue de l'Arb. 597 and following.

However, it is worth noting that in France the “*principe de la contradiction*” plays an important role in international arbitration²¹ and applies to legal principles and bases.²² The result, as confirmed in case law, of not giving the parties the opportunity to comment on the legal basis of the award, is that the award could be set aside or refused enforcement.²³ The principle is often strictly applied. In a recent precedent of the Paris Court of Appeal, an award was set aside because the arbitral tribunal had based its decision on a legal principle that was not explicitly invoked, even though the principle had been discussed during the proceedings.²⁴

Nevertheless, under French law, uncertainty remains regarding the scope of application of the *principe de la contradiction*, as it may not be entirely clear what exactly should be subject to contradictory debates.²⁵ A recent ruling by the Court of Cassation manifests the difficulty of setting a boundary between a legal source and a legal basis.²⁶ In the case, the Court of Cassation applied the term “legal question” (*question de droit*) and refused to set aside an award in which the arbitral tribunal had reasoned its decision by referring to Polish case law and legal doctrine, which had not been subject to the parties’ discussions. The challenging party claimed that the Polish case law in question was not merely a *legal source* but rather an *autonomous legal basis*, since it contained principles not expressed in the Polish statute of limitations. Nevertheless, the Court stated that the issue of limitation periods had been duly invoked by one party, and that it was therefore a *legal question* that had been subject to contradictory debate, and that the sources used in the arbitral tribunal’s reasoning were simply redundant affirmations of the actual reasoning.²⁷

In England, the Commercial Court held in *Hussman (Europe) Ltd v Al Ameen Dev & Trade Co*²⁸ that section 46(1)(a) of the Arbitration Act 1996, pursuant to which arbitral tribunals are to apply the law chosen by the parties, does not require arbitrators sitting in London to obtain general evidence and guidance in relation to a law other than that of England and Wales, even if that law is the proper law. The Court further stated:

“If there is no suggestion by the parties that there is an issue under the applicable system of law which is different from the law of England and Wales, or the tribunal does not itself raise a specific issue, then the tribunal is free to decide the matter on the basis of the presumption that the applicable system of law is the same as the law of England and Wales. To hold otherwise would mean that international arbitrations held in London would be encumbered with the considerable extra expense of obtaining general evidence of foreign law relevant to the matters in issue in every case where the proper law of the contract was not the law of England and Wales.”²⁹

Under English law, the determination of the contents of the *lex causae* is by and large a matter of procedure, and accordingly, in the absence of pertinent mandatory rules of the *lex loci arbitri*, arbitrators must consider the direct or indirect will of the parties, absent

²¹ Catherine Kessedjian, “Principe de la Contradiction et Arbitrage” (1995) *Revue de l’Arb.* 381 and following.

²² Catherine Kessedjian, “Principe de la Contradiction et Arbitrage” (1995) *Revue de l’Arb.* 381, 409; Emmanuel Gaillard and John Savage, *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (Alphen aan den Rijn : Kluwer Law International, 1999), p.; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (London: Sweet & Maxwell, 2007), 475.

²³ Paris Court of Appeal (1st Ch. civ.), Decision of 19 June 2008 (refusing enforcement of a CRCICA award rendered in favour of an English company against the Arab Republic of Egypt because the arbitral tribunal had introduced legal provisions ex officio without giving the parties an opportunity to comment thereon) (2010) *Revue de l’Arb.* 108; see also French Court of Cassation (1st Ch. civ.), Decision of 14 March 2006 (2006) *Revue de l’Arb.* 653.

²⁴ Paris Court of Appeal, Decision of 3 December 2009 (2010) *Revue de l’Arb.* 112.

²⁵ Cécile Chainais, “L’arbitre, Le Droit et La Contradiction: L’Office du Juge Arbitral à La Recherche de son Point d’Équilibre” (2010) *Revue de l’Arb.* 3, 33 and following.

²⁶ French Court of Cassation (1st Ch. civ.), Decision of 6 May 2009 (2010) *Revue de l’Arb.* 90.

²⁷ French Court of Cassation (1st Ch. civ.), Decision of 6 May 2009 (2010) *Revue de l’Arb.* 90.

²⁸ *Hussmann (Europe) Ltd v Al Ameen Dev & Trade Co* [2000] 2 Lloyd’s Rep. 83; [2000] C.L.C. 1243; [2000] EWHC 210 (Comm).

²⁹ *Hussmann (Europe) Ltd v Al Ameen Dev & Trade Co* [2000] 2 Lloyd’s Rep. 83; [2000] C.L.C. 1243; [2000] EWHC 210 (Comm) at [42].

which they should follow the rules or approach of their choice, which implies some discretionary powers.³⁰

To that effect, the arbitral tribunal in *Hussman* disagreed with the submission of one of the parties that English law was to be applied except if the tribunal accepted evidence on the Saudi governing law. Without informing the parties, the tribunal appointed its own expert and held a meeting to discuss the expert's report. The Commercial Court held that the tribunal should have sought the views of the parties on the issues of Saudi law before appointing the expert and made an error in meeting with the expert without the parties' knowledge.³¹ However, the Court did not find that this conduct amounted to an irregularity or even to a serious irregularity within the meaning of section 68 of the Arbitration Act 1996.³²

It is noteworthy that, under English law, arbitral tribunals conducting their own research into the applicable law are expected to provide the parties with the opportunity to comment on their findings before basing the award, or part of an award, on such findings. The award, however, will only be set aside where a substantial injustice has been caused by a procedural irregularity.³³ Thus, where an arbitral tribunal relies on legal authorities, cites legal sources, or adopts reasoning that neither party has invoked, relied upon, or was given the opportunity to comment on, the award would not be set aside unless the aggrieved party proves that such irregularity was serious and led to substantial injustice.

This standard was confirmed in *Sanghi Polyesters Ltd (India) v International Investor*,³⁴ where the arbitrator had made reference to eighteen textbooks and legal sources that neither party had referred to without letting the parties comment on them. The arbitrator emphasized that the sources did not present any new arguments but only amplified the parties' positions; the award was not set aside as no substantial injustice or prejudice of any kind was proven. However, in *OAO Northern Shipping Co v Remolcladores de Marin SL (Remmar)*, the arbitral award was set aside because a new legal basis affecting the outcome of the dispute was raised ex officio by the arbitral tribunal without affording the parties any opportunity to comment thereon.³⁵

Based on the above, there seems to be a general consensus that *iura novit arbiter* does exist and that arbitrators retain the power to ascertain the content of the applicable law ex officio and raise legal issues and principles, provided that the parties are afforded the adequate opportunity to comment on such legal issues.

In light of this legal realism, the ILA Committee on International Commercial Arbitration addressed the issue of ascertaining the content of the applicable law in international commercial arbitration in 2008. The conference held in Rio de Janeiro 17–21 August 2008, resulted in a recommendation on how an arbitral tribunal should ascertain the content of the applicable law. Recommendations (5)–(8) are of particular importance in this context.

Recommendation 5 provides that arbitrators should primarily receive information about the contents of the applicable law from the parties.

³⁰ See International Law Association, *Final Report on Ascertainning the Contents of the Applicable Law in International Commercial Arbitration* (London: Thomson Reuters, 2008), pp.15–16.

³¹ *Hussmann (Europe) Ltd v Al Ameen Dev & Trade Co* [2000] 2 Lloyd's Rep. 83; [2000] C.L.C. 1243; [2000] EWHC 210 (Comm).

³² International Law Association, *Final Report on Ascertainning the Contents of the Applicable Law in International Commercial Arbitration* (2008), p.15.

³³ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes—International and English Law and Practice* (Oxford: Oxford University Press, 2005), p.766 and following. See also *Groundshire Ltd v VHE Construction plc* [2001] All E.R. (D) 180; [2001] B.L.R. 395; [2001] App. L.R. 02/15 at [34] (“the Act requires that the court is only to interfere on the ground of serious irregularity in the form of unfairness if the court considers, not speculates, that the irregularity or unfairness has caused or will cause substantial injustice to the applicant”).

³⁴ *Sanghi Polyesters Ltd (India) v International Investor (KCFC)* [2000] 1 Lloyd's Rep. 480 at 485.

³⁵ *OAO Northern Shipping Co. v Remolcladores de Marin SL (Remmar)* [2007] App.L.R. 07/26; [2007] 2 Lloyd's Rep. 302; [2007] EWHC 1821 (Comm).

Recommendation 6 states that, in general and subject to Recommendation 13, arbitrators should not introduce legal issues—propositions of law that may bear on the outcome of the dispute—that the parties have not raised.

Recommendation 7 confirms that arbitrators: (i) are not confined to the parties' submissions about the contents of applicable law, and, subject to Recommendation 8, (ii) may question the parties about legal issues the parties have raised and about their submissions and evidence on the contents of the applicable law, (iii) may review sources not invoked by the parties relating to those legal issues, and (iv) may, in a transparent manner rely, on their own *legal knowledge* as to the applicable law.

Recommendation 8 provides the needed comfort to the parties and the balancing factor by emphasizing that, before reaching their conclusions and rendering a decision or an award, arbitrators should give parties the reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case. They should not give decisions that might reasonably be expected to surprise the parties, or any of them, or that are based on legal issues not raised by or with the parties.

According to the ILA Recommendations, arbitrators should not introduce any legal issues—propositions of law that may bear on the outcome of the dispute—*ex officio*, except where the legal issue concerns matters of *ordre public* (for example, arbitrators must raise the issue of illegality of contract on the own motion). The reason for this point of view is that, although many jurisdictions accord the power to the arbitrators to raise legal issues *ex officio*, the arbitral tribunal could be challenged or accused of exceeding its mandate if it based its decision on a legal rule not invoked by the parties.

Failing to observe the parties' claims and going beyond their arguments (without affording them the reasonable opportunity to consider, respond and comment) would clearly defy the parties' legitimate expectations and transcend the boundaries of legality and due process.

Arbitral tribunals do not have absolute discretion; their inherent, implied and/or discretionary powers aim at safeguarding the integrity and the efficient conduct of the proceedings. In discharging their mandates and navigating through the perils and challenges of ascertaining the content of the applicable law, arbitral tribunals need to consider a host of laws and rules that include: the overriding mandatory provisions of the *lex arbitri*, including in particular: rules of due process.

It is in this respect that the principles set forth by the ILA recommendations offer the safe harbor principles that: (i) harness arbitral discretion, (ii) avert the abuse of arbitral powers, (iii) maintain the fine line separating justice and legality from encroachment and subjectivism in the specific context of ascertaining the content of the applicable law, and (iv) observe the parties' legitimate expectations.

3. *Iura novit arbiter*—A recast: Between necessity and realism

In a survey of factors affecting the appointment of arbitrators, the arbitrator's familiarity with the applicable law ranked lower than other factors such as the reputation of the arbitrator, expertise in the subject matter of the dispute, and knowledge of the relevant language.³⁶ Even assuming that these types of surveys do not represent a global view over the issues surveyed, they do, if and to the extent they are conducted in a well-structured methodological manner, offer some guidance on the stakeholders' expectations and desires. Such party-driven choices therefore imply an inclination towards a more reserved (or common law-oriented) transplantation of *iura novit curia* in the context of international arbitration through the doctrine of *iura novit arbiter* when it comes to ascertaining the content of the applicable substantive law.

³⁶ Emelia Onyema, "Empirically Determined Factors in Appointing Arbitrators in International Commercial Arbitration" (2007) 73 *Arbitration* 199.

However, arbitration is not about the apostasy or disregard of the law; it is rather an application for advanced membership.³⁷ That said, it is submitted that certain misconceptions regarding *iura novit arbiter* exist and so certain observations merit mentioning.

First, *iura novit arbiter* is not exclusive to substantive legal issues, but also includes procedural legal matters.

Secondly, in the context of international arbitration, there exists a very high degree of overlap and convergence between civil and common law legal systems when it comes to ascertaining the content of the applicable *procedural* provisions. Arbitral tribunals tend to proactively raise procedural issues with the parties to safeguard and shield the arbitral award against any serious procedural irregularity that could lead to setting aside the award.

Thirdly, on the substantive law, national arbitration laws and institutional rules rarely address the extent to which arbitrators may ex officio ascertain and apply, *sua sponte*, the contents of the *lex causae*. At best, said laws and rules address the criteria for determination of the applicable substantive law.

Fourthly, in the exceptional cases where certain laws and/or rules address the issue of ascertaining the content of the applicable law, such laws/rules surprisingly appear to be common law influenced, such as the English Arbitration Act and the LCIA Arbitration Rules. This invites scholarly reconsideration of the classical civil-common law divide and of the traditional adversarial-inquisitorial dichotomy.

Fifthly, a certain degree of convergence and overlap could be traced between civil law and common law regarding substantive legal principles. Without *iura novit curia*, the court/tribunal would be strictly bound by the limits of the parties' interpretations, arguments, claims, and defenses. To many, such strict limitation catalyzes the pollution of the law by judicial errors induced by the parties' mistakes, whether intentional or not, and may even support evasion of law and malignant legal-system shopping. Since it is least doubtful that legal pollution and evasion of law are intolerable practices, *iura novit curia* (*iura novit arbiter*) remains useful in the law and practice of international arbitration to thwart deplorable practices provided that no encroachment upon the principles of party autonomy, due process, and legitimate expectations exist.

Sixthly, the principle *iura novit arbiter* is not a manifestation of absolute judicial discretion, but is subject to concrete limitations that vary depending on the applicable legal system and the overarching golden rules of due process and aversion of circumvention of arbitral jurisdiction and claims. The ILA Recommendations offer guiding parameters for arbitral tribunals when ascertaining the content of the applicable law.

Seventhly, it is submitted that, in international arbitration, *iura novit arbiter* has room to apply, especially that, if prudently used, it can strike the correct balance between the legitimate expectations of the parties, the arbitral tribunal's right to ascertain the content of the law and the flexibility to deal with inadequate submissions by the parties on legal issues.

Eighthly, as previously mentioned, arbitral tribunals sometimes appear, albeit unfortunately, to be less concerned about the law and more concerned about the procedures. This is primarily due to the fact that awards are rarely reviewed on the merits or for wrongful application of the law, but can be vacated for serious procedural irregularities. Thus, the non-review of arbitral awards on the merits, though merited and welcomed, appears to have brought about a realism of inconsideration and insensitivity towards the necessity to properly ascertain the content of the *lex causae*.

Ninthly, it is submitted that the success and stability of the international arbitration system hinges not only on respecting and observing the principle of party autonomy, but also considering those overriding global legal principles that safeguard the legitimacy, integrity and operability of the system. For example, arbitral tribunals must not lend their assistance to illicit dealings.

³⁷ Jan Paulsson, "Arbitration in Three Dimensions" *LSE Law, Society and Economy Working Papers* 2/2010, p.7.

Tenthly, in properly applying *iura novit arbiter*, arbitral tribunals must first turn to the parties to seek their input, since they bear the burden of ascertaining the applicable law. Failing adequate or proper submissions by the parties, the arbitral tribunal may resort to other discretionary means to ascertain the content of the applicable law, as detailed herein above. However, the arbitral tribunal's exercise in ascertaining the content of the applicable law must not circumvent the fundamental pillars of arbitration, notably: (i) due process by observing the principles of contradiction and adversariality; (ii) the arbitral tribunal's jurisdiction; (iii) aversion of aiding a party at the expense of the other by raising arguments not flagged by either party; and (iv) not exceeding the parties' claims.

By and large, despite its advocated delocalization and perceived procedural liberalization, arbitration remains, to varying degrees, anchored at the place of arbitration and subject to some minimal procedural guarantees constituting what some scholars have labeled as the *lex mercatoria arbitralis*.³⁸ These procedural guarantees act as the parameters defining the limits of *iura novit arbiter* and the interventionist approach taken by arbitral tribunals to ascertain the content of the applicable law. Whilst the principle of *iura novit arbiter* militates against exclusive adherence to the parties' statements on legal issues, if inadequate, it remains necessary to strike a balance between the inquisitorial *iura novit arbiter* considerations and the principles of legitimate expectations, due process, and transparency.

It is submitted that the doctrine of *iura novit arbiter* will continue to evolve and be re-shaped by considerations of legal necessity and practical realism, which will likely bring about a more harmonized doctrine that will be a by-product of the continuing infusion of divergent and convergent trends across different legal systems.

³⁸ Filip De Ly, *Conflicts of Law in International Arbitration—An Overview* (Munich: European Law Publishers, 2011), p.16.

Document Production in International Arbitration: From Civil and Common Law Dichotomy to Operational Synergies¹

Gordon Blanke

1. Introduction

Document production is a staple in any international arbitration process. Documentary evidence plays a key role in the discharge of a disputing party's burden of proof in most, if not all, developed jurisdictions. The rule of thumb in both litigation and arbitration is that oral testimony in the form of fact witness evidence is disregarded or—depending on the jurisdiction—inadmissible to the extent that the content of that evidence is capable of proof by the presentation of documentary evidence. In other words, a document—to the extent that it does exist and bar allegations of forgery—is taken to be conclusive evidence of its contents. This is, of course, not to say that the actual weight of documentary evidence will not depend on a number of circumstantial factors, including its origin and authorship and hence the authenticity of its content, which in turn may require the presentation of fact witness testimony. By way of example, whereas the presentation of a paper copy of a contract may be considered conclusive of the existence of that contract, the question as to whether that contract was validly concluded by reference to the applicable law on the merits may be a question requiring fact witness testimony from key individuals involved in the negotiating of that contract.

The techniques applied to the presentation of documentary evidence in both litigation and arbitration vary depending on whether a jurisdiction is of common or civil law origin. The common or civil law divide informs the conduct of international dispute resolution more generally, but has encountered limits where the disputing parties and their counsel come from different legal backgrounds. In international arbitration more specifically, there has been a marked trend towards the convergence of adversarial and inquisitorial techniques in the presentation of documentary evidence to facilitate a harmonised approach to document production in international disputes. This has culminated in the creation of document production rules that are the result of a procedural compromise between the common and civil law approach to the presentation of documentary evidence and create new operational synergies borne out of the common and civil law dichotomy. Most prominently amongst these feature the 2010 IBA Rules on the Taking of Evidence in International Arbitration. But there are others that mark the same trend.

Before exploring further how these operational synergies operate in practice, it is worth understanding in some further detail the civil and common law dichotomy in dispute resolution more generally and in the presentation of documentary evidence more specifically.

2. The civil and common law dichotomy in dispute resolution in general²

Generally speaking, the civil law and the common law distinctly differ in their procedural style and orientation: to capture this difference, it is commonly said that civil law systems are inquisitorial whereas common law systems are adversarial in nature. This essentially

¹ This article is based on a presentation given by the author on “Adversarial and Inquisitorial Techniques and Document Production” at the CIArb International Arbitration Conference, Dubai, 8–9 March 2017, as part of a panel discussion on “The Civil-Common Law Dichotomy: Practical Solutions to Current Problems”.

² J. Paulsson, “Overview of Methods of Presenting Evidence in Different Legal Systems” in A. J. van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ICCA Congress Series, 1996, pp.112–122.

means that disputes in the common law system witness a duel between the disputing parties before the judge, who acts as a kind of referee or a neutral umpire. In the search for the “absolute” truth, the common law judge remains largely passive, leaving the active case management to the parties. As a result, the evidential process is party-driven, that is the disputing parties decide what fact and expert witness evidence they wish to serve in support of their respective case and are in charge of interrogating the witnesses they call. The common law heavily relies upon oral testimony and requires the disclosure of both supportive and adverse documents to a disputing party’s case. The golden rule in document disclosure in common law is the proverbial “cards face up on the table”³ in order to secure equality of arms and to avoid trial by ambush.

By contrast, the inquisitorial approach underlying the civil law draws on the Roman adage of *ius novit curia* and *da mihi factum, dabo tibi ius*, whereby the judge identifies and applies the law to the facts of the case pleaded before him. It is the judge who, in search of the “relative” truth, takes an active role in the fact-finding process and is responsible for establishing the truth. All aspects of case management are therefore entrusted to the judge, including witness interrogation. As such, it is the judge who decides what evidence is relevant to be heard in support of a disputing party’s case and who appoints and instructs his own technical experts. The civil law judge places heavy reliance on documentary evidence (oral evidence not being admissible in lieu of existing documentary evidence). Document production is initiated by the disputing parties but strictly confined to the discharge of a party’s burden of proof. Each disputing party has to make out its own case in reliance on the evidence in its own possession; document requests are basically non-existent and only admissible in the most exceptional circumstances.

3. The civil and common law dichotomy in the presentation of documentary evidence⁴

The civil and common law dichotomy apparent from the conduct of litigious proceedings in civil and common law jurisdictions finds its way into the presentation of documentary evidence more specifically. Firstly, the language employed for and in the presentation of documentary evidence varies between the civil and the common law world. Secondly, contrasting the US and English approaches to the presentation of evidence more specifically assists in understanding the more extreme positions of discovery and disclosure that prevail under the common law and how these foster the need for a harmonised document production process of the nature required in truly international arbitral proceedings.

*Some semantics*⁵

The two key terms employed across the common law/civil law spectrum to describe the presentation of documentary evidence are *discovery* and *disclosure*. *Document production*, by contrast, denotes a harmonised form of the presentation of documentary evidence encountered in international arbitration. Both *discovery* and *disclosure* are terms commonly used in the common law world.

³ *Davies v Eli Lilly & Co and Others* [1987] 1 W.L.R. 428 at 431; [1987] 1 All E.R. 801; [1987] E.C.C. 340.

⁴ M. McIlwrath and H. Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in P. E. Mason and H. A. Grigera Naón (eds), *International Arbitration: 21st Century Perspectives* (New York: LexisNexis, 2010), paras 2.05 and following; and N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2015), paras 6.77 and following. Also J. Waincymer, *Procedure and Evidence in International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2012), pp.825–884; and J. D. M. Lew, “Document Disclosure, Evidentiary Value of Documents and Burden of Evidence” in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Vol.6, (Paris: Kluwer Law International/International Chamber of Commerce, 2009), pp.11–27.

⁵ R. Marghitola, *Document Production in International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2015), pp.5–10.

Discovery is usually associated with US-style disclosure, is very wide and includes depositions, interrogatories, admissions and the production of documents that both serve and disserve the producing party. The rationale behind discovery is to provide both disputing parties access to the same evidentiary material to ensure fairness in the adversarial contest between them. *Disclosure* describes English-style document production and requires the production of both serving and disserving documents, but does not extend to depositions, interrogatories and admissions in the way that US-style discovery does. The main objective behind disclosure is the just resolution of disputes.

Document production is a term that has gained currency in international arbitration more specifically. It originates in the narrow definition of document production within the meaning given to it in the civil law world and requires the disputing parties to produce only those documents that are in support of their own case. Requests for document production are rare and subject to requirements of specificity. The rationale of document production lies in the discharge of the burden of proof. Document production lies at the heart of the presentation of documentary evidence within the meaning of the IBA Rules and branches out into the common law understanding of disclosure by opening up the scope of individual document production requests to include categories (albeit specific) of documents. That said, both discovery and disclosure can prevail as the preferred modus of the presentation of documentary evidence in arbitration to the extent that the disputing parties agree to adopt one or the other in preference to document production. This will usually only be the case where both parties and/or their advising counsel are of a common law background. Given the far-reaching implications of US-style discovery, discovery will likely only ever be adopted as the chosen document production regime where both parties and/or their counsel are of US origin.

Discovery v Disclosure: US v English style

Within the common law world, the presentation of documentary evidence is taken to an extreme. It requires full disclosure of documents in a disputing party's possession for inspection by the opponent party. This is intended to create a level playing-field in the adversarial contest between the parties and assist the judge in his search for the absolute truth. The archetypical regimes for the presentation of the documentary evidence in the common law world are embodied in US-style discovery and English-style disclosure. Between these two, US-style discovery takes the more extreme position in the terms further explained below.

US-style discovery⁶ is primarily pre-trial. It requires:

- the production of all supportive and adverse documents in relation to the underlying dispute: this means that each disputing party must disclose all documents it has in its possession and that relate to the dispute (irrespective of whether these serve or disserve the disclosing party's case);
- depositions: this is witness testimony taken on oath by the disputing parties outside the courtroom;
- interrogatories: these are written questions put by one disputing party to the other and that require answering in writing and under oath; and
- requests for admissions of one disputing party to the other to admit or deny a statement.

⁶L. B. Kimmelman and D. C. MacGrath, "Document Production in the United States" in *Document Production in Arbitration*, ICC Bulletin, 2006 Special Supplement 43–56; and L. Reed and G. Hancock, "US-Style Discovery: Good or Evil?" in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Vol.6, (Alphen aan den Rijn: Kluwer Law International/International Chamber of Commerce, 2009), pp.339–353.

Taken in the round, it is evident that US-style discovery promotes “fishing expeditions”, that is attempts by the opposing party to discover new documentary evidence that may assist in identifying and building a case where there was none before. This is a source for concern and would ultimately encourage the commencement of vexatious proceedings in the hope that a case may be identified through a pre-trial document discovery exercise. For the avoidance of doubt, US-style discovery has been found to be extremely costly and time-consuming (and hence hardly in line with the requirements of procedural efficiency that inform international arbitration).

English-style disclosure⁷ has a long history and was originally—given its similarity to US-style discovery—known as *discovery*. It encapsulated an obligation to disclose any document that a party may reasonably suppose “contain[ed] information which may enable the party (applying for discovery) either to advance his own case or that of his adversary, [or] if it [was] a document which may fairly lead him to a train of enquiry which may have either of these two consequences”.⁸ This disclosure obligation is comparatively wide, requiring disclosure of documents that albeit not themselves relevant and/or material to the determination of the underlying dispute, may lead to the identification of further documents that may be. Following the introduction of the revised English Civil Procedure Rules in 1999 through the so-called Woolf Reform (named after Lord Woolf, its originator),⁹ the English regime of discovery experienced a shift to disclosure. Since then, the English regime has operated on the basis of so-called *standard disclosure*.¹⁰ Standard disclosure requires a disputing party to produce:

- all documents that are in support of its own case; and
- adverse documents of which that party is aware and which to a material extent affect its own case or support the opponent’s case.

English-style disclosure is conducted on the basis of a list system: Each disputing party will compile a list of all documents—both serving and disserving its own case—in its possession and exchange that list with the opponent party for inspection. This list system allows the disputing parties to request disclosure of documents held by the opponent that it believes may assist it in proving its case. Additional disclosure (over and above the list) will be by court order only to the extent that the documents sought to be disclosed are “necessary for justice” and the disclosure request is proportionate. Such documents include the train of enquiry documents referred to above. For the avoidance of doubt, even though the 1999 reform was intended to reduce its overall costs, English-style disclosure presently remains very costly and time-consuming.

4. The civil and common law dichotomy in document production: The IBA Rules as a procedural compromise¹¹

The 2010 IBA Rules on the Taking of Evidence in International Arbitration,¹² in shorthand the IBA Rules, have been designed as a procedural compromise solution between the common and civil law world in the presentation of evidence in international arbitration proceedings. The IBA Rules establish a document production regime that reconciles the

⁷ V. V. Veeder, “Document Production in England: Legislative Developments and Current Arbitral Practice” in *Document Production in Arbitration*, ICC Bulletin, 2006 Special Supplement 57-62.

⁸ *Compagnie Financière du Pacifique v Peruano Guano* [1882] 11 Q.B.D. 55 at 63 (Eng).

⁹ The Right Honourable The Lord Woolf, Master of the Rolls, *Access to Justice Final Report*, 1996.

¹⁰ P. Ashford, “Document Production in International Arbitration: A Critique from ‘Across the Pond’” (2012) 10(1) *U.Chi.Int’l L.Rev.* 1–9, 5–6.

¹¹ P. Tercier and T. Bersheda, “Document Production in Arbitration: A Civil Law Viewpoint” in *The Search for the “Truth” in Arbitration*, ASA Special Series No.35, 2011, pp.77–102.

¹² Adopted by a resolution of the IBA Council on 29 May 2010. Available online on the official website of the International Bar Association (IBA). For a full commentary, see P. Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013).

common and civil law approaches to the presentation of documentary evidence and as such operates as a catalyst between the overly wide discovery/disclosure obligations prevalent in common law jurisdictions and the too restrictive limits of the production of documents in civil-law dominated countries. By reconciling the extreme positions taken under the common and the civil law, the IBA Rules seek to manage the expectations of the disputing parties from different legal backgrounds through a workable compromise by establishing a “sensible middle ground between the expansive document production practices of common-law jurisdictions and the reluctance in civil-law systems to compel parties to produce documents”.¹³

The primary objective of the IBA Rules is to assist disputing parties to discharge their evidentiary burden, that is a disputing party’s burden to prove its case, yet not to build it. In marked contrast to the position under US-style discovery, the IBA Rules seek to prevent any kind of fishing expedition by any disputing party. The IBA Rules mark a prevailing trend of harmonisation between civil and common law practices in the field of international arbitration, including in relation to the presentation of documentary evidence more specifically. Pursuant to one commentator, “[t]he IBA Rules of Evidence contain procedures initially developed in civil law systems, in common law systems and even in international arbitration processes themselves”.¹⁴ This comment bears testimony to the hybrid origin of the IBA Rules in both the common and the civil law worlds and their adaptation to the requirements of fairness and efficiency in international arbitration. The IBA Rules empower a tribunal to conduct a document production process, giving proper consideration to the cultural sensitivities of the disputing parties and their legal counsel.

5. The IBA Rules in practice: Civil and common law operational synergies¹⁵

The IBA Rules have made document production a mainstream feature in most international arbitration processes. In an attempt to create operational synergies from their hybrid civil and common law origin, the IBA Rules have introduced a practical framework for the advancement of requests for document production in an international arbitration process involving parties from varying cultural and legal backgrounds. The Redfern Schedule,¹⁶ named after its inventor Alan Redfern, assists in the articulation and determination of document production requests under the IBA Rules and as such facilitates an understanding of how document production under the IBA Rules works in practice. That said, a number of imperfections remain; these merit brief discussion.

*The Redfern Schedule*¹⁷

The Redfern Schedule has become a widely accepted tool for the conduct of document production in international arbitration, in particular under the IBA Rules. A Redfern Schedule is usually composed of a total of at least four columns:

¹³ M. Mellwrath and H. Alvarez, “Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives” in P. E. Mason and H. A. Grigera Naón (eds), *International Arbitration: 21st Century Perspectives* (2010), para.2.05 [4].

¹⁴ 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, “Commentary on the Revised Text of the 2010 IBA Rules” available on the official website of the IBA.

¹⁵ R. Trittman and B. Kasolowsky, “Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions—The Development of a European Hybrid Standard for Arbitration Proceedings” 31(1) (2008) UNSW Law Journal 330 and following.

¹⁶ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), para.6-77.

¹⁷ For practical consideration, see P. Tercier and T. Bersheda, “Document Production in Arbitration: A Civil Law Viewpoint” in *The Search for the “Truth” in Arbitration*, ASA Special Series No.35, 2011, pp.77–102, at pp.92 and following.

- **Column No.1**

Documents or category of documents requested: The first column contains a disputing party's document production request. It identifies each document or a narrow and specific category of documents that are reasonably believed to exist¹⁸ by reference to (i) the presumed author and/or recipient of the requested document or category of documents, (ii) the date or presumed timeframe within which the requested document or category of documents was created, and (iii) the presumed content of the requested document or category of documents. The information provided in this column is to ensure that the document production request is sufficiently narrow and does not run the risk of turning into a fishing expedition.

- **Column No.2**

Relevance and materiality of the documents or category of documents requested: The second column typically adds a statement as to the relevance of the requested document or category of documents to the case and their materiality to its outcome.¹⁹ This column also confirms that the requested document or category of documents is not in the possession, custody or control of the requesting party or the reasons why it would be too burdensome for the requesting party to produce the requested document or category of documents.²⁰ The requesting party is further required to add a statement of the reasons why it assumes that the requested document or category of documents is in the possession, custody or control of the other party.²¹

- **Column No.3**

Objections to the documents requested: The third column typically contains the objections advanced by the requested party to a document production request. This will typically be a purported failure of the requested document or category of documents to comply with the requirements of relevance and materiality under Art.3.3 of the IBA Rules.²² In the alternative,²³ the requested party may object on one of the following grounds²⁴: (i) legal impediment or privilege; (ii) unreasonable burden to produce the requested document or category of documents; (iii) loss or destruction of the requested document or category of documents; (iv) commercial or technical confidentiality of the requested document or category of documents; (v) special political or institutional sensitivity of the requested document or category of documents; or (vi) a lack of procedural economy, proportionality or fairness.²⁵

- **Column No 4**

Tribunal's decision: The fourth and final column contains the tribunal's determination in the form of an order to produce or a rejection of the document production request in reliance on one of the grounds under Art.9.2 of the IBA Rules. In the event of a failure to comply with an order to produce, the

¹⁸ Art.3.3(a)(i)–(ii), IBA Rules.

¹⁹ Art.3.3(b), IBA Rules.

²⁰ Art.3.3(c)(i), IBA Rules.

²¹ Art.3.3(c)(ii), IBA Rules.

²² Art.3.5, IBA Rules.

²³ Art.3.5, IBA Rules.

²⁴ Art.9.2(a), IBA Rules.

²⁵ Art.9.2(b)–(g), IBA Rules.

requesting party may invite the tribunal to draw adverse inferences²⁶ and/or make an adverse costs order against the defaulting party.²⁷

Some Redfern Schedules contain an additional column allowing for a further reply from the requesting party to any objections raised by the requested party. If properly conducted, a document production exercise on the basis of the Redfern Schedule will be efficient and both time- and cost-saving.

Civil and common law synergies

A closer look at the document production regime underlying the IBA Rules reveals that it is inspired by both civil and common law features of the presentation of documentary evidence. The hybrid nature of the IBA Rules, bridging the void between civil and common law procedural practices, has been the main source of attraction of the Rules since their adoption in their first version in 1999.²⁸

For a better understanding, *Table No.1* illustrates how the various articles of the IBA Rules that have a bearing on document production originate in the civil or common law tradition. In summary, the rationale underlying the document production regime of the IBA Rules, that is the obligation to produce documents on which a disputing party seeks to rely in support of its case,²⁹ has its origin in a party's obligation to discharge the burden of proof, which is central to the presentation of documentary evidence in civil law systems. That said, the requirement to discharge one's burden of proof is, of course, also an implicit feature of discovery and disclosure in the terms advocated under the common law. As has been seen previously, however, the civil law tradition does not allow the obligation to discharge the burden of proof to be used for mounting a fishing expedition. The obligation to identify a specific document or a specific category of documents for production³⁰ feeds off the obligation to discharge the burden of proof as understood in the civil law and more specifically the specificity requirement prevalent in civil law document production. In a way, the disclosability of a wider class of documents (albeit specific) may find some reflection in the wider discovery or disclosure obligations as known in common law legal systems, in particular England and the US. For the avoidance of doubt, the obligation to produce specific documents or a specific category of documents within the meaning of the IBA Rules does not prevent the production of documents that may be adverse to the producing party's case and as such gives expression to a common law tradition.

Further, in addition to the specificity requirement, some of the grounds by reason of which a party may refuse to produce a requested document or a requested category of documents under the IBA Rules reflect existing practice under civil and/or common law. Documents may be excluded from production on the basis of a legal impediment or privilege under the legal or ethical rules that the tribunal determines to be applicable.³¹ Arguably, this includes the common law attorney-client privilege and without prejudice privilege, as well as the duty of professional secrecy within the meaning given to it in the civil law. In considering those issues of legal impediment and privilege, the tribunal will take into account the protection of confidentiality of a document created for the purpose of obtaining or providing legal advice,³² thus capturing the attorney-client privilege under the common law

²⁶ Art.9.5, IBA Rules. For further detail, see V. van Houtte, "Adverse Inferences in International Arbitration" in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Vol.6, (Paris: Kluwer Law International/ International Chamber of Commerce, 2009), pp.195–217.

²⁷ Art.9.7, IBA Rules.

²⁸ For the sake of historical completeness, note that this first version was preceded by a 1983 version known as the "IBA Supplementary Rules of Evidence in International Commercial Arbitration".

²⁹ Art.3.1, IBA Rules.

³⁰ Arts 3.3(a)(i)–3.3(a)(ii), IBA Rules.

³¹ Art.9.2(b), IBA Rules.

³² Art.9.3(a), IBA Rules.

and the duty of professional secrecy under the civil law. The IBA Rules further make provision for the exclusion from production of a document created for the purpose of settlement discussions.³³ This, no doubt, pays deference to the without prejudice or settlement privilege under common law. In order to resolve any conflicts of legal impediments in different legal systems, in particular where the parties and their legal counsel are subject to different legal and/or ethical rules, the IBA Rules rely upon considerations of the disputing parties' expectations, waiver as well as the fairness and equality of the disputing parties.

*Remaining imperfections*³⁴

There are a number of remaining imperfections in the IBA Rules that impact the development of a harmonised document production regime internationally. In this sense, the document production regime under the IBA Rules remains inevitably imperfect, but leaves as such room for the disputing parties and the tribunal to adjust the procedural requirements of document production on a case-by-case basis, taking account of the cultural sensitivities of the parties and their legal counsel. These imperfections are listed in *Table No.2*, which identifies the main reasons for these by reference to their origin in the civil or common law tradition. It is to be hoped that further international arbitration practice will narrow remaining discrepancies by reference to firmed-up harmonised rules.

In summary, there are three principles that inform document production more specifically: Good faith, legal privilege and confidentiality. Given that these principles tend to find divergent interpretations in common and civil jurisdictions, their application in document production under the IBA Rules can be a source of uncertainty. To illustrate the point:

- **Good faith—**

The IBA Rules require each disputing party to “act in good faith ... in the taking of evidence ...”.³⁵ A failure to comply with this obligation of good faith may entail adverse costs sanctions for the defaulting party.³⁶ The principle of good faith is not of general application in the common law world. English law is largely unfamiliar with the concept of good faith (other than expressly provided for by the contracting parties or implied into special contracts, such as, for example, an insurance contract).³⁷ That said, the US Restatement (Second) of Contracts stipulates that “every contract imposes a duty of good faith and fair dealing in its performance and enforcement”.³⁸ That said, the principle of good faith is one of the bedrocks of civilian contract law and as such constitutes a cause of action in its own right in the civil law. It even extends to the performance of arbitration agreements, imposing a requirement to arbitrate in good faith.

³³ Art.9.3(b), IBA Rules.

³⁴ V. V. Veeder, “Are the IBA Rules ‘Perfectible’?” in T. Giovannini and A. Murre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Vol.6 (2009), pp.321–337.

³⁵ Preamble 3, IBA Rules.

³⁶ Art.9.7, IBA Rules: “If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence”.

³⁷ Cf. more recent developments that point to the implication of a duty of good faith in commercial contracts: *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd’s Rep. 526; [2013] B.L.R. 147; [2013] EWHC 111 (QB). Re-drawing the boundaries most recently: *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789.

³⁸ US Restatement (Second) of Contracts (1981), para.205.

- **Legal privilege**³⁹

As has been seen before, “legal impediment or privilege” constitutes a ground for refusing the production of a requested document or a requested category of documents under the legal or ethical rules determined by the tribunal to be applicable.⁴⁰ The common law distinguishes between legal advice privilege and litigation privilege. Variations of the theme are understood to be legal professional privilege, attorney-client privilege and the work product doctrine. A third form of privilege in common law jurisdictions is the without prejudice or settlement privilege. The civil law, in turn, only knows of the attorney-client privilege, which in some jurisdictions⁴¹ is only available to outside (as opposed to in-house) counsel. In *Akzo Nobel*,⁴² the Court of Justice of the European Union held that exchanges with in-house lawyers were (despite their professional membership of the Bar or the Law Society) not covered by legal professional privilege given the lack of professional independence of in-house lawyers from their employer, typically the company under investigation. It bears mentioning that the differing approaches to privilege are partly explained by the varying attribution of ownership of the privilege in civil and common law jurisdictions.⁴³

- **Confidentiality**

The IBA Rules also impose confidentiality obligations on disputing parties. In the terms of the Rules:

“Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.”⁴⁴

Under the Rules, “commercial and technical confidentiality” may also constitute a ground for refusal to produce a requested document or a requested category of documents.⁴⁵ That said, the tribunal may make arrangements for the production of certain documents subject to suitable confidentiality protection.⁴⁶ Even though confidentiality protection is not a general *acquis* in the common law world, some jurisdictions, such as England and Hong Kong,

³⁹ G. S. Tawil and I. J. Mironrini Lima, “Privilege-Related Issues in International Arbitration” in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Vol.6 (2009), pp.29–55; A. F. Cohen, “Options for Approaching Evidentiary Privilege in International Arbitration” in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Vol.6 (2009), pp.423–445.

⁴⁰ Art.9.2, IBA Rules.

⁴¹ e.g. France, Italy, Sweden and Switzerland.

⁴² Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, Judgment of the Court of Justice of the European Union, 14 September 2010.

⁴³ For example, in Germany and Switzerland, the attorney owns the privilege whereas in the US and England it is the party that does.

⁴⁴ Art.3.13, IBA Rules.

⁴⁵ Art.9.2(e), IBA Rules.

⁴⁶ Art.9.4, IBA Rules.

take an inclusive approach to confidentiality. The situation is similar in civil jurisdictions, the inherent confidentiality of arbitration proceedings being advocated in, for example, France and Switzerland.

Needless to say that the level of protection under any of the above concepts will depend on the applicable substantive and/or procedural law as the case may be. Solutions to any conflict in an individual reference may lie in adopting, for example, a choice-of-law approach or a most-favoured or a least-favoured-rule approach, whereby the principles with the greatest or the least protection will be applied to both disputing parties in the individual reference. The obvious problem with a most- or least-favoured approach will be that it may disappoint a party's legitimate expectations.⁴⁷

6. Other Rules

Apart from the IBA Rules, there are a number of institutional rules of arbitration that follow the trend of document production set by the IBA Rules. These include rules from a wider range of different jurisdictions, including the Middle East,⁴⁸ Asia and (Northern) Europe. Even the International Centre of Dispute Resolution, also known in shorthand as the ICDR, has subscribed to a narrow regime of document production in derogation from US-style discovery. This, no doubt, demonstrates that the practice of international arbitration has successfully set a new standard for the presentation of documentary evidence even in the most sacred of common law jurisdictions.

To provide a flavour of the wording provided by a selection of some of the other rules, the following examples are instructive:

- The Rules of Arbitration of the London Court of International Arbitration (LCIA) and its sister organisation in the Dubai International Financial Centre (DIFC) provide as follows: “The Arbitral Tribunal shall have the power, upon application of any party or ... 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: ... (v) to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant”.⁴⁹
- The 2007 Rules of Arbitration of the Dubai International Arbitration Centre (DIAC) provide that “[a]t any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents ... within such a period of time as the Tribunal considers necessary or appropriate ...”.⁵⁰
- The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) empower the tribunal “[a]t the request of a party, ... [to]order a party to produce any documents or other evidence which may be relevant to the outcome of the case”.⁵¹
- Under the Arbitration Rules of the Singapore International Arbitration Centre (SIAC), “... the Tribunal shall have the power to: ... (g) order any party to

⁴⁷ For further discussion within the context of legal privilege more specifically, see G. S. Tawil and I. J. Mironrini Lima, “Privilege-Related Issues in International Arbitration” in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Vol.6 (2009), pp.29–55, at pp.39 and following.

⁴⁸ On the role of the IBA Rules and their adoption in international arbitration practice in the Middle East, see A. S. El-Kosheri and M. S. Abdel Wahab, “Trends in Document Production in Egypt and the Arab World” in *Document Production in Arbitration*, ICC Bulletin, 2006 Special Supplement 7–14.

⁴⁹ Art.22.1, LCIA Rules; and Art.22.1, DIFC-LCIA Rules.

⁵⁰ Art.27.3, DIAC Rules.

⁵¹ Art.26(3), SCC Rules.

produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome; ...”⁵²

- Pursuant to the ICDR Rules of Arbitration, “[t]he Tribunal may, upon application, require a party to make available to another party documents that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case”⁵³

A cursory review of the wording of these various rules shows that the requirement for specificity and materiality or relevance of individual documents to a disputing party’s case has taken root in the presentation of documentary evidence in international arbitration across the globe more generally. This is an encouraging trend that confirms the gradual establishment of document production within the spirit of the IBA Rules as the standard in international arbitration worldwide.

7. Conclusion

The civil and the common law are at polar opposites of the cultural spectrum of legal regimes. Given the procedural and practical differences that separate them, civil and common law legal systems constitute an area of study of particular focus in comparative law, a discipline of law that investigates the origin of laws and legal systems and their place within society. The civil law/common law dichotomy has created operational synergies in the presentation of documentary evidence in international arbitration to form best international standards of document production in the conduct of arbitrations between disputing parties from different legal backgrounds.

The IBA Rules and a number of institutional rules of arbitration of international pedigree provide good guidance for the conduct of efficient and diligent document production in international arbitration more specifically. These rules have built their document production regimes on the basis of a procedural compromise between civil and common law requirements in the presentation of documentary evidence, which has been developing into a harmonised, best international standard of document production.⁵⁴

A number of imperfections remain, in particular in relation to the treatment of good faith, legal privilege and confidentiality. These, no doubt, will be addressed over time. In the meantime, the IBA Rules will provide reliable guidance on document production in disputes that involve parties and/or counsel from both civil and common law legal backgrounds.

Table 1 The IBA Rules in Practice: Civil and Common Law Operational Synergies

RD: requested document or requested category of documents

IBA Rules	Common law	Civil law
Art. Content		
3.1	imposes obligation to produce documents on which a party relies in support of its case	implicit in discovery/dis-closure discharge of burden of proof

⁵² Art.24, SIAC Rules.

⁵³ Art.21(4), ICDR Rules.

⁵⁴ On best standards in document production, see also B. Hanotiau, “Document Production in International Arbitration: A Tentative Definition of ‘Best Practices’” in *Document Production in Arbitration*, ICC Bulletin, 2006 Special Supplement 113and following.

IBA Rules	Common law	Civil law
Art. Content		
3.3(a)(i)	imposes obligation to identify specific documents for production	specificity requirement
3.3(a)(ii)	imposes obligation to identify specific category of documents for production	disclosability of wider class of documents specificity requirement
9.2(b)	provides protection for documents covered by certain privileges	includes attorney-client and “without prejudice” privilege includes professional secrecy
9.3(a)	authorises to exclude production of RD on grounds of legal impediment or privilege for the protection of confidentiality of a document created for the purpose of obtaining/providing legal advice	includes attorney-client privilege includes duty of professional secrecy
9.3(b)	authorises to exclude production of RD on grounds of legal impediment or privilege for the protection of confidentiality of a document created for the purpose of settlement discussions	includes “without prejudice”/“settlement” privilege
9.3(c)–(e)	consider the expectations of the parties, waiver and fairness and equality of parties (particularly if subject to different legal and/or ethical rules) in order to resolve conflicts of legal impediments in different legal systems	

Table 2 The IBA Rules between Civil Law and Common Law: Remaining Imperfections
RD: requested document or requested category of documents

	Good faith	Legal privilege	Confidentiality
<i>IBA Rules</i>	<i>Preamble 3</i> : “in the taking of of evidence [...] each Party shall act in good faith”; <i>Art. 9.7</i> : cost sanctions	<i>Art. 9.2</i> : exclusion of production of RD given the existence of a “legal impediment or privilege” under the legal or ethical rules determined by the tribunal to be applicable	<i>Art. 3.13</i> : imposes confidentiality obligations on parties; <i>Art. 9.2(e)</i> : “commercial and technical confidentiality” as ground for exclusion of RD; <i>Art. 9.4</i> : production of RD subject to confidentiality protection
<i>Common law</i>	no principle of good faith of general application (e.g. English law) but e.g. US Restatement (Second) of Contracts: “every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement”	“legal advice privilege” v “litigation privilege” (legal professional privilege, attorney-client privilege/work product doctrine) “without prejudice”/“settlement privilege”	inherent confidentiality of arbitration proceedings in e.g. Hong Kong and England, but not a general acquis

	Good faith	Legal privilege	Confidentiality
<i>Civil law</i>	one of the bedrocks of civilian contract law extended to duty to arbitrate in good faith (in performance of arbitration agreement)	attorney-client privilege only available to outside (not in-house) counsel (e.g. France, Italy, Sweden, Switzerland): also see <i>Akzo Nobel</i>	inherent confidentiality of arbitration proceedings in e.g. France and Switzerland, but not a general <i>acquis</i>
<i>Comment</i>	The scope of the obligation or the level of protection ultimately remain subject to the applicable law (substantive or procedural?) owner of privilege (Germany/Switzerland: attorney; US/England: party)		

Immunity of Arbitrators

Teresa Giovannini

“Immunity of arbitrator” is a widespread expression, despite the fact that the concept actually relates only to a global and general privilege of exemption of laws and taxes (diplomatic immunity), or of suit (absolute immunity) granted to judges generally in the common law countries.

When referring to the immunity of arbitrators, the legal landscape shows that national legislations or jurisprudence, and arbitral institutions apply either absolute immunity (namely general exemption of suit), or qualified immunity (namely immunity limited to cases outside bad faith, recklessness and misconduct), on the one hand, or limitation of liability, on the other hand, the former stemming from the theory that the relationship with the parties is of a quasi-judicial nature, while the latter finds its source in the theory that such relationship is a matter of contract.

This paper tries to explain these distinctions, where and how they are used and implemented and the question of their validity, as the case may be.

1. Introduction

In general

The *Oxford Online Dictionary* defines immunity as a feature of international law protecting state sovereignty, such as diplomatic immunity as granted by International Conventions,¹ i.e. “the privilege of exemption from certain laws and taxes granted to diplomats by the state in which they are working”.² The same Dictionary extends the notion to an “officially granted exemption from legal proceedings or liability”. More specifically, judges in many and probably most countries with a democratic organisation benefit from judicial immunity, allowing them to be exempt from liability and/or any proceedings pertaining generally to the way they fulfil their juridical duties.³

In international arbitration

In international arbitration, the concept of civil⁴ immunity or limitation or absence thereof has been the subject matter of a major debate,⁵ following the reactions of legislators and arbitral institutions to discontented parties’ attempts⁶ to circumvent the effects of an arbitral decision by contesting in personam the way an arbitrator has acted.⁷

¹ cf. among others: the European Convention on State Immunity of 16 May 1972 at <http://conventions.coe.int/Treaty/en/Treaties/HtmI/074.htm> [Accessed 8 September 2017] and the Vienna Convention on Diplomatic Relations of April 18, 1961 at http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf [Accessed 8 September 2017].

² *Oxford Online Dictionary*.

³ e.g. cf. US Supreme Court case *Stump v Sparkman*, 435 U.S. 349; 98 S. Ct. 1099; 55 L. Ed. 2d 331 (1978); Robert Craig Waters, “Judicial Immunity vs. Due Process: When Should a Judge Be Subject to Suit?” (1987) 7(2) *Cato Journal* (Fall) 461ff.

⁴ This article pertains exclusively to civil liability, the rules on the criminal liability of arbitrators are fundamentally different: see B. Hanotiau, “Quand l’arbitrage s’en va-t-en guerre: les perturbations par l’Etat de la procédure arbitrale” (2003) 21 *Rev. arb.* 805, 813.

⁵ P. Lalive, “Sur l’irresponsabilité arbitrale” in *Etudes de Procédure et d’arbitrage en l’honneur de J.-F. Poudret* (Lausanne: Faculté de Droit de l’Université de Lausanne, 1999), pp.419–435. Also the thesis by J.-Y. Sorrente, “La responsabilité de l’arbitre”, Lyon 2007.

⁶ For state parties, see B. Hanotiau, “Quand l’arbitrage s’en va-t-en guerre: les perturbations par l’Etat de la procédure arbitrale” (2003) *Rev. arb.* 805–826.

⁷ cf. P. Lalive, “Note on Cour d’Appel de Paris (1re Ch. A) 15 September 1998: Société Cubic Defense Systems Inc v Chambre de commerce international” (1999) 13 *Rev. de l’Arb.* 1999, 113, 115, with references.

Such debate was notably illustrated by the French decision issued in 1991 in the matter “*Bompard*”. In this decision, the Paris Court of Appeal recalled that the arbitrators are submitted to civil liability within the meaning of Articles 1142 and 1147 of the French Civil Code that requires that there be a “personal fault” of the arbitrator, that is “a fault that is incompatible with his jurisdictional functions”.⁸

Besides, attempts were made to implicate the arbitrator in the exequatur proceedings, and thus undermining the effect of the final award, by compelling him to testify on how the arbitral proceedings were accomplished. The reactions of the state courts with respect to whether an arbitrator may or may not testify as a witness have been diverse. For example, in France, the Paris Court of Appeal considered in 1992 that the arbitrator is not a third party to the litigation he has arbitrated, and similar as to a judge, he cannot be heard as a witness.⁹

On the contrary, in England, an 1871 House of Lords decision¹⁰ held that arbitrators may be heard on the facts of a case but not on the award, as “an award must speak for itself”.

An extreme protection is granted in the USA, where in numerous cases the testifying of an arbitrator was excluded on grounds of immunity.¹¹

Such cases are not rare,¹² and bear witness to a major issue in international arbitration today: is an arbitrator immune from any form of liability whilst fulfilling his duties? Should this be the case, what content does such immunity have?

A worldwide survey of legislation and jurisprudence reveals a kaleidoscopic situation of the arbitrator’s status today. This diverse picture is a consequence of, on the one hand, the different concepts of immunity in various jurisdictions (below at Pt 2), and on the other hand the scope of such immunity (at Pt 4).

2. The concept of immunity and distinction with non-liability

The term “immunity” is essentially a common-law concept.¹³ Immunity/protection is granted to the judiciary who thus are directly protected from any discontented parties: should the professional (or hereto assimilated) judge have committed a personal fault, no juridical action is open to the parties to claim compensation from the judge at fault. However, the damaged party has the right to sue the state for loss caused by the defective operation of the courts.¹⁴ This right is a fundamental right protected in particular by Article 6 ECHR.¹⁵ The judge himself is protected from legal action, except when the state decides to recover damages paid to a third party.

In the context of international arbitration, the term is “used primarily by the courts and authors in common law countries to refer to the principle that arbitrators cannot be held liable for the manner in which they perform their judicial functions”.¹⁶ Immunity in this respect is put on the same level as non-liability.¹⁷

⁸ CA Paris, 22 May 1991, Rev. arb. 1996, 476.

⁹ CA Paris, 29 May 1992 cited in Ph. Fouchard, “Les institutions permanentes d’arbitrage devant le juge étatique”, (1987) Rev. arb. 225.

¹⁰ *Duke of Buccleuch v Metropolitan Board of Works (Buccleuch)* (1871–72) L.R. 5 H.L. 418; G. Blanke, “Whether Arbitrators Can be Called as Witnesses: The Position under English Law” (2008) 74 *Arbitration* 114–120.

¹¹ US Supreme Court: *Fukaya Trading Co SA v Eastern Marine Corp* : 322 F Supp. 278 [1971].

¹² cf. *Raffineries d’Homs et de Baniyas* of 28 May 1984 and 15 May 1985: Rev. arb. 1985, 141 and *Cekobanka* of 8 October 1986: Rev. arb. 1987, 367.

¹³ E. Gaillard and J. Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (New York: Kluwer Law International, 1999), p.588, no.1085.

¹⁴ But only in cases of gross negligence or denial of justice.

¹⁵ cf. *ECHR Raffineries Grecques Stran et Stratis Andreatis* (para.39, p.78): “l’article 6 al. 1 CEDH s’applique indépendamment de la qualité des parties, comme de la nature de la loi régissant la contestation et de l’autorité compétente pour trancher, il suffit que l’issue de la procédure soit déterminante pour des droits et obligations de nature privé”.

¹⁶ Fouchard, Gaillard, Goldman (1999), p.588, no.1077.

¹⁷ cf. T. Oyre, “Professional liability and judicial immunity” (1998) *Arbitration* 45; Hong-Lin Yu, “Who is an arbitrator? A study into the issue of immunity” (2009) *International Arbitration Law Review* 3; D. Mainguy, *Des Délais de l’Arbitrage et de la responsabilité des arbitres* (Paris: Recueil Dalloz, 2009), p.538.

The concept of immunity must be distinguished from the provisions aimed at avoiding or restricting liability which concern the strictly contractual aspects of the arbitrator's functions. Indeed, there is a main difference between the concepts of immunity and liability. Immunity, as a concept implying the immunity from suit¹⁸ for arbitrator's acts within the scope of arbitral process¹⁹ "underlines that only public authorities (the legislature or the courts) are liable to grant it and that it is intended to serve the public interest by guaranteeing that arbitral justice can function properly",²⁰ the arbitrator being held in that context as not merely providing the parties with a service, but also serving a public, adjudicatory function,²¹ whereas the concept of liability refers more to contractual provisions that tend to avoid or restrict liability within "the contractual status of the arbitrator as a provider of services".²²

As a result, and as a rule, "Immunity" *stricto sensu* is either granted by an international convention or by national law, whereas most arbitral institutions and contracts nominating an arbitrator actually (i.e. even if they use the word immunity) refer to the concept of "liability" as a feature of the contract. The legal source of the provision granting immunity or non-liability has consequences on the scope of the liability of the arbitrator.

Notwithstanding such distinction, most courts of arbitration also include so-called immunity rules within their regulations whereas parties to arbitration may also agree to such immunity of the arbitrator. Doing so, the scope of immunity granted to the arbitrator is subject to the validity of such clauses that may be construed as simple limitation of liability clauses and thus follow the same legal regime defined under general contract law.

3. Justifications of arbitrator's immunity

The traditional justification of immunity is the public interest considerations that an arbitrator fulfils a quasi-judicial function and should as a result be protected in the same manner as a judge.²³ In the 1974 House of Lords case *Sutcliffe v Thackrah*,²⁴ an assimilation was made between the juridical functions of judges and those of arbitrators, extending the same type of immunity of the former to the latter, even though in a later decision,²⁵ a dissenting opinion considered that an arbitrator who was negligent in the fulfilling of his duties could be liable for damages. The 1996 English Arbitration Act section 29 goes a step further considering that the juridical power of the arbitrator is delegated to the arbitrator by the state, thus justifying his immunity "unless the act or omission is shown to have been in bad faith".

Yet this justification is not universal, and a 1960 decision of the French *Cour de cassation* specifically considers that arbitrators are not invested with a public mission that could trigger the liability of the state with the result that a claim for liability against an arbitrator is subject to the general rules of civil law.²⁶ This does not mean that arbitrators are not protected within their jurisdictional functions, but only that they can be liable under certain conditions. In the *Bompard* case already mentioned,²⁷ the Tribunal de Grande Instance of

¹⁸ US case *Mireles v Waco*, 502 U.S.9 (1991): Judicial Immunity is an immunity from suit, not just from the ultimate assessment of damages.

¹⁹ e.g. *Austem v Chicago Bd of Options Exchange*, 898 F.2d 882, 886 (2d Cir. 1990).

²⁰ Fouchard, Gaillard, Goldman (1999), p.588, no.1077.

²¹ G. Born, *International Commercial Arbitration*, 2nd edn (New York: Wolters Kluwer, 2014), ch.13, p.1962.

²² Fouchard, Gaillard, Goldman (1999), p.588; more recently: I. Najjar, "L'immunité de l'arbitre" (2008) 45 *Revue Libanaise de l'Arbitrage* 14, referred to in N. Smahi, "The Arbitrator's Liability and Immunity under Swiss Law", Part I (2016) 34(4) *ASA Bulletin*, Kluwer Law International 2016, 876–896.

²³ G. Born, *International Commercial Arbitration*, 2nd edn (2014), ch.13.02, p.1967; Fouchard, Gaillard, Goldman (1999), p.588, no.1077. See however criticisms by P. Lalive, "Note on Cour d'Appel de Paris" (1999) 13 *Rev. de l'Arb.* 113, 117, no.23.

²⁴ *Sutcliffe v Thackrah* [1974] A.C. 727.

²⁵ Lord Kilbrandon in *Arenson v Casson Rutley & Co* [1975] 3 All E.R. 901.

²⁶ Cass. 2^e civ., 29 juin 1960: D. 1960, 262.

²⁷ TGI Paris, 13 juin 1990, *Bompard*, Rev. arb. 1996, p.476, 1^e décision: "une action en responsabilité [contre l'arbitre] ne peut pas être substituée aux voies de recours ouvertes contre la sentence ni conférer indirectement au juge étatique un pouvoir de révision de la sentence arbitrale ... il n'entre donc pas dans les attributions du tribunal de grande instance, saisi d'une action en justice de droit commun, d'apprécier le bien ou le mal jugé de la décision des arbitres".

Paris considered that “civil liability can only be incurred [by the arbitrators] ... where it is established that they have committed fraud, misrepresentation, or gross fault”,²⁸ but the Court of Appeal upheld that there be a “personal fault” of the arbitrator that is “a fault that is incompatible with his jurisdictional functions”.²⁹ Therefore, in French law, the liability of the arbitrator is of a contractual nature,³⁰ linked to the breach of the arbitration contract, a *sui generis* contract, of which only the breach of certain obligations may lead to the liability of the arbitrator. As a result, French jurisprudence³¹ considers that an arbitral award does not need to fulfil the formal conditions of a juridical decision such as the principle of contradictory proceedings and the obligation to motivate the decision.³²

4. The scope of absolute and qualified immunity

The scope of immunity varies: from the status of diplomatic or absolute immunity to (i) qualified immunity and (ii) contractual regimes of limitation of liability, the situations differ greatly.

The diplomatic or absolute immunity

Whenever an arbitrator benefits from diplomatic immunity, also called “absolute immunity”, the arbitrators (and generally, also the arbitral institution) may under no circumstances, even if in bad faith or having committed a gross negligence, be subjected to juridical proceedings.³³ This immunity is linked to both the functions of arbitrator and the person of the arbitrator.

The only international conventions providing for such an absolute immunity for the arbitrators and the institution are the OHADA Treaty³⁴ and the ICSID Convention,³⁵ being emphasised that most international conventions (e.g. the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 1958 (the New York Convention), the Inter-American Convention on International Commercial Arbitration) are silent on the issue.

The UNCITRAL Model Law does not include any provision on immunity or non-liability but only on a waiver on the right to object.³⁶

At the national level, some countries have adopted legislation providing for the arbitrator’s absolute immunity in the sense recalled above, namely:

²⁸ Translation by Fouchard, Gaillard, Goldman (1999), p.597, no.1098.

²⁹ CA Paris, 22 May 1991, Rev. arb. 1996, 476.

³⁰ cf. CA Paris, 29 nov. 1985: Rev. arb. 1987, 335: “les tribunaux arbitraux ... ne prononcent pas leurs décisions au nom du Peuple français et n’exercent aucune mission de service public”.

³¹ Ph. Fouchard, “Les institutions permanentes d’arbitrage devant le juge étatique”, (1987) Rev. arb. 239.

³² See however Paris, 15 mai 1995, *Raffineries d’Homs*, Rev. arb. 1985, 141, stating that a motivation was present.

³³ Ph. Leboulanger, “L’arbitrage et l’harmonisation du droit des affaires en Afrique” (1999) Rev. arb. 541, 577, no.74.

³⁴ *Traité relatif à l’Harmonisation en Afrique du Droit des Affaires* dated 17 October 1993, that provides, under art.49, that: “Les fonctionnaires et employés du Secrétariat permanent, de l’Ecole Régionale Supérieure de la Magistrature et de la Cour Commune de Justice et d’Arbitrage, ainsi que les juges de la Cour et les arbitres désignés par cette dernière jouissent dans l’exercice de leurs fonctions des privilèges et immunités diplomatiques ...”. cf. Statute of the International Court of Justice art.19: “The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities”.

³⁵ See Section 6, Status, Immunities and Privileges of the 1966 ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, as amended effective 10 April 2006.

³⁶ UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Article 4. Waiver of right to object: “A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object”.

- The United States, where the 2000 US Revised Uniform Arbitration Act (RUAA)³⁷ adopted by 18 American states³⁸ provides in its section 14 for the immunity of arbitrators “to the same extent as a judge of a court of this State acting in a judicial capacity”.³⁹
- Ireland: the Irish Arbitration Act 2010 (the 2010 Act), which adopted the UNCITRAL Model Law,⁴⁰ came into force in Ireland on 8 June 2010.⁴¹ Under this law, the arbitrator is immune from suit and there is no scope for an arbitrator to be liable in any proceedings for anything done or omitted in discharge of his duties. Such immunity also extends to employees, agents or advisors of arbitrators, and to any appointing or nominating bodies.

Likewise, New Zealand⁴² courts have adopted the concept of absolute immunity for the arbitrators.

It is of note that China set forth a series of legal responsibilities in case of arbitrators being engaged in unlawful or unethical conduct.⁴³ Scholars however believe that those sanctions are of an administrative and/or criminal nature and that, as a matter of fact, arbitrators in China are enjoying de facto absolute immunity.

The qualified immunity: bad faith, recklessness and misconduct

Besides the strict and quasi-judicial absolute immunity rules mentioned, there are a few national laws and/or arbitral institutions’ rules providing for the immunity of the arbitrator but in cases of bad faith. Examples of such qualified immunity can be found in:

- The 1996 English Arbitration Act that provides at section 29 (Immunity of arbitrator):
 - “(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.
 - (2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.
 - (3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).”
- The Mauritius International Arbitration Act 2008 section 19 that states that “An arbitrator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.”

³⁷ Y. Banifatemi, “Le nouveau droit de l’arbitrage interne aux Etats-Unis (Revised Uniform Arbitration Act 2000): la persistance des particularismes” (2003) Rev. arb. 1195–1212.

³⁸ Alaska, Arizona, Colorado, District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington, Massachusetts, Michigan, Pennsylvania.

³⁹ e.g. *Stasz v Schwab*, 121 Cal. App. 4th 420, 437 (Cal. Ct Appeal 2004): where the Court held that arbitrator’s immunity extends to negligence for late issuance of the award; *Int’l Med Group Inc v Am. Arbitration Assoc* 312 F. 3d 833, 844 (7th Cir. 2002), where the Court held that immunity extends to bad faith or intentional misconduct; *La Serena Properties, LLC v Weisbach*, 112, Cal. Rptr., 3d 597 (Cal. Ct App. 2010), where immunity was upheld despite non-disclosure of arbitrator’s romantic relationship with the sister of party’s counsel.

⁴⁰ UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments as adopted by that Commission at its 39th session on 7 July 2006.

⁴¹ Repealing the legislation which previously governed arbitration in Ireland, namely the Arbitration Act 1954, the Arbitration Act 1980 and the Arbitration (International Commercial) Act 1998; cf. Ph. Pinsolle, P. Griffith, “Quelques observations sur la loi irlandaise sur l’arbitrage international de 1998” (2000) Rev. arb. 615–622; also, Ch. Koch, “The New Irish Arbitration Act of 1998” (1999) Bull. ASA 51; N.G. Bunni, “Ireland’s Arbitration (International Commercial) Act 1998” (1999) RDAI 482.

⁴² e.g. *Pickens v Templeton* (1994) 2 N.Z.L.R. 718 at 728 (Christchurch High Ct).

⁴³ PRC Arbitration Law (1994), Articles 34, 38 and 58; PRC Criminal law (1979 as amended 1997), Article 399.

- The Arbitration (Scotland) Act 2010 and its Schedule 1, the Scottish Arbitration Rules⁴⁴ that provide in an analogue manner, with the same caveat as to the “bad faith” of the person under scrutiny.

Other legal systems have adopted similar reasoning holding that immunity does not extend to cases where the arbitrator did not act in good faith or where his or her conduct was fraudulent.⁴⁵

Other legal systems extend such limitation to the principle of absolute immunity to:

- Recklessness or wilful misconduct as it is the case for the 2011 Spanish Arbitration Act,⁴⁶ that obliges arbitral institutions and arbitrators to subscribe to professional liability insurance to cover their potential liability for loss caused by bad faith, recklessness or wilful misconduct.
- Gross negligence and intentional wrongdoing as for example in Germany.⁴⁷

At the regulatory level, some arbitral institutions very carefully delimited the scope of immunity in excluding its applicability to conscious and deliberate wrongdoing, as shown by the LCIA 2014 Rules on Arbitration that exclude the liability:

“of the LCIA ..., the LCIA Court ..., the Registrar ..., any arbitrator, any Emergency Arbitrator and any expert to the Arbitral Tribunal, ..., save (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law.”

The LCIA thus does not protect those benefiting from an exclusion of liability, if the act or omission constitutes a “conscious and deliberate wrongdoing”. This clearly covers a case of wilful misconduct, but not of gross negligence.

The contractual regime

Other attempts were made to adopt immunity rules such as the much criticized⁴⁸ Article 34 (Exclusion of liability) of the 1998 ICC Rules: “Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration”.

This provision was redrafted in the ICC 2012 Rules on arbitration following a clear declaration of invalidity of article 34 by the Paris Court of Appeal in 2009.⁴⁹ The new Article 40 (Limitation of Liability) now reads:

“The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.”

⁴⁴ N. Meyer Fabre, C. Baker Chiss, “La nouvelle loi écossaise sur l’arbitrage (Arbitration (Scotland) Act 2010)” (2010) Rev. Arb. 2010 801–811.

⁴⁵ e.g. in Canada: *Sport Maska Inc v Zittner* (1988), 1 S.C.R.; 1988 CanLII 68 (SCC) (*Sport Maska*); *Flock v Beattie*, 2010 ABQB 193 (*Flock*); other jurisdictions: *Mond v Berger* (2004) VSC 150 (Victoria S. Ct); *Sinclair v Bayly*, Case N. 4909/1992 (Victoria S. Ct, 1994); *Logy Enters, Ltd v Haikoo City Bonded Area Wansen Prods. Trading Co*, XXIII. Y.B. Comm. Arb 660 (HK Ct. App. (1998)); *Mitsui Eng’g & Shipbldg Co v Easton Graham Rush* (2004) 2 SUR 14 (Singapore High Ct).

⁴⁶ On 20 May 2011, the Act 11/2011 (the Act) containing the expected amendments to the Spanish Arbitration Act 60/2003 (SAA) was finally passed, and published on 21 May 2011 in the Spanish *Official Gazette*. The amendments came into force on 10 June 2011.

⁴⁷ BGHZ 15, 12; BGHZ 42, 313; BGHZ 161, 298; BGHZ 187, 286.

⁴⁸ P. Lalive, “Note on Cour d’Appel de Paris” (1999) 13 Rev. de l’Arb. 113, 117, no.23.

⁴⁹ Ch. Jarrosson, “Note sous 22 janvier 2009, Cour d’appel de Paris (1e Ch. Civ.)” (2010) Rev. arb. 320–328.

Many other arbitral institutions have since followed,⁵⁰ as shown by the example mentioned of the 2010 UNCITRAL Rules (Article 16) that expressly reserve the validity of an agreed immunity regime to the national laws applicable:

“Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.”

These examples show that the parties can agree on given limitations to liability, subject however to the validity of such limitations under the applicable law.

5. Validity of contractual “immunity or non-liability” provisions

In general

Most jurisdictions allow parties to a contract to exclude or limit their liability to a certain amount of damages or to certain circumstances only. This limitation or even exclusion of liability derives from the general principles of foreseeability and party autonomy inherent to each contract: a contract being construed as an act that aims to organise the future performance of the parties, each party is entitled to define in advance the limits of its liability in cases of non-performance or breach of contract.

The indemnification for damages other than personal injuries may be limited or excluded by contract. However, in general, such exclusions or limitations are inoperative in cases of gross negligence and wilful misconduct and/or bad faith.

As an example, under Swiss law, Article 100 of the Swiss Code of Obligations (CO) provides that “Any agreement purporting to exclude liability for misrepresentation or gross negligence in advance is void”. Article 100 CO does not cover wilful misconduct. However, the general liability of an agent is set out in Article 398 of the Swiss Code of Obligations by reference to the employment contract: “The agent generally has the same duty of care as the employee in an employment relationship”. As a result, pursuant to Article 321e CO, the contractor is “liable for any loss or damage he causes to the employer whether wilfully or by negligence”. This article is imperative and may not be excluded by the parties.

Contractual limitation of the arbitrator’s liability

Most national legislations on arbitration are silent on the issue of the arbitrator’s liability, but with a few isolated examples such as in Poland, where, pursuant to Article 1175 of the Polish Code of Civil Procedure, if the arbitrator resigns from his/her function without a valid reason, he or she shall be liable for damages caused thereby, or in Singapore, where the law⁵¹ provides that the arbitrator will not be liable for negligence or mistake in law, fact or procedure made in the course of arbitral proceedings.

Where there is no legislation on the subject, national courts have in several instances developed doctrines generally recognizing the dual nature (jurisdictional and contractual) of the arbitrators’ responsibility and thus admitting peculiar limitations to the arbitrator’s liability as compared to ordinary contractual liability regimes. Such is the case for instance in the Netherlands, where the courts held that arbitrators can be held personally liable if they have acted intentionally, wilfully, recklessly or with a manifestly gross misjudgment of what constituted proper performance of duties⁵², such high threshold being applicable to

⁵⁰ See, however, the IBA Milan Chambers Rules where there is no liability clause.

⁵¹ International Arbitration Act, section 25.

⁵² Supreme Court, *Greenwold*, 4 December 2009, ECLI: NL:HR:2009: BJ7834: the Court held that the mere fact that an award is set aside does not qualify as such as improper performance of duties.

both the merits and/or the procedure.⁵³ The same dual approach has been taken by French courts in the well-known *Arzan*⁵⁴ and *Delubac*⁵⁵ cases.

At the regulatory level, many arbitration rules provide for limitation of the arbitrator's liability.

Thus, and for example, Article 45 of the 2012 Swiss Rules on Arbitration provides for an exclusion of liability: "except if the act or omission is shown to constitute intentional wrongdoing or gross negligence", a position—as we have seen—compliant with Swiss domestic law. As to the issue of misrepresentation, the Swiss Rules on Arbitration do not include this restriction, but it is fair to consider that in a case of misrepresentation, e.g. false declarations made by the arbitrator, the arbitral institution or any other person protected under article 45 of the 2012 Swiss Rules, a limitation of liability would be considered by a Swiss tribunal as void in application of article 100 of the Swiss Code of Obligations.

A similar rule may be found in the 2010 Netherlands Arbitration Institute Rules of Arbitration at Article 66 (Exclusion of Liability):

"Neither the NAI, its board members and personnel, the arbitrator and his secretary, if any, nor any other individuals involved in the matter by any of these shall be liable under contract or otherwise for any act or omission by that individual or any other individual or due to use of any aids in or involving arbitration, unless and in so far as mandatory Dutch law precludes exoneration."

This would mean that if the seat of arbitration is outside the Netherlands (for example in Switzerland), the exclusion of liability clause would need to be construed whilst considering mandatory Dutch law and the mandatory law at the seat of the arbitration (e.g. Swiss law).

By way of comparison, the 2010 UNCITRAL Arbitration Rules also refer to "the applicable law" yet include in the general limit "intentional wrongdoing", which is a major step in limiting the non-liability of arbitrators. This provision can also be found in the WIPO Arbitration Rules at article 77:

"Except in respect of deliberate wrongdoing, the arbitrator or arbitrators, WIPO and the Center shall not be liable to a party for any act or omission in connection with the arbitration."

Let it, however, be noted that the concept of "intentional wrongdoing" may be manifold. The term "intentional wrongdoing" may be considered in some jurisdictions to include gross negligence. French law, for example considers that in some cases the violation of a contract by gross negligence is so fundamental that it is equivalent to an intentional wrongdoing ("dol").⁵⁶ German contract law also has a similar approach.⁵⁷ Within the common-law countries it is to be expected that such an extension is not acceptable.

A careful mapping of the world's jurisdictions will thus allow identifying three types of arbitral seats:

- (i) Those who allow full exclusion of liability, whatever the behaviour of the actors of the arbitration (except the parties);
- (ii) Those who allow exclusion of liability subject to the law applicable, namely to the extent it is permitted by the applicable law; and

⁵³ Supreme Court, *Qnow*, 30 September 2016, ECLI: NL:HR:2016: 2215.

⁵⁴ *Arzan* case Cass. Civ., 1ère, 15 January 2014, n. 11-17.196.

⁵⁵ *SCS Banque Delubac & Cie c/ M. A. Bouanha et autres* CA Paris, 31 March 2015, no.14/05436.

⁵⁶ "Faute lourde équipollente au dol."

⁵⁷ §276 German civil code: Responsibility of the obligor.

(1) The obligor is responsible for intention and negligence, ...

(2) A person acts negligently if he fails to exercise reasonable care.

(3) The obligor may not be released in advance from liability for intention."

- (iii) Those that refuse to exempt the same in cases of wilful misconduct or gross negligence.

6. Who is concerned? Arbitrators? Institutions? Others?

Initially, absolute immunity or qualified immunity (equivalent to limited liability) were only granted to arbitrators, in personam, as individuals. The tendency however extends this absolute or qualified immunity to arbitral institutions and even to all persons directly concerned by the arbitration proceedings.

A comparison of various clauses adopted in recent years shows the variety of persons targeted by the non-liability clause. Whilst in all such non-liability or limited liability clauses the arbitrators are protected as are the arbitration courts and their members per se, more recent provisions extend their protection to the “administrative side” of the arbitrations, such as the 2012 ICC Rules Article 40 (Limitation of Liability) referring to:

“The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.”

The liability of the Institution has been in particular illustrated by French courts in the famous 1998 “Cubic” decision,⁵⁸ where the Paris Court of Appeal was called upon to decide on whether an arbitral institution, the ICC, incurred liability whilst fulfilling its duties within the arbitration contract concluded with the parties. The case was brought by an American company in relation to an arbitration that had taken place in Paris with respect to Iranian defence contracts. Before even the issuance of the final award (that condemned the Cubic company to the payment of USD 2.8 million compensation to the Iranian Ministry of Defence), the Cubic Company attempted to establish that the ICC had (notably) not fulfilled its information duties with respect to the proceedings. The Paris Appeal Court, after having stated that the content of the ICC Rules was sufficiently clear to be understandable by any businessperson (a fortiori by their counsel), added that “any party to a contract, even an association responsible for organising an arbitration, is liable if in default with respect to its contractual obligations”.⁵⁹ The Court however concluded that it had not been established that the ICC had not respected its contractual obligations, and thus dismissed the case.

Similar extensions can be found in other arbitration regulations such as the Rules of the Polish Court of Arbitration at the Polish Chamber of Commerce that provide that besides the arbitrators themselves, the Court, the Polish Chamber of Commerce, their staff and the members of the authorities of the Chamber of Commerce and the Court of Arbitration shall not be liable for any loss arising as a result of acts or omissions connected with the conduct of arbitration proceedings unless the loss was caused intentionally.

In a more limited manner, the 2010 UNCITRAL Rules cover in their Article 16: “the arbitrators, the appointing authority and any person appointed by the arbitral tribunal”.

In this context, it is worth mentioning the possibility under given legal instruments to adopt different regimes depending upon the question as to who (the institution or the parties) has designated or appointed the arbitrators. The more striking example is given by the 1993 OHADA Treaty⁶⁰ which grants diplomatic immunity to the seven judges of the Common Court of Justice and Arbitration (Cour Commune de Justice et d’Arbitrage—CCJA) and

⁵⁸ See P. Lalive, “Note on Cour d’Appel de Paris” (1999) 13 Rev. de l’Arb. 113–120.

⁵⁹ Our translation: “Toute partie à une convention, fût-elle une association chargée d’organiser un arbitrage, engage sa responsabilité dès lors qu’elle manque aux obligations contractées”.

⁶⁰ Traité pour l’Harmonisation en Afrique du Droit des Affaires, signed 17 October 1993, entered into force 18 September 1995.

also to the arbitrators nominated by the Court (Art. 49 OHADA Treaty).⁶¹ The OHADA Treaty thus creates a dual system: the arbitrators appointed by the CCJA have diplomatic immunity whereas the arbitrators nominated by the parties do not have the same immunity. As Philippe Leboulanger notes: such a discrepancy in the status of the arbitrators within the same arbitration proceedings is contrary to the fundamental principle of equality between the parties to an arbitration.⁶²

7. Some illustrations of arbitrator's liability

Besides the few cases mentioned above, it is worth mentioning the listing, by Bernard Hanotiau in an article published in 2003, of a certain number of cases of illicit behaviour by arbitrators:⁶³ corruption by one party; a non-disclosed relation, whether of business or of private nature between the arbitrator and a party; favouring of one party; unilateral communications with one party without implicating the other party; resignation of an arbitrator without real reason, generally just before the signing of the award when the victorious party is known.

Whether or not such behaviour leads to liability is a matter for national legislation, and notably measured by the degree of duty of care required in that context. In French law for instance, there is a clear distinction between (i) a simple duty of care (“obligation de diligence”), for example with respect for reasonable procedural time limits⁶⁴ that will only trigger liability if the arbitrator is at fault, and (ii) a duty to perform (“obligation de résultat”) where the simple non-performance triggers liability such as the non-compliance with the duty to request an extension of the procedural deadlines.⁶⁵ In the face of such behaviour, non-liability or exclusion of liability clauses may encourage an arbitral *laissez-aller* incompatible with the intrinsic rights of the parties. A serious issue is thus the “contractual” validity of such “immunity” clauses.

8. Applicable law

The issue remains as to what law will be applicable to the issue of immunity/liability of the arbitrators.

It is commonly accepted and recognized that the issue of immunity or exclusion of liability of the arbitrator is the law applicable to the status of the arbitrator, which in turn will be the law governing the arbitral procedure because the arbitrator's activity is linked by its nature to the arbitral proceedings. However, because of its autonomy, international arbitration is often detached from all national procedural laws. If this is the case, the law of the seat of the arbitration will be the most appropriate connection for two reasons:

- (i) First, in comparative private international law, the law of the seat will often govern the arbitral procedure;
- (ii) Second, the status of the arbitrators being partly modelled on that of the judge as we have seen, it therefore follows that it should be determined by reference to the law of the place where the arbitrators perform their duties.⁶⁶

⁶¹ Ph. Leboulanger, “L’arbitrage et l’harmonisation du droit des affaires en Afrique” (1999) Rev. arb. 541–592.

⁶² Ph. Leboulanger, “L’arbitrage et l’harmonisation du droit des affaires en Afrique” (1999) Rev. arb. 541, 577, no.75.

⁶³ B. Hanotiau, “Quand l’arbitrage s’en va-t-en guerre: les perturbations par l’Etat de la procédure arbitrale” (2003) Rev. arb. 805, 806, no.5.

⁶⁴ Cass. 1^{er} civ., 17 nov. 2010: D. 2010, 2849, obs X. Delpech.

⁶⁵ Cass. 1^{er} civ., 6 déc. 2005: 2006, Jur. P. 274, note P-Y. Gautier. Ch. Jarrosson, “Note sous Cour de cassation (1^{re} Ch. Civ.), 6 décembre 2005” (2006) Rev. arb. 127–138.

⁶⁶ Fouchard, Gaillard, Goldman (1999), para.1010 ff., pp.556 ff.

9. Conclusion

The question that remains is how the arbitration users perceive the issue of immunity or exclusion and/or limitation of liability clauses, be it in the national laws or in the arbitration rules.

Taking the civil law contractual approach, the parties coming from common-law jurisdictions might consider such exclusion as unacceptable, whilst the state, in their jurisdiction, would be responsible for the judges' wrongful doings or faults.

Considering more in general the limitations by national laws on the validity of exclusion or limitation of liability clauses, on the one hand, and the fact that professionals in general, and state judges (through the state itself) in particular are liable for their wrongful doings or (generally heavy) faults, the credibility of arbitration could be enhanced by the institutions either refraining from inserting such "immunity clauses" in their rules or specifying that the liability of the arbitrators and of the institution is governed by the applicable law.

Immunity of Arbitrators

Doyin Rhodes-Vivour

1. Introduction

Arbitral immunity exempts arbitrators from certain acts or omissions arising out of or in relation to their functions.¹ The concept of arbitral immunity is essentially premised on policy considerations of according immunity to persons acting in judicial capacity. Judicial immunity, a common law doctrine, entails that any person acting within a judicial capacity, if acting within his jurisdiction, shall enjoy immunity from any liability that may result from him discharging his duties.² The scope and application of arbitral immunity may differ between different jurisdiction depending upon the parties' agreement,³ the applicable institutional rules and the provisions of the applicable national law.

The purpose of this paper is to give an overview of the concept of arbitral immunity with references to the practice in countries and the application of the doctrine by arbitral institutions. The paper highlights the differences in the approach of civil and common law jurisdictions and seeks to identify the existence of any common grounds and/or divergences. Possible solutions to achieving harmonization or bridging the gap between common and civil law cultures in a bid to aid certainty in international arbitration are proffered.

2. Judicial/arbitrator's immunity

The concept of arbitral immunity derives justification from judicial immunity in common law jurisdictions.⁴ In *Bremer Schiffban v South Indian Shipping Corp Ltd*,⁵ Donaldson J held that "courts and arbitrators are in the same business, namely the administration of justice". Donaldson J however affirmed that "the only difference is that the courts are in the public and arbitrators are in the private sector of the industry". International instruments state the protection granted to judges through the doctrine of judicial immunity. The IBA Minimum Standards of Judicial Independence (adopted 1982) provides that a judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.⁶

The UN Basic Principles on the Independence of the Judiciary 1985 though recognizing that judges may be subject to disciplinary procedure and their decisions subject to right of appeal, states that judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.⁷

¹ For the definition of immunity generally see *Black's Law Dictionary*, 8th edn (Eagan, Minn.: Thomson West, 2004), p.765. See also <https://definitions.uslegal.com/a/arbitral-immunity/> [Accessed 8 September 2017].

² See J. Randolph Block, "Stump v Sparkman and the History of Judicial Immunity" (1980) 5 Duke L.J. 880. In the Irish case, *Patrick Redahan v Minister for Education and Science*, [2005] LEH C 271, Giligan J referred to the policy arguments cited by Lord Denning in *Sirros v Moore* [1975] 1 Q.B. (CA) 118 (1974) 132, 137 in relation to the immunity of judges from suits. He also referred to the Irish decision in *Manning v Shackleton* [1996] 3 I.R. 88, 94 where the Irish Supreme Court reiterated policy arguments in support of arbitrators enjoying immunity from suits at common law on the basis of being in a quasi-judicial position and thus should enjoy immunity from negligence and mistakes in law, and fact in the absence of bad faith. See also Adedoyin Rhodes-Vivour, *Commercial Arbitration Law and Practice in Nigeria through the Cases* (South Africa: LexisNexis, 2016), p.216.

³ To the extent that the *Lex arbitri* allows this.

⁴ Judicial immunity dates back at least to two early 17th century English cases, *Floyd v Barker* 77 Eng. Rep. 1305 (1607) and *The Marshalsea* 77 Eng. Rep. 1027 (1612) in which Lord Coke announced the rule of judicial immunity, stated its purposes, and specified its limitations.

⁵ *Bremer Schiffban v South Indian Shipping Corp Ltd* (1981) A.C. 999-921.

⁶ See G43 IBA Minimum Standards of Judicial Independence (adopted 1982).

⁷ See UN Basic Principles on the Independence of the Judiciary 1985. For the rationale for the wide extent of judicial cover from suits see *McC v Mullan* [1984] 3 All E.R. 908 at 916b where Lord Bridge held as follows: "If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful

However, opponents of a broad conferment of immunity on arbitral tribunals argue that there are differences between an arbitrator and a judge in the carrying out of their functions. Firstly, whilst a judge's power is derived directly from a state, an arbitrator derives its power from the agreement of the parties and unlike a judge who is accountable to the state, the arbitrator is accountable to the parties and the arbitral institutions, where applicable. Furthermore, in most jurisdictions an arbitrator's decision is not subject to appeal or is subject to appeal on limited grounds whilst a judge's decision can be revised or rectified on appeal. An arbitrator is also paid by the parties whilst a judge derives its remuneration from the state.⁸ Arguments are thus advanced that parties and arbitral institutions deserve a right of action against arbitrators who act carelessly, negligently or compromise in any form the high expectations of the parties.⁹ There are arguments in favour of the grant of arbitral immunity.¹⁰ Immunity helps to ensure the finality of an award. Fewer skilled persons would be willing to act if they were to run the risk of incurring substantial liability.¹¹ In addition, arbitrators have no interest in the outcome of the dispute and should not be compelled to become parties to it.¹² Finally, it ensures the protection of the public in those cases in which the judicial functions are truly exercised.¹³

The approach differs in various jurisdictions and in particular the civil and common law divide. It is possible to group the different approaches into countries which offer their arbitrators absolute immunity, others who offer them a limited or qualified immunity and others which offer no immunity whatsoever (absolute liability).¹⁴ The different theories in relation to the concept of arbitral immunity throw some light on the rationale for the different approaches.

3. Theories on arbitrators' immunity

Arbitral immunity has been classified under three main theories, contractual theory, jurisdictional theory and hybrid theory. These theories attempt to understand the relationship between the arbitrator(s) and the parties and the basis for the liability of an arbitrator (if any). These jurisprudential theories have influenced how arbitral immunity is viewed in different jurisdictions.¹⁵

Contractual theory

The theory evolved from Merlin's perception that the arbitration agreement has the character of a contract.¹⁶ The proponents of contractual theory argue that the (international) arbitral process is rooted in the arbitration agreement between the disputing parties which is a contract and the arbitrator draws his power and authority from the same arbitral agreement and not from any public authority.¹⁷

to the health of the society to leave that party without a remedy than that 999 honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction".

⁸ For further reading see R. Mullerat, J. Blanch, "The liability of arbitrators: A survey of current practice" (2007) 1(1) *Dispute Resolution International* (June) 106.

⁹ A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*, 6th edn (New York: Oxford University Press, 2015), p.325.

¹⁰ A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (2015), p.324.

¹¹ A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (2015).

¹² A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (2015).

¹³ A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (2015).

¹⁴ R. Mullerat, J. Blanch, "The liability of arbitrators: A survey of current practice" (2007) 1(1) *Dispute Resolution International* (June) 106.

¹⁵ J. Brown, "The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion?" [2009] *J. Disp. Resol.* 230, <http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed 8 September 2017].

¹⁶ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators" *LEX E-SCRIPTA ONLINE LEGAL J.* (June 20, 2002), <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm> [Accessed 8 September 2017].

¹⁷ E. Onyeama, *International Commercial Arbitration and the Arbitrator's Contract* (New York: Routledge, 2010), p.36.

According to the theory, an arbitrator cannot be regarded as a judge since the function is not of a public character.¹⁸ However a modern proponent of the contractual theory, Bernard, argues that the arbitration agreement is a contract but which is determined by special rules.¹⁹ He conceded that an arbitrator is not considered to be an agent of the parties, since the duty that determines the mutual obligations of the parties cannot be fitted into that of an agent's duties.²⁰ He defined the nature of this special contract as, "a contract *sui generis*, governed by the rules appropriate to it and which must be dealt with by taking into account both the principles of the contract and the particular nature of the function exercised by the arbitrator".²¹

Countries that follow the contractual theory view arbitrators as professionals and therefore subject to civil liability like all other professionals.²²

Jurisdictional theory

Jurisdictional theory is based on the premise that the arbitrator performs judicial functions as an alternative (though private) judge as permitted under the national law (or international convention which the state has implemented) of the particular sovereign state.²³ It postulates that both the arbitrator's powers, and the award rendered, are governed by the laws of the jurisdiction, placing all aspects of the arbitral process ultimately in the control of the state (*lex arbitri*). This theory is justified largely on the grounds that it encourages the use of arbitration as an alternative dispute resolution forum.²⁴

Hybrid theory

Hybrid theory attempts to reconcile the jurisdictional and contractual theories on the basis that arbitrators are creations of statutes but the ability of these arbitrators to perform their function is dependent on the disputing parties' arbitral agreement and the parties appointing them.²⁵ Supporters of this theory "believe that the reality lies somewhere in the middle of the contractual and jurisdictional theory, namely, that neither the arbitrator performs a legal function nor that the award is a contract".²⁶ The parties by their agreement created and fixed the limits of their private jurisdiction and though the arbitrator's duty is to judge, the power to do so is conferred to him by the agreement of the parties.²⁷

¹⁸ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (20 June 2002), <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm> [Accessed 8 September 2017].

¹⁹ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (20 June 2002), <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm> [Accessed 8 September 2017].

²⁰ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (20 June 2002), <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitratorsimmunity.htm> [Accessed 8 September 2017].

²¹ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (20 June 2002), <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm> [Accessed 8 September 2017].

²² J. Brown, "The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion?" [2009] J. Disp. Resol. 229, <http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed 8 September 2017].

²³ E. Onyeama, *International Commercial Arbitration and the Arbitrator's Contract* (New York: Routledge, 2010), p. 33.

²⁴ J. Brown, "The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion?" [2009] J. Disp. Resol. 230, <http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10> [Accessed 8 September 2017].

²⁵ E. Onyeama, *International Commercial Arbitration and the Arbitrator's Contract* (New York: Routledge, 2010), p. 57.

²⁶ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (20 June 2002), <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm> [Accessed 8 September 2017].

²⁷ Anastasia Tsakatoura, "Arbitration: The Immunity of Arbitrators" LEX E-SCRIPTA ONLINE LEGAL J. (20 June 2002), <http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm> [Accessed 8 September 2017].

The English Court of Appeal appears to favour the hybrid approach in *K/S Norjari v Hyundai Heavy Industries Co Ltd*,²⁸ where Sir Nicholas Browne-Wilkinson VC noted that:

“For myself, I find it impossible to divorce the contractual and status considerations: in truth the arbitrator’s rights and duties flow from the conjunction of these two elements. The arbitration agreement is a bilateral contract between the parties to the main contract. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status.”

4. International instruments

UNCITRAL Model Law on International Commercial Arbitration

The Model Law is silent on the question of immunity of an arbitrator. The UNCITRAL Working Group agreed that the question of the liability of an arbitrator could not appropriately be dealt with in a model law on international commercial arbitration nor was it desirable to attempt the preparation of a code of ethics for arbitrators.²⁹

UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules 1976 contain no provisions on the immunity of an arbitrator. However, during the process of revising the 1976 Rules, it was generally agreed that any provision that might be introduced in the Rules to exonerate arbitrators from liability should be aimed at reinforcing the independence of arbitrators and their ability to concentrate with a free spirit on the merits and procedures of the case. It was recognized that arbitrators need to be protected from threats of potentially large claims from parties dissatisfied with the tribunal’s decision. However, such protective provision should not result or appear to result in total impunity for the consequences of any personal wrongdoing on the part of arbitrators or otherwise interfere with public policy or the applicable law.³⁰

Thus, the UNCITRAL Arbitration Rules 2010 provide³¹:

“Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.”

*OHADA*³²

Article 49 of the OHADA Treaty provides as follows:

“the civil servants and employees of OHADA, the judges of the [OHADA Common Court of Justice and Administration, CCJA] and the arbitrators appointed or confirmed

²⁸ *K/S Norjari v Hyundai Heavy Industries Co Ltd* [1992] Q.B. 863; [1991] 3 W.L.R. 1025 at [7].

²⁹ Report of the Working Group on international contract practices on the work of its third session A/CN.9/216, (New York, 16–26 February 1982).

³⁰ Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session A/CN.9/646 (New York, 4–8 February 2008).

³¹ Article 16 UNCITRAL Arbitration Rules 2010.

³² OHADA is the acronym for the French Organisation pour l’Harmonisation en Afrique du Droit des Affaires, which translates into English as Organisation for the Harmonization of Business Law in Africa. Seventeen out of the 54 African countries are members of OHADA including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.

by said Court, shall all benefit from privileges and diplomatic immunities in the performance of their duties.”

Initially the diplomatic immunity and privileges of CCJA arbitrators were limited to those designated by the Court. By a subsequent revision of the treaty, the privileges and immunity were extended to arbitrators appointed by the parties and confirmed by the Court.³³

IBA Rules of Ethics for International Arbitrators 1987

The IBA Rules of Ethics provide that:

“International arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of willful or reckless disregard of their legal obligations.”

The IBA appears to seek a balance between protecting arbitrators from unnecessary suits and holding them accountable for their obligations.

5. Immunity under institutional rules

Rules of arbitral institutions provide for the limitation of the liability of arbitrators, the arbitral institutions, their employees and other organs of the arbitral institutions. The ICC Rules extend immunity to the ICC Court and its members, ICC national Committees and Groups and their employees and representatives.³⁴ Some Rules including the SIAC Rules 2016³⁵ and KIAC Rules 2012³⁶ provide for absolute immunity for the arbitral tribunal and the institutions. Thus, arbitrators and the institution are not liable for any negligence, acts or omissions. The LCIA grants a qualified immunity exempting intentional wrongdoing.³⁷ The Cairo Regional Centre follows suit.³⁸ The Stockholm Chamber of Commerce Rules exempt wilful misconduct or gross negligence.³⁹ The UNCITRAL Arbitration Rules, ICC Rules, LCIA Rules, ICDR Rules⁴⁰ provide that the immunity/limitation of liability is dependent on the relevant applicable law. The Vienna Rules provide that the liability of arbitrators is excluded “to the extent legally permissible”.⁴¹ The ICDR Rules further provide that the parties agree that arbitrators are not under any obligation to make any statement about the arbitration and parties shall not make them, a party or witness in any judicial or other proceedings relating to the arbitration.

6. Immunity under national laws

Arbitral immunity in Africa

Africa is made up of diverse legal systems including common law, customary law, civil law and religious law systems. The laws in a number of African countries are influenced by one or more of these legal systems. Therefore, arbitral immunity will be discussed under

³³ See <http://www.ohada.com/content/newsletters/1240/OHADA-International-Commercial-Arbitration.pdf> [Accessed 8 September 2017].

³⁴ Article 41 ICC Rules 2017.

³⁵ Rule 38 SIAC Arbitration Rules 2016.

³⁶ Article 47 KIAC Arbitration Rules 2012.

³⁷ Article 16 UNCITRAL Arbitration Rules 2010, Article 31 LCIA Rules 2014, Article 79 WIPO Arbitration Rules and Article 16 Lagos Court of Arbitration Arbitration Rules 2013.

³⁸ Article 16 CRCICA Arbitration Rules 2011.

³⁹ Article 48 Stockholm Chamber of Commerce Rules.

⁴⁰ Article 38 ICDR Rules 2014.

⁴¹ Article 46 of the Rules of Arbitration of the Vienna International Arbitral Center (VIAC) 2013.

common law jurisdictions,⁴² civil law jurisdictions⁴³ including the OHADA states⁴⁴ and mixed regime jurisdictions.⁴⁵

Common law jurisdictions in Africa

The principles of arbitral immunity in common law jurisdictions in Africa have been greatly influenced by the common law received from England. In jurisdictions where there are no express provisions on arbitral immunity, common law is deemed to be applicable. Equally the provisions of the English Arbitration Act 1996 on the immunity of an arbitrator were adopted with little or no modifications in Ghana,⁴⁶ Liberia⁴⁷ and Kenya.⁴⁸

Nigeria

The Arbitration and Conciliation Act⁴⁹ makes no provisions on the immunity of arbitrators. However common law is applicable in Nigeria and arbitral immunity from suit exists at common law. Thus, courts in various common-law jurisdictions have consistently recognized that arbitrators perform duties of a judicial character and enjoy the same immunity as judges in view of the adjudicatory nature of their functions.⁵⁰ In *NNPC v Lutin Investment Ltd*,⁵¹ Hon. Justice Uche Omo was named as a party in a judicial proceeding for action he had taken as an arbitrator. The Court heard and determined the dispute involving the arbitrator, however the claims were dismissed. The issue of immunity of the arbitral tribunal was not raised during the court proceedings.⁵²

The Lagos State Arbitration Law specifically provides for arbitral immunity adopting the provisions of the English Arbitration Act 1996.⁵³

Zambia

Section 28 of the Arbitration Act⁵⁴ provides that an arbitrator, an arbitral or other institution or a person authorized by or under the Act to perform any function in connection with arbitral proceedings is not liable for anything done or omitted in good faith in the discharge or purported discharge of that function. The Act further provides that witnesses in arbitral proceedings enjoy protection from liability as witnesses appearing before a court of law.

Uganda

The Ugandan Arbitration and Conciliation Act 2000 is silent on immunity of an arbitrator. However, Section 19(4) provides that every witness giving evidence and every person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court. In *Attorney General v Dtt Services*

⁴² These include Gambia, Sierra Leone, Ghana, Nigeria, Zambia, Malawi, Tanzania, Kenya, Uganda, South Sudan, Rwanda.

⁴³ These include Algeria, Angola, Benin, Burkina Faso, Burundi, Chad, Congo, Democratic Republic of Congo, Cote D'Ivoire, Cape Verde, Central African Republic, Egypt, Equatorial Guinea, Ethiopia, Eritrea, Gabon, Guinea Bissau, Libya, Mauritius, Rwanda.

⁴⁴ These include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.

⁴⁵ These include South Africa, Somalia, Botswana, Cameroon, Lesotho, Mauritius, Namibia, Swaziland, Zimbabwe.

⁴⁶ Section 23(1) Alternative Dispute Resolution Act 2010.

⁴⁷ Section 7.21 Liberian Commercial Code of 2010.

⁴⁸ Section 16B Arbitration Act 1995 as amended in 2010.

⁴⁹ Cap A18LFN 2004.

⁵⁰ *London v Keen* [1916] 1 K.B. 994; *Arenson v Casson Beckman Rutley & Co* [1977] A.C. 405 (HL).

⁵¹ *NNPC v Lutin Investment Ltd* [2006] 2 C.L.R.N. 1 16.

⁵² Adedoyin Rhodes-Vivour, *Commercial Arbitration law and Practice Through the Cases* (South Africa: LexisNexis, 2016), p.216.

⁵³ Section 18(1)–(3) Lagos State Arbitration Law.

⁵⁴ Arbitration Act No.19 of 2000.

& 3 Ors,⁵⁵ it was held that arbitrators are vested with judicial immunity which protects their person from claims by the parties regarding any judicial intervention professed by them. The court on this premise held that there can be no claim for general or special damages against an arbitrator under the Arbitration Act.⁵⁶ Thus the court confirmed that the common law position is applicable in Uganda.

Tanzania

The Tanzanian Arbitration Act makes no provision for the immunity of an arbitrator. However, Tanzania's legal system is based on the English common law and the position of the common law on arbitral immunity is applicable. Thus, an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator unless the act or omission is shown to have been in bad faith and constitutes an intentional breach of duty.⁵⁷

Civil law jurisdictions in Africa

The civil law systems in Africa are inspired by the French, Portuguese, Spanish and the Italian legal systems.

Egypt

The Arbitration Act is silent on the immunity of arbitrators. However, arbitrators generally enjoy immunity from suit save in exceptional cases of fraud, corruption and/or gross negligence. Further, Article 217/2 of the Egyptian Civil Code precludes the exclusion of liability in the case of fraud or gross negligence.

Angola

The Arbitration Act⁵⁸ provides for situations that may give rise to the liability of an arbitrator. Article 9(3) provides that having accepted the office, any arbitrator who withdraws without justification from the performance of his/her functions shall be civilly liable for the damages that he/she may cause. In addition, arbitrators who, with no justified grounds, prevent the arbitral award from being rendered within the time limit shall, under the law, be liable for any losses caused.⁵⁹ However arbitrators are generally immune, much as state judges.⁶⁰

Libya

There are no provisions in Libyan Law No.4 of 2010 on Arbitration and Conciliation. Article 748 Code of Civil and Commercial Procedure of 1953 provides that once an arbitrator accepts an arbitration appointment, the arbitrator may not withdraw without good reason otherwise the arbitrator might be liable in damages.

Arbitrators might be held personally liable for their unjustified failure to render an award, as well as in the event of deliberate misconduct.⁶¹

⁵⁵ *Attorney General v Dtt Services & 3 Ors* (CAD/AMA/01/2013) [2013] UGCADER 1 (10 April 2013); <https://www.ulii.org/ug/judgment/court-appeal/2013/1-0> [Accessed 8 September 2017].

⁵⁶ Sections 13–14 Arbitration and Conciliation Act 2000.

⁵⁷ See <http://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2015/1036895/tanzania> [Accessed 8 September 2017].

⁵⁸ Law 16/2003 of 25 July 2003.

⁵⁹ Article 25(3) Arbitration Act.

⁶⁰ See <https://gettingthedealthrough.com/area/3/jurisdiction/151/arbitration-angola/> [Accessed 8 September 2017].

⁶¹ See <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/libya> [Accessed 8 September 2017].

Mozambique

In Mozambique, an arbitrator who having accepted the position resigns without justification is liable for the damages caused.⁶² The arbitrators or the parties who without justification impede the award being made within the deadline, are liable at law for the damages caused.⁶³ Where an arbitrator breaches any of its duties listed in Article 22(2), the parties may solicit the withdrawal from the office of an arbitrator.⁶⁴ The Law also provides that arbitrators are responsible for the dishonest or fraudulent exercise of their office, for the damages caused and for the violations of the law committed during the arbitration.⁶⁵ In instances where an arbitrator refuses to sign the arbitral award or does not justify in writing the reasons for her dissent or particular vote, the arbitrator may be penalized with the loss of fees.⁶⁶

OHADA states

Most of the OHADA countries practice civil law and have adopted the OHADA Uniform Act of Arbitration. The Uniform Arbitration Act contains no provision on the immunity of an arbitrator. However, arbitrators designated or confirmed by the CCJA shall enjoy privileges and diplomatic immunities under Article 49 of the OHADA Treaty.

7. Arbitral immunity in mixed legal systems in Africa

South Africa

There is no law in South Africa expressly providing for arbitrator immunity.⁶⁷ While notionally a claim may lie against an arbitrator for breach of mandate, there is no case law precedent whereby a party to an arbitration agreement has brought a claim against an arbitrator or former arbitrator in South Africa.⁶⁸ There is also no restriction on the arbitrator's entitlement to require the parties to arbitration to contractually indemnify him or her on acceptance of the mandate.⁶⁹

Rwanda

The Rwandan Arbitration Code⁷⁰ makes no provision for the immunity of an arbitrator.

Mauritius

The Mauritian International Arbitration Act 2008 provides that the arbitrator enjoys immunity for anything done or omitted while acting as arbitrator unless the act or omission is shown to have been in bad faith.⁷¹ The immunity is extended to the Permanent Court of Arbitration

⁶² Article 21(5) Arbitration Law no.11/99 of 8 July. See <http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf> [Accessed 8 September 2017].

⁶³ Article 35(5) Arbitration Law no.11/99 of 8 July, <http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf> [Accessed 8 September 2017].

⁶⁴ Article 22(3) Arbitration Law no.11/99 of 8 July, <http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf> [Accessed 8 September 2017].

⁶⁵ Article 22(4) Arbitration Law no.11/99 of 8 July, <http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf> [Accessed 8 September 2017].

⁶⁶ Article 22(5) Arbitration Law no.11/99 of 8 July, <http://www.acismoz.com/lib/services/translations/Arbitration%20Law%2011%2099%20ENG.pdf> [Accessed 8 September 2017].

⁶⁷ See <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/south-africa> [Accessed 8 September 2017].

⁶⁸ See <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/south-africa> [Accessed 8 September 2017].

⁶⁹ See <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/south-africa> [Accessed 8 September 2017].

⁷⁰ Law No.005/2008 of 14 February 2008.

⁷¹ Section 19 Mauritian International Arbitration Act 2008.

(PCA) in discharge of its functions under the Act. This provision is headed as “protection from liability and finality of decisions”. It is based on Sections 29 and 74 of the English Arbitration Act 1996 and it has been recognized that English case law may be of assistance in future interpretations of this provision.⁷²

8. Countries outside Africa

Common law countries favour the jurisdictional approach on arbitral immunity. The common law position evolved from England and the courts long recognized the concept of arbitral immunity in several cases.⁷³ The common law principles conferring immunity upon arbitrators have been codified by s.29 of the Arbitration Act 1996.⁷⁴ Section 29 of the English Arbitration Act provides that an arbitrator or his employee or agent is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. A resigning arbitrator is also liable for any liability incurred by reason of his resigning (if any). The Act extended arbitral immunity to arbitral institutions.⁷⁵ An arbitral or other institution or person designated or requested by parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been made in bad faith.⁷⁶ An arbitral or other institution or persons by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator, or by his employees or agents, in the discharge or purported discharge of his functions as arbitrator.⁷⁷ Thus both arbitrators and arbitral institutions are not immune for acts or omissions done in bad faith.

The position of the English Arbitration Act has largely influenced the position of some common law countries including Australia.⁷⁸ Some countries including Canada,⁷⁹ USA,⁸⁰ India,⁸¹ do not have national laws with provisions on arbitral immunity; however, the common law position on arbitral immunity is applicable. However, in Ireland, an arbitrator is not liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions⁸² even where an arbitrator acts in bad faith unlike the English Arbitration Act.⁸³

⁷² See <https://pca-cpa.org/wp-content/uploads/sites/175/2016/02/Mauritian-International-Arbitration-Legislation-Handbook.pdf> [Accessed 8 September 2017].

⁷³ *Sutcliffe v Thackrah* [1974] A.C. 727.

⁷⁴ R. Merkin, *Arbitration Law* (London: Informa Professional, 2004), p.387.

⁷⁵ Section 74 Arbitration Act 1996.

⁷⁶ Lord Mackay of Clashfern, *Halsbury's Laws of England*, 4th edn Reissue Vol.2(3) Arbitration, para 36.

⁷⁷ Lord Mackay of Clashfern, *Halsbury's Laws of England*, 4th edn Reissue Vol.2(3) Arbitration, para 36.

⁷⁸ See Section 28 of the International Arbitration Act 1974 (as amended in 2010). However, the immunity of an arbitrator was not extended to the employee or agent of the arbitrator. Equally, an entity that appoints, or fails or refuses to appoint, a person as arbitrator is not liable in relation to the appointment, failure or refusal if it was done in good faith. Immunity of an arbitrator applies in domestic arbitral proceedings and the immunity also extends to the arbitrator acting as a “mediator, conciliator or other non-arbitral intermediary”. See *Sinclair v Bayly* unreported 19 October 1994 Supreme Court of Victoria, Nathan J.

⁷⁹ See http://www.fasken.com/files/Publication/0020d7a2-7c72-4320-8c00-42bf8f24fe0/Presentation/PublicationAttachment/d3a5202-5aa9-4647-8368-4eb1192235df/1A10_Chapter-37_Canada.pdf [Accessed 8 September 2017]. See also *Sport Maska Inc v Zittner* [1988] 1 S.C.R. 564.

⁸⁰ See *Malik v Ruttenberg*, 942 A.2d 136 (N.J. Super. Ct. App. Div. 2008); *Johnson v Thompson-Smith*, No.16 C 1182 (N.D. Ill., Aug. 23, 2016). Various court decisions have also extended immunity to arbitral institutions. See *Owens v American Arbitration Association*, No. Civ. 15-3320 (D. Minn. Dec. 15, 2015).

⁸¹ See <http://globalarbitrationreview.com/jurisdiction/1000192/india> [Accessed 8 September 2017]. See also *Rajesh Batra v Ranbir Singh Ahlawat*, 2011 (4) Arb. LR. 371 (Delhi), <https://indiankanoon.org/doc/121036482/> [Accessed 8 September 2017].

⁸² Section 22(1) Arbitration Act 2010. This immunity is extended to persons engaged by the arbitrators including an employee, agent, advisor or expert and arbitral institutions. See Section 22(2)–(5) Arbitration Act 2010.

⁸³ See <https://www.lawteacher.net/free-law-essays/commercial-law/the-principle-of-arbitrator-immunity-commercial-law-essay.php> [Accessed 8 September 2017], <https://iclg.com/practice-areas/international-arbitration/-international-arbitration-2016/ireland> [Accessed 8 September 2017].

Civil law countries favour the contractual approach on arbitral immunity. Generally Civil Codes of countries including Austria,⁸⁴ Italy⁸⁵ expressly provide for the liability of arbitrators. In some countries like Germany,⁸⁶ France,⁸⁷ Netherlands⁸⁸ there are no explicit provisions on the immunity of arbitrators; however, arbitrators may be liable under provisions for contractual breaches. The Malaysian Arbitration Act provides that any acts or omissions by the arbitrator in the discharge of his functions will not attract liability except where an impugned act or omission was in bad faith.⁸⁹ The Spanish Arbitration Act provides that where arbitrators and, as appropriate, the arbitral institution, fail to comply with their commission in good faith, they will be liable for any damages resulting from bad faith, recklessness or mens rea.⁹⁰ It further provides that arbitrators or arbitral institutions on their behalf will be bound to take liability insurance or equivalent security for the amount established in the rules.⁹¹ The Singapore International Arbitration Act provides that an arbitrator will not be liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator and any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award.⁹² The Act further adopts the provisions of the English Arbitration Act 1996 on the immunity of appointing authorities and arbitral institutions.⁹³ The New Zealand Arbitration Act provides that arbitrators are not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator.⁹⁴

9. Synergies

Most jurisdictions acknowledge a form of immunity either absolute or qualified for arbitrators and/or including their agents for either judicial acts only and/or procedural errors.

An analysis of both common law and civil law jurisdictions reveals that most jurisdictions apply limited/qualified immunity. Most jurisdictions acknowledge liability on limited grounds, e.g. failure to discharge duties, delay in the delivery of the award, misconduct, fraud, bad faith and corruption.

The immunity of arbitrators does not extend to criminal matters including bribery, corruption and embezzlement of funds in both common law and civil law jurisdictions. Neither does it extend to non-judicial acts nor omissions in excess of the arbitrator's jurisdiction.

⁸⁴ See Section 594(4) of the Austrian Code of Civil Procedure. See also <http://globalarbitrationreview.com/jurisdiction/1003167/austria> [Accessed 8 September 2017].

⁸⁵ Article 813 bis of the Italian Civil Procedural Code.

⁸⁶ See sections 1036 and 1038 ZPO German Civil Code (Bürgerliches Gesetzbuch—BGB). See also <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/germany> [Accessed 8 September 2017], <https://www.globallegalinsights.com/practice-areas/international-arbitration-/global-legal-insights---international-arbitration-3rd-ed./germany> [Accessed 2 August 2017], <http://www.inhouselawyer.co.uk/index.php/practice-areas/arbitration/germany-arbitration/> [Accessed 8 September 2017].

⁸⁷ Article 1142 of the French Code Civil, https://eguides.cmslegal.com/pdf/arbitration_volume_1/CMS%20GtA_Vol%20I_FRANCE.pdf [Accessed 8 September 2017], http://www.inhouselawyer.co.uk/index.php/wgd_question/are-arbitrators-immune-from-liability/ [Accessed 8 September 2017].

⁸⁸ Article 6:162 of the Netherlands Civil Code. See also <http://www.lexology.com/library/detail.aspx?g=d7fd72d8-8021-4b0a-836b-0515ab2c4fda> [Accessed 8 September 2017].

⁸⁹ Section 47AA Malaysian Arbitration Act.

⁹⁰ Article 21 Spanish Arbitration Act.

⁹¹ Article 21 Spanish Arbitration Act.

⁹² Section 25, International Arbitration Act Chapter 143A.

⁹³ Section 25A International Arbitration Act Chapter 143A. Compare with Section 74 English Arbitration Act 1996.

⁹⁴ Section 13 New Zealand Arbitration Act.

10. Divergence

Arbitral immunity in common law countries is premised on the origin and character of the appointment and not on the methods of performing the duties.⁹⁵ In these jurisdictions, judges and arbitrators are perceived as playing similar roles in the administration of justice and arguments are made for immunity on public policy grounds.⁹⁶ Civil law countries premise liability of an arbitrator on the terms of appointment rather than the functions an arbitrator performs. Thus, the liability of the arbitrator is based on the contractual relationship between the arbitrator and the parties. In mostly civil law jurisdictions, an arbitrator may also be liable in torts for failure to act with diligence or due care as a professional. Interestingly in some civil law jurisdictions, in spite of the contractual basis, the courts recognize that arbitrators perform similar functions with judges and should be accorded some form of immunity from suits.⁹⁷

There are divergences in the scope, nature and extent of arbitral immunity in civil and common law jurisdictions. The scope of the liability of an arbitrator in civil law jurisdictions appears wider than that applicable in common law countries. In common law countries, the major exception to immunity will be bad faith⁹⁸ or lack of good faith and for losses occasioned by the resignation of an arbitrator.⁹⁹ Arbitrators in civil law countries may be liable under the general principles of tort and contract law on several grounds including delay in rendering a timely award, erroneous application of the law, gross negligence, willful misconduct, denial of justice and misrepresentation.

Most common law jurisdictions provide for the immunity of an arbitrator while civil law jurisdictions expressly provide and/or make reference to the liability of an arbitrator.

Common law jurisdictions practice absolute immunity or limited immunity with very few grounds for liability. Civil law jurisdictions provide for absolute liability or wider grounds for the liability of an arbitrator.

In some common law jurisdictions, immunity is extended to persons engaged by the arbitrator including employees, agents, advisors or experts. In Australia, immunity is further extended to an arbitrator acting as a “mediator, conciliator or other non-arbitral intermediary”. Arbitral immunity has also been extended to appointing authorities including arbitral institutions and their employees or agents in respect of the appointment of arbitrators and other functions. Some jurisdictions like Zambia and Uganda provide that immunity extends to witnesses in arbitral proceedings. However, a number of civil law jurisdictions recognize the immunity of arbitrators and/or arbitral institutions while it is silent on the liability of persons employed by arbitrators or appointing authorities.

Arbitrators in civil law jurisdictions are usually liable in damages for civil claims. In some civil jurisdictions, the arbitrators have been found liable to pay all or part of the costs of a failed arbitration.¹⁰⁰ The arbitrators may also forfeit all or part of their fees in instances where liability is established by the court.

There are few or no cases in common law jurisdictions where arbitrators were held liable for civil claims arising out of the arbitration.¹⁰¹ Many common law jurisdictions have adopted the UNCITRAL Model Law which provides remedies for the acts or omissions of the

⁹⁵ Julian D.M. Lew, Loukas A. Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), p.289.

⁹⁶ A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6th edn (2015), p.324.

⁹⁷ *Bompard v Consorts C. et al.* (Court of Appeal of Paris, 22 May 1991), <https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/france> [Accessed 8 September 2017], <https://www.hoganlovells.com/en/blogs/international-arbitration-news/arbitrators-in-france-a-quasiimmunity-from-liability> [Accessed 8 September 2017].

⁹⁸ In England, bad faith has been said to mean malice in the sense of personal spite or desire to injure for improper reasons or knowledge of absence of power to make the decision in question. See David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration*, 23rd edn (London: Sweet & Maxwell, 2007), p.175.

⁹⁹ Sutton, Gill and Gearing, *Russell on Arbitration*, 23rd edn (2007), p.175.

¹⁰⁰ *Du Toit v Vale* [1993] WAR 138.

¹⁰¹ See <http://www.nadr.co.uk/articles/published/construction/Immunity%20Sporin%202006.pdf> [Accessed 8 September 2017].

arbitrator. Commonly the recourse against the acts or omissions of the arbitrator is against the award not the arbitrator personally subject to the exceptions to the immunity rule.¹⁰² In instances of misconduct, the arbitrator may be removed upon application to the Court.

11. Conclusion

Arbitrators should be able to perform their functions without threats, harassment or intimidation from a losing party. However, arbitrators are professionals who are being remunerated for the tasks they perform. All jurisdictions, civil law and common law, recognize that arbitrators owe duties to the parties irrespective of whether they follow the contractual or jurisdictional approach.

The CIARB London Centenary Principles 2015 recognizes arbitral immunity as an important principle for an efficient and effective seat of arbitration. It provides for a clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

The issue is the extent to which arbitrators should be conferred with immunity. It appears there is no common worldwide approach. The standards for liability and/or the exceptions currently provided for in most national laws and rules e.g. “bad faith”, “good faith” and “conscious and deliberate wrongdoing” are not easily ascertainable.

Uniform principles and standards of immunity across the civil/common law divide should be adopted with a view to establishing uniform application of immunity and the exceptions to the protection. Making arbitrators liable for wrongful acts or omission preserves the integrity of the office and the continuing legitimacy of the arbitration process. Adopting a uniform approach beyond the divide augurs well for the development and growth of international commercial arbitration and will be in line with the spirit and intent of the harmonization of arbitration law and practice. UNCITRAL and Arbitral institutions should promote the case for harmonization in this area.

¹⁰² However, see the case of *Wicketts v Brine Builders & Siederer* [2001] App. L.R. 06/08 where the English Court removed the arbitrator for serious procedural irregularity and he was ordered to pay the costs of a party to the arbitration.

Investment Arbitration Tribunals: Beyond the Civil-Common Law Dichotomy

Benoit Le Bars*

1. Introduction

The classical difference between civil and common law systems lies in the manner in which legal rules are generated.¹ While the civil law legal tradition usually relies on codified rules that cover all matters capable of being submitted to a court, the common law tradition is generally less comprehensive in its compilation of legal rules and statutes. Consequently, the civil law tradition is heavily dependent on a codified set of laws whereas the common law tradition relies heavily on precedent, thereby giving the judge a pre-eminent role in the law-making process. In addition to this classical substantive distinction that first comes to mind, the procedural conduct of the two legal systems differs as well.² For example, a common law judge typically takes a more passive role in the conduct of legal proceedings, whereas a civil law judge may take a more active role, such as by examining witnesses himself.³ These contrasts, among others, as regards the procedural and substantive aspects of the two legal traditions constitute the civil-common law dichotomy.

Investment tribunals are confronted by the civil-common law dichotomy less than commercial arbitration tribunals. International investment law developed on the presumption that an alien investor must be protected against unacceptable measures of a host State by rules of international law that are independent from those of the host State.⁴ It therefore developed substantive protections particular to the protection of foreign investors and investments, which are often distinct from those employed by national systems. Moreover, as these protections were developed through treaty negotiations between both common and civil law States, the standards of protection, barring a few exceptions, mostly developed as autonomous standards, which did not mimic either conventional civil law or common law traditions.⁵ Even in those areas of investment law, where the civil-common law dichotomy is relevant, treaty negotiation and/or arbitral practice has veered towards reconciling this dichotomy.

Accordingly, the civil-common law dichotomy hardly features in decision-making by present day investment tribunals, as can be seen from the basis of decision-making by investment tribunals, as well as investment tribunals' approach to decision-making.

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¹ Frédéric G. Sourgens, "Law's Laboratory: Developing International Law on Investment Protection as Common Law" (2014) 34 Nw. J. Int'l L. & Bus. 181, 224.

² Christian Borris, "The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process", in Stefan N. Frommel and Barry A. K. Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 1999), p.6.

³ C. Borris, "The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process", in S. N. Frommel and B. A. K. Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration* (1999), p.7.

⁴ Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (Oxford: Oxford University Press, 2012), p.3.

⁵ This does not mean that investment protection is completely divorced from domestic law. Depending upon the circumstances of each case, the interplay between rules of a host State and general rules of international law may be significant to the resolution of an international investment dispute. For example, certain areas of domestic law, such as rules relating to nationality, may determine the jurisdiction of a tribunal. See Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (2012), p.12.

2. The basis of decision-making by investment tribunals

Foreign investment law is a juxtaposition of general international law, international economic law, and, in certain circumstances, the domestic law of host States.⁶ The primary source of contemporary international law⁷ is bilateral (BITs)⁸ and multilateral investment treaties (MITs)⁹ that contain the substantive standards particular to investment protection.

Additionally, certain multilateral treaties, such as The Convention on the Settlement of Disputes between States and Nationals of Other States (ICSID Convention), provide the procedural framework for the settlement of disputes between contracting States.¹⁰ Moreover, parties may choose to apply international rules, such as the UNCITRAL Rules, or those of international institutions such as the International Chamber of Commerce, Stockholm Chamber of Commerce etc., to the procedural aspects of the arbitration.

Similarly, international investment tribunals may be guided by “soft law” while conducting arbitration proceedings, such as the IBA Rules on the Taking of Evidence in International Arbitration of 2010 (IBA Rules).¹¹

A brief examination of investment treaties as well as other international instruments, reveals that international investment law is moving towards the convergence of civil and common law legal cultures and norms.

Convergence in investment treaties

Investment treaties “are negotiated in the context of legal preferences shaped by legal attitudes that exist within the legal systems of the different parties to such treaties”.¹² Consequently, these legal attitudes may sometimes be reflected in investment treaties.

As stated above, evidence of the civil-common law dichotomy in investment treaties is rare. In the author’s opinion, the most flagrant instance of an arguable influence of these disparate legal cultures in investment law is the definition of corporate nationality. However, the author will use this example to demonstrate that, although in theory, corporate nationality is defined differently in the civil and common law cultures, in investment treaty practice, there seems to be a trend of convergence.

Contracting States have a broad discretion to define corporate nationality under a BIT,¹³ as international instruments such as the ICSID Convention do not impose any particular test of nationality.¹⁴ According to international law and practice, there are different criteria to define the nationality of a corporate entity.¹⁵ The generally accepted criteria for nationality of a corporate entity include the place of incorporation, or the corporate seat (or *siège*

⁶ Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (2012), p.12.

⁷ Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (2012), p.13 and following.

⁸ To date, there are 2,366 Bilateral Investments Treaties that are in force. See <http://investmentpolicyhub.unctad.org/IIA> [Accessed 8 September 2017].

⁹ Such as the North American Free Trade Agreement (NAFTA), and the Energy Charter Treaty (ECT).

¹⁰ Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (2012), p.13.

¹¹ *Churchill Mining and Planet Mining Pty Ltd v Indonesia*, ICSID Case No.ARB/12/14 and 12/40, Procedural Order No.5, 19 March 2013, para.4; *Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Procedural Order No.1, 20 October 2006, para.6.

¹² M. Sonarajah, *The International Law on Foreign Investment*, 3rd edn (Cambridge: Cambridge University Press, 2010), p.200.

¹³ *KT Asia Investment Group BV v Kazakhstan*, ICSID Case No.ARB/09/8, Award, 17 October 2013, para.113.

¹⁴ *Mobil Corp, Venezuela Holdings BV, Mobil Cerro Negro Holding Ltd, Mobil Venezolana de Petróleos Holdings Inc, Mobil Cerro Negro Ltd, and Mobil Venezolana de Petróleos Inc v Venezuela*, ICSID Case No.ARB/07/27, Decision on Jurisdiction, 10 June 2010, paras 155–157; *The Rompetrol Group NV v Romania*, ICSID Case No.ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, paras 81–83 and 93; *KT Asia Investment Group BV v Kazakhstan*, ICSID Case No.ARB/09/8, Award, 17 October 2013, para.113.

¹⁵ *Orascom TMT Investments Sàrl v Algeria*, ICSID Case No.ARB/12/35, Award, 31 May 2017, para.267.

social).¹⁶ Some investment treaties, however, look to the nationality of the natural or legal person(s) that exercise control over a company to determine the nationality of that company.¹⁷

While countries of the civil legal culture often retain the *siège social* theory of corporate nationality¹⁸ which determines nationality based on the place of effective management of a company,¹⁹ countries within the common law legal culture tend to favour the incorporation theory, which attributes to a company the nationality of the State in which it was incorporated.²⁰

However, these preferences are not set in stone. Indeed, the incorporation theory is the preferred and most widely used test in international law.²¹ Moreover, States often digress from their legal cultures during treaty negotiations. Singapore, for example, adopts the incorporation theory in its BIT with the UK,²² another common law country, but employs the *siège social* definition for German companies (while retaining the incorporation theory for Singaporean companies) in its BIT with Germany, a civil law country.²³ The UK applies the incorporation theory regarding corporate nationality in its BIT with Nigeria,²⁴ and the *siège social* theory in its BIT with the Philippines.²⁵

¹⁶ Christoph Schreuer, *The ICSID Convention: A Commentary*, 2nd edn (Cambridge: Cambridge University Press, 2009), Art.25, para.694; *Tokios Tokelés v Ukraine*, ICSID Case No.ARB/02/18, Decision on Jurisdiction, 29 April 2004, paras 40–41; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No.ARB/98/2, Award I, 8 May 2008, paras 548–550.

¹⁷ Rachel Thorn and Jennifer Doucleff, “Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of ‘Investor’” in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2010) p.8.

¹⁸ See, for example, the French Civil Code Art.1887, para.2; the French Commercial Code Art.L.210-3; the Uniform Act relating to Commercial Companies and Economic Interest Groups of the Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA) Art.26; see also M. Sonarajah, *The International Law on Foreign Investment*, 3rd edn (2010), p.200.

¹⁹ R. Thorn and J. Doucleff, “Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of ‘Investor’”, in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (2010), pp.7–8.

²⁰ M. Sonarajah, *The International Law on Foreign Investment*, 3rd edn (2010), p.324.

²¹ C. Schreuer, *The ICSID Convention: A Commentary*, 2nd edn (2009), para.694; M. Sonarajah, *The International Law on Foreign Investment*, 3rd edn (2010), p.324; R. Thorn and J. Doucleff, “Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of ‘Investor’”, in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (2010), p.6.

²² Agreement between the Government of the Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Singapore for the Promotion and Protection of Investments, Art.1(d), which entered into force on 22 July 1975.

²³ In the Treaty concerning the Promotion and Reciprocal Protection between Germany and Singapore, dated 3 October 1973, entered into force on 1 October 1975, Art.1(4) states that: “The term ‘companies’ shall mean: (a) in respect of the Federal Republic of Germany: any juridical person as well as any commercial company or other company or association with or without legal personality, having its seat in the territory of the Federal Republic of Germany and lawfully existing consistent with legal provisions irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit, and (b) in respect of the Republic of Singapore: any company incorporated in the territory of the Republic of Singapore, or any juridical person or any association of persons lawfully constituted in accordance with its legislation”.

Please note that a new MIT is being discussed between the EU and Singapore and if it enters into force, the Germany-Singapore BIT will be replaced. This MIT adopts a stricter theory (a combination of place of incorporation and effective place of business) as Art.9.1(4) of the draft provides: “a ‘Union juridical person’ or a ‘Singapore juridical person’ means a juridical person set up in accordance with the laws of a Member State of the European Union or Singapore respectively, and having its registered office, central administration⁴ [sic], or principal place of business in the territory of the European Union or Singapore, respectively”; M. Sonarajah, *The International Law on Foreign Investment*, 3rd edn (2010), p.200.

²⁴ Agreement between the Federal Republic of Nigeria and the United Kingdom of Great Britain and Northern Ireland Art.1(d), signed and entered into force on 11 December 1990.

²⁵ Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Philippines, 3 December 1980 Art.1.4, entered into force on 2 January 1981.

Similarly, countries often combine or vary the aforementioned tests. Swiss,²⁶ Chilean,²⁷ Iranian,²⁸ and Philippine²⁹ BITs sometimes prescribe a strict test requiring that a company be incorporated, have its seat, and conduct its actual business in the same State, in order to be considered a national of that State.³⁰

Consequently, the civil-common law dichotomy with respect to corporate nationality is largely theoretical. In practice, contracting States have “complete freedom of choice”³¹ as regards the manner in which to define the nationality of companies, and a tribunal cannot add requirements for nationality that have not been provided by contracting States.³² To the extent that contracting States do not feel bound to adopt a definition of corporate nationality that is particular to any specific legal culture, and often devise mixed requirements for corporate nationality, the civil-common law dichotomy has little practical relevance for an investment tribunal. In practice, even private international law theories of corporate nationality often mix these approaches.³³

Thus, international law, including investment treaties, “can be viewed as a ‘common denominator’ of the expectations and practices of States of widely varying legal traditions ...”³⁴ This is apparent from international instruments other than investment treaties as well.

Convergence in other international instruments

Broadly speaking, convergence with respect to legal instruments that are not investment treaties, but are applicable to investment arbitration proceedings, is evident from the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) and the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles).

The IBA Rules

The first example discussed is a procedural standard, namely the IBA Rules of Evidence. The taking of evidence is an extremely important component of the investment arbitration process. Yet this has the potential for the most divergence between the common and civil law systems and owing to structural and philosophical differences between the roles of the adjudicators and the objective of the dispute resolution proceedings in the respective legal systems.

The IBA Rules of Evidence were adopted by the IBA in 1999 and revised in 2010, with the express aim of governing “in an efficient and economical manner the taking of evidence in international commercial arbitrations, particularly those between Parties from different legal traditions”.³⁵

²⁶ See for example, Agreement between the Swiss Confederation and the Republic of Djibouti on the Promotion and Reciprocal Protection of Investment, 4 February 2001 Art.I(1)(b), entered into force on 10 June 2001.

²⁷ See for example, Agreement between the Republic of Chile and the Republic of Finland on the Promotion and Reciprocal Protection of Investments, 27 May 1993 Art.I(3)(b), entered into force on 1 May 1996.

²⁸ See for example, Agreement on Reciprocal Promotion and Protection of Investments between the Socialist Republic of Sri Lanka and the Islamic Republic of Iran Art.I(2)(b), signed on 25 July 2000 but did not enter into force.

²⁹ See for example, Agreement between the Republic of the Philippines and the Argentine Republic on the Promotion and Reciprocal Protection of Investment, 20 September 1999 Art.I(2)(b), entered into force on 1 January 2002.

³⁰ R. Thorn and J. Doucleff, “Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of ‘Investor’”, in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (2010), p.9.

³¹ *Saluka Investments B.V. v Czech Republic*, UNCITRAL/PCA, Partial Award, 17 March 2006, para.241.

³² *Saluka Investments B.V. v Czech Republic*, UNCITRAL/PCA, Partial Award, 17 March 2006, para.241.

³³ Alain Couret and Benoit Le Bars, “Livre II: L’Entreprise Privée face au Commerce International” in Jaques Béguin, Michel Menjucc, et al., *Droit du Commerce International*, 2nd edn (Paris: LexisNexis, 2016), p.186 and following (in French).

³⁴ *Sanum Investments Ltd v Laos*, PCA Case No.2013-13, Judgment of the Court of Appeal of the Republic of Singapore, 29 September 2016, para.61.

³⁵ In keeping with the flexibility inherent to arbitration practice, it is important to note that the IBA Rules are just guidelines rather than binding norms, and the parties are free to give these rules as little or as much importance as they wish. See Preamble to the 1999 version of the IBA Rules.

The IBA Rules are equally well suited to both commercial and investment arbitration proceedings. Investment tribunals have used the IBA Rules (both the 1999³⁶ and 2010³⁷ versions) upon the agreement of parties as guidance with respect to evidentiary matters. Indeed, the 2010 edition of the Rules removed the word “commercial” from the title of the previous version of the Rules to reflect the use of the IBA Rules in both commercial and investment arbitration.³⁸

The IBA Rules contain principles that are accepted in both civil and common law countries, and find middle ground between the two legal traditions, where evidentiary practices differ.³⁹ This harmonisation is particularly evident with respect to document production, a key area in which civil and common law procedures differ.⁴⁰

To illustrate, the two legal traditions have a different approach towards a request for document production. The IBA Rules of Evidence eliminate the differences by providing a uniform method that is acceptable for both common law and civil law practitioners. The approach is to limit the very broad discovery of documents under the common law and expand the restrictive document production under the civil law. In international arbitration, the parties cannot exercise a “fishing expedition”, which is a request for a very broad and unspecific category of documents,⁴¹ used in common law,⁴² but they have the possibility to request a specific and narrow category of documents that are relevant and material to the outcome of the case.⁴³ This approach enables the party to obtain necessary documents from the other party or a third party, which may not be possible in civil law courts.

One of the grounds of objection to a document requested during document production is that the requested document is subject to a legal privilege.⁴⁴ Legal privilege is not understood in the same way in the common law and the civil law. The US Federal law recognises two types of legal professional privilege, the attorney-client privilege for a document used for giving or obtaining legal advice, and the litigation privilege for a document submitted to a legal advisor or in litigation.⁴⁵ Under the Swiss and German law, there is only one type of legal professional privilege that is not determined by the type of the document, but with respect to the person in whose possession the document is.⁴⁶ Generally, documents in the possession of lawyers enjoy legal professional privilege whereas those in the possession of clients do not.⁴⁷ In order to resolve these differences, the IBA Rules give the arbitral tribunal the discretion to choose a legal or ethical rule that it deems

³⁶ See for example, *Methanex Corp v United States of America*, UNCITRAL, Final Award, 3 August 2005; *Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Procedural Order No.1, 20 October 2006, para.6; *Grand River Enterprises Six Nations Ltd. et al. v United States of America*, UNCITRAL, Award, 12 January 2011, para.32; *Churchill Mining and Planet Mining Pty Ltd v Indonesia*, ICSID Case No.ARB/12/14 and 12/40, Procedural Order No.5, 19 March 2013, paras 4 and 7.

³⁷ *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No.ARB(AF)/12/1, Procedural Order on Privileged Document Production, 5 July 2013, paras 33 and 42; *American Silver Ltd v Bolivia*, PCA Case No.2013-15, Procedural Order No.14, 1 April 2016, paras 33 and 37.

³⁸ Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p.2.

³⁹ C. Borris, “The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process”, in S. N. Frommel and B. A. K. Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration* (1999), pp.15–17.

⁴⁰ Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p.7.

⁴¹ Reto Marghitola, *Document Production in International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2015), p.61.

⁴² Bernard Hanotiau, “Massive Productions of Documents and Demonstrative Exhibits” in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Paris: ICC, 2009), p.358.

⁴³ IBA Rules Art.3.3.

⁴⁴ IBA Rules Art.9.2(b).

⁴⁵ R. Marghitola, *Document Production in International Arbitration* (2015), pp.80–82.

⁴⁶ R. Marghitola, *Document Production in International Arbitration* (2015), pp.82, 83.

⁴⁷ R. Marghitola, *Document Production in International Arbitration* (2015), pp.82, 83.

applicable.⁴⁸ One of the criteria to determine the applicable rule is to consider the expectation of the parties and their legal counsel.⁴⁹

In *Apotex Holdings v United States*, the Respondent argued that such expectations should be judged with respect to the approach to privilege prevailing in the home jurisdiction of the parties and their advisors.⁵⁰ The tribunal, however, found that, as an international arbitration tribunal, its decision would not be based on national law, but on the exercise of its discretionary powers under the IBA Rules and the ICSID Additional Facility Rules that were applicable to the case.⁵¹ By doing so, the tribunal gave due regard to the “need to maintain fairness and equality as between the Parties”.⁵² By applying the IBA Rules, investment tribunals thus avoid most clashes between the civil law and common law methods of production of evidence.

The UNIDROIT Principles

The second example is that of the UNIDROIT Principles, which contain substantive principles of commercial law first promulgated in 1994. Again, this was a deliberate effort, to “establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied”.⁵³ The UNIDROIT Principles are the product of legal scholars and experts representing different legal systems, and they combine the principles of contract law from both the common law and civil law traditions.

The application of the UNIDROIT Principles in investment arbitration is infrequent but not unprecedented, especially in a treaty-based dispute arising out of a contractual relationship between an investor and the host State. The UNIDROIT Principles may be applied in three situations.

The arbitral tribunal shall apply the UNIDROIT Principles where the parties have explicitly agreed to its application.⁵⁴ In the absence of an explicit choice of law, the arbitral tribunal may apply the UNIDROIT Principles as an implicit choice of law. In *Lemire v Ukraine*, the arbitral tribunal found that the parties had failed to agree on either Ukrainian or US law as the applicable law, but had incorporated extensive parts of the UNIDROIT Principles into the terms of their settlement agreement. The arbitral tribunal, which was given the power to decide on the applicable law by the parties, decided that the agreement should be governed by the rules of international law, especially the UNIDROIT Principles.⁵⁵

Some of the UNIDROIT Principles, by virtue of being the codification of principles of contract law in a large number of legal systems, may be applied as general principles of public international law.⁵⁶ The tribunal in *Petrobart v Kyrgyz Republic* recognised the UNIDROIT Principles as rules of international law, especially the principles governing the interest rates, and thus preferred to apply the UNIDROIT Principles rather than municipal law.⁵⁷

⁴⁸ IBA Rules Art.9.2(b).

⁴⁹ IBA Rules Art.9.3(c).

⁵⁰ *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No.ARB(AF)/12/1, Procedural Order on Privileged Document Production, 5 July 2013, para.20.

⁵¹ *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No.ARB(AF)/12/1, Procedural Order on Privileged Document Production, 5 July 2013, para.21; see also *Philip Morris Asia Ltd v Australia*, PCA Case No. 2012-12, Procedural Order No.12 regarding the Parties’ Privilege Claims, 14 November 2014, para.4.6.

⁵² IBA Rules Art.9.3(e).

⁵³ 2010 UNIDROIT Principles, Introduction to the 1994 Edition, p.xxiii.

⁵⁴ See for example, ICSID Convention Art.42(1), which states that: “[t]he Tribunal shall decide the dispute in accordance with such rules of law as may be agreed by the parties”. See also UNCITRAL Arbitration Rules Art.35(1), which states that, “[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute ...”.

⁵⁵ *Joseph Charles Lemire v Ukraine*, ICSID Case No.ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para.111.

⁵⁶ Giuditta Cordero-Moss and Daniel Behn, “The Relevance of the UNIDROIT Principles in Investment Arbitration” (2014) *Unif. L. Rev.* 17.

⁵⁷ *Petrobart Ltd v Kyrgyzstan*, SCC Arbitration, Award, 29 March 2005, para.88.

In the absence of an explicit choice, the UNIDROIT Principles have been used as corroboration of the applicable national law because they have a supplementary function for ensuring that a domestic law is “interpreted and supplemented in accordance with internationally accepted standards and/or the special needs of cross-border trade relationships”.⁵⁸ Such practice can be seen in *African Holding v Congo* in which the tribunal applied the UNIDROIT Principles in conjunction with Congolese law, regarding the formation of contract.⁵⁹ The tribunal in *Al-Kharafi v Libya* also employed the UNIDROIT Principles along with Libyan law for assessing damages.⁶⁰ This practice occurs when there are “doubts as to the proper solution to be adopted under that [municipal] law, either because different alternatives are available or because there seem to be no specific solutions at all”.⁶¹

The combination of principles of contract law from different legal systems in the UNIDROIT Principles bridges the common-civil law divide and provides a possibility to apply these principles in an international context such as investment arbitration. As discussed earlier, in the absence of the parties’ adoption of the UNIDROIT Principles, investment arbitration tribunals have employed them as a corroboration of international law and national law because they are regarded as international rules reflecting the principles of contract law of both legal traditions.

3. Investment tribunals’ approach to decision-making

While investment treaties provide general standards of protection to investors, such as the provision by States of fair and equitable treatment to investors and their investments, and dispute settlement provisions, the interpretation and application of these standards of protection is left to arbitral tribunals that decide on a case-by-case basis using their discretionary power.⁶² Similarly, when provisions of investment treaties are silent as to the scope of their application or the extent of a standard of protection, tribunals have to exercise their discretion while interpreting and applying such provisions.⁶³

Tribunals however do not exercise such discretion in vacuum, but by giving due regard to the previous decisions of other tribunals. An examination of the use of discretion and the use of precedent by investment tribunals reveals that the civil law-common law dichotomy does not hamper decision-making by investment tribunals.

The use of discretion

Although the extensive power accorded to arbitral tribunals to use their discretion in investment arbitration has been criticised,⁶⁴ as being responsible for inconsistent decisions in investment arbitration,⁶⁵ tribunals must nonetheless be lauded for having used this discretion to bridge the divide between varying civil and common law practices.

⁵⁸ UNIDROIT Principles 2010, Preamble, p.6.

⁵⁹ *African Holding Company & Société Africaine de Construction au Congo v Congo*, ICSID Case No.ARB/05/21, Award on Objections to Jurisdiction and Admissibility, 29 July 2008, paras 32, 35.

⁶⁰ *Mohamed Abdulmohsen Al-Kharafi & Sons Co v Libya*, Ad Hoc Arbitration, Award, 22 March 2013, pp.370–371.

⁶¹ UNIDROIT Principles 2010, Preamble, p.6.

⁶² Adrés Rigo Sureda, *Investment Treaty Arbitration, Judging Under Uncertainty* (Cambridge: Cambridge University Press, 2012), pp.9–10.

⁶³ A.R. Sureda, *Investment Treaty Arbitration, Judging Under Uncertainty* (2012), p.29.

⁶⁴ Michael Waibel, Asha Kaushal, et al., “The Backlash against Investment Arbitration: Perceptions and Reality” in M. Waibel, A. Kaushal, et al. (eds), *The Backlash against Investment Arbitration* (2010), pp.xxxvii–li.

⁶⁵ For example, arbitral tribunals in the *SGS* cases have adopted conflicting conclusions concerning the meaning of umbrella clauses. In the *SGS v Pakistan* case, the arbitral tribunal decided that “breaches of a contract [are not] automatically ‘elevated’ to the level of breaches of international law,” by virtue of an umbrella clause. See *SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No.ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para.166. However, in the *SGS v Philippines* case, the arbitral tribunal held that an umbrella clause “makes it a breach of the BIT for the host State to fail to observe binding commitments”. See *SGS Société Générale de Surveillance SA v the Philippines*, ICSID Case No.ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 para.128.

Arbitral tribunals have exercised such discretion when faced with differing civil and common law evidentiary standards such as the standard of proof,⁶⁶ as evidentiary rules in investment arbitration are neither rigid nor technical.⁶⁷

In *Crystallex v Venezuela*,⁶⁸ the tribunal contrasted the civil law and common law approaches to standard of proof. In the tribunal's view, the general standard of proof in common law systems is a "balance of probabilities" or a "sufficient degree of certainty" test. Conversely, in civil law systems, the matter of proof is left to the inner conviction or "intime conviction" of the judge.⁶⁹

Keeping those distinctions in mind, the *Crystallex* tribunal recognised that it was "operating as an international arbitral body established under the framework of an international treaty".⁷⁰ Therefore, in exercise of the discretion it had as regards evidentiary issues, it would be guided by the following principles: first, the existence of the damage must be proved with certainty.⁷¹ Second, once the damage is proved, the claimant need not prove its exact quantification with certainty, but should only provide a basis upon which the tribunal can estimate the extent of the loss with reasonable confidence.⁷² The tribunal placed particular emphasis on "reasonable confidence", which it found "to strike a wholesome and pragmatic approach, prone to satisfy common law and civil law minds."⁷³

In *Noble Ventures v Romania*, the tribunal refused to apply rules of discovery of the United States of America, on the grounds that the ICSID Convention and the ICSID Arbitration Rules did not grant it the authority to apply national rules of discovery. Accordingly, the tribunal encouraged the parties to agree on the disclosure of documents taking into consideration the fact that Romania was a civil law country where production of documents was less prevalent than in common law countries.⁷⁴

The use of discretion by arbitral tribunals has thus helped bridge the procedural civil-common law dichotomy in investment arbitration, as investment arbitral tribunals most often endeavour to reach middle ground between diverging civil and common law practices, in the interest of procedural fairness.

The use of precedent

Civil law uses a deductive approach of reasoning, by using codified legal principles as the basis for decision-making and legal interpretation.⁷⁵ Codifications are perceived to promote certainty and completeness in law.⁷⁶ Therefore, legislative provisions are the only source of law.⁷⁷ Case law serves as "soft law" with persuasive, although not authoritative, force if it has become *jurisprudence constante*.⁷⁸

⁶⁶ See, for example, *Metal Tech Ltd v Uzbekistan*, ICSID Case No.ARB/10/3, Award, 4 October 2013, para.238.

⁶⁷ *The Rompetrol Group NV v Romania*, ICSID Case No.ARB/06/3, Award, 6 May 2013, para.181. See also, Aloysius Llamzon and Anthony C. Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Vol.18, p.494.

⁶⁸ *Crystallex International Corp v Venezuela*, ICSID Case No.ARB(AF)/11/2, Award, 4 April 2016.

⁶⁹ "If the judge is persuaded of the truth of a certain matter, then the standard of proof has been met". See *Crystallex International Corp v Venezuela*, ICSID Case No.ARB(AF)/11/2, Award, 4 April 2016, para.865.

⁷⁰ *Crystallex International Corp v Venezuela*, ICSID Case No.ARB(AF)/11/2, Award, 4 April 2016, para.866.

⁷¹ *Crystallex International Corp v Venezuela*, ICSID Case No.ARB(AF)/11/2, Award, 4 April 2016, para.867.

⁷² *Crystallex International Corp v Venezuela*, ICSID Case No.ARB(AF)/11/2, Award, 4 April 2016, para.869.

⁷³ *Crystallex International Corp v Venezuela*, ICSID Case No.ARB(AF)/11/2, Award, 4 April 2016, para.869.

⁷⁴ *Noble Ventures Inc v Romania*, ICSID Case No.ARB/01/11, Award, 12 October 2005, para.20.

⁷⁵ F. G. Sourgens, "Law's Laboratory: Developing International Law on Investment Protection as Common Law" (2014) 34 Nw. J. Int'l L. & Bus. 181, 225.

⁷⁶ Vincy Fon and Francesco Parisi, "Judicial Precedents in Civil Law Systems: A Dynamic Analysis" (2006) 26 Int'l Rev L. & Eco 522.

⁷⁷ Michel Troper and Christophe Grzegorzczky, "Precedent in France" in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents: A Comparative Study* (Aldershot: Dartmouth Publishing Co, 1997), p.107.

⁷⁸ *Royal v Cook*, 984 So.2d 156 (La. Ct. App. 2008).

Judicial decisions in common law are governed by the doctrine of stare decisis, in which judicial precedent is seen as a primary source of law.⁷⁹ Common law uses an inductive approach of reasoning, by applying the solution of a decided case to decide another case with similar facts.⁸⁰ A lower court is bound by the decision of a higher court.⁸¹ However, a court may not be bound by its own decision or that of another court at the same level.⁸²

In investment arbitration, tribunals have repeatedly held that they are not bound by the doctrine of stare decisis.⁸³ The decision of a tribunal has no binding effect except between the parties.⁸⁴ In addition, there is no hierarchy between arbitral tribunals to justify a binding effect, because each tribunal is constituted ad hoc by different parties.⁸⁵

Nevertheless, in practice, the use of previous decisions of tribunals has become the evolving norm in investment arbitration. Indeed, counsel cite prior awards in legal submissions; investment tribunals, for their part, increasingly refer to previous decisions, not only to support their own reasoning, but they often incorporate the reasoning of other awards into their own decisions.⁸⁶

Although arbitral precedent has no binding effect, it has been recognised to constitute persuasive authority.⁸⁷ Some tribunals even acknowledge a duty to adopt solutions established in a series of consistent cases and to promote the harmonious development of investment law,⁸⁸ in order to bring certainty to investment law and meet the expectations of both States and investors.⁸⁹ Moreover, tribunals have found that although they are not bound by decisions of other tribunals, they should nonetheless provide reasons for any deviation from prior decisions.⁹⁰

It is thus believed today that decision-making in investment arbitration is developing more along the lines of the common law system, rather than the civil law system, not only because of the weight given to prior decisions by arbitral tribunals, but mainly because of the manner in which prior decisions are imported into arbitral awards (including by arbitrators that are trained in the civil legal system).⁹¹

4. Conclusion

The realm of investment arbitration brings together parties, counsel, and arbitrators from both the civil and common law cultures. Investment treaties and other international instruments, on which tribunals base their decisions, increasingly reflect this unison of the civil and common law systems, by developing standards and norms that are neutral, and can cater to both systems.

⁷⁹ William Tetley, "Mixed Jurisdictions. Common Law v Civil Law" (2000) 60 La. L. Rev. 677, 703.

⁸⁰ F. G. Sourgens, "Law's Laboratory: Developing International Law on Investment Protection as Common Law" (2014) 34 Nw. J. Int'l L. & Bus. 181, 227.

⁸¹ Alvin B. Rubin, "Hazards of a Civilian Venturer in Federal Court: Travel and Travail on the Erie Railroad" (1988) 48 La. L. Rev. 1369, 1371.

⁸² e.g. The US Supreme Court has provided that it has the power to overrule its own decision. See *Hohn v United States* 524 U.S. 252, 253 (1998).

⁸³ *Liberian Eastern Timber Corp v Liberia*, ICSID Case No.ARB/ 83/2, Award, 31 March 1986, paras 346, 352; *SGS Société Générale de Surveillance SA v the Philippines*, ICSID Case No.ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 para.97.

⁸⁴ Article 53 of the ICSID Convention.

⁸⁵ *Wintershall Aktiengesellschaft v Argentina*, ICSID Case No.ARB/04/14, Award, 8 December 2008,194.

⁸⁶ Stephan W. Schill, "From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?" in *Is There an Evolving Customary International Law on Investment?* (London: BIICL, 2011), p.6.

⁸⁷ *Sempra Energy International v Argentina*, ICSID Case No.ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 5 March 2009, para.94.

⁸⁸ *Saipem SpA v Bangladesh*, ICSID Case No.ARB/05/7, Award, 30 June 2009, para.90; *Burlington Resources Inc v Ecuador*, ICSID Case No.ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para.46.

⁸⁹ *Planet Mining Pty Ltd v Indonesia*, ICSID Case No.ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, para.85.

⁹⁰ *AES Corp v Argentina*, ICSID Case No.ARB/02/17, Award, 26 April 2005, para.30.

⁹¹ F. G. Sourgens, "Law's Laboratory: Developing International Law on Investment Protection as Common Law" (2014) 34 Nw. J. Int'l L. & Bus. 181 224–227.

This is not to say that investment treaties are self-contained instruments that are divorced from domestic systems. While investment tribunals do rely on the domestic law of contracting States to determine certain substantive aspects, such reliance would ordinarily not compel tribunals to choose between contrasting civil and common law norms. Where diverging civil and common law cultures are most apparent, i.e. with respect to procedural or evidentiary matters, tribunals as well as international instruments strive to find common ground between both systems.

The absence of a real “dichotomy” in investment arbitration is also apparent from the decision-making process of tribunals. While there is general consensus that tribunals are not bound by previous decisions, even arbitrators from civil legal cultures import *jurisprudence constante* into their decisions and justify a departure from *jurisprudence constante*. Similarly, BIT standards are generally interpreted in the context of a similar factual matrix. In this regard, investment arbitration seems to be steering more towards the common law culture.

That said, even under civil law, convergent case law leads to the creation of accepted “general principles of law”. This civil law approach, where case law translates to general principles of law after a certain period of time, is another example of different routes leading to the same destination. The civil-common law dichotomy is thus becoming less relevant to decision-making by investment tribunals, and investment arbitration itself is moving towards convergence rather than divergence.

Judicial Intervention at an Early Stage of Arbitral Proceedings: Recognising the Effect of Arbitral Agreement and Interpreting its Scope

Joyce Aluoch

1. Introduction

This paper discusses the status of arbitration law and practice in Kenya, with regard to arbitral agreements, and how the Kenyan courts have interpreted or given effect to the same. The discourse generally looks at the scope of the role of the court in arbitration, as canvassed in various Kenyan cases. Reference is also made to the practice in the courts of the United Kingdom in as far as the same is relevant to Kenya. The ultimate goal is to examine how the arbitration climate in Kenya compares to the global trends in the recognition and interpretation of arbitral agreements.

2. Statutory scope of the role of the court in arbitration in Kenya

The Constitution of Kenya 2010¹ gives the courts the authority to use alternative dispute resolution mechanisms to resolve disputes. The Constitution is the supreme law in Kenya, “and any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency”. However, the Constitution acknowledges Kenya’s international obligations especially with regard to treaties and conventions.²

The principle of court intervention in Kenya is governed by the Arbitration Act, 1995,³ as amended by the Amending Act of 2009. The Act has various specific legal provisions which give the court the power to intervene in arbitration before, pending and after arbitration, in interlocutory and other matters.

However, before discussing the Kenyan law and practice in arbitration, suffice it to say that the principle applicable in discerning the role of the court in arbitration can be found in the various instruments which address the subject, the most important being the UNCITRAL Model Law on International Commercial Arbitration⁴ which provides in part:

“in matters governed by this law, no court shall intervene except where so provided.”

This provision limits the scope of the role of the court in arbitration to situations contemplated under the Model Law. The Arbitration Act, 1995, is based on the Model Law, though with some variations as necessary, such as the requirement in Section 6(1) of the Arbitration Act to the effect that:

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds ...”⁵

¹ The Constitution of Kenya, 2010, Government Printers, Nairobi.

² Article 2(5), “The general rules of international law shall form part of the law of Kenya”; Article 21(4), “The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms”; Article 132(5), “The President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries”.

³ Arbitration Act, No.4 of 1995, Government Printers, Nairobi.

⁴ Article 5, UNCITRAL Model Law on Commercial Arbitration, UN Document A/40/17, Annex 1.

⁵ Section 6(1) Arbitration Act, No.4 of 1995, Government Printers, Nairobi.

The Model Law, on the other hand has a provision that differs slightly from the above provision in the Arbitration Act. Article 8(1) of the Model Law provides as follows:

“A court, before which an action is brought in a matter subject to arbitration agreement, shall, if a party so requests not later than when submitting his first statement on the subject of the dispute, refer the parties to arbitration.”⁶ (emphasis added)

As far as the United Kingdom law on Arbitration is concerned, the Arbitration Act of 1996 has provisions that seem geared towards reducing the court’s intervention in arbitration. Section 44, captioned “The court’s powers exercisable in support of arbitral proceedings” confers jurisdiction upon the courts with the following three provisions:

- “(1) If the case is one of urgency, the court may, on the application of a party or proposed party in the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets;
- (2) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal), made with the permission of the tribunal or the agreement in writing of the other parties;
- (3) In any case, the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”⁷

The above shows that the court’s intervention in the United Kingdom is restricted if such intervention may result in unnecessary delay and expense in arbitration. Further still, the purpose of the court’s intervention is to guarantee the fair and impartial resolution of disputes. The courts are also not allowed to take any steps that would limit party autonomy, unless it is in the public interest.⁸

In the case of *Coppee-Lavalin SA/NV v KenRen Chemicals and Fertilizers Ltd*,⁹ the House of Lords highlighted three situations where the courts must be involved in Arbitration. The three situations are relevant to the Kenyan scenario.

- (1) First are such measures as involve procedural steps and which the arbitral tribunal cannot order and/or enforce, for example issuing witness summons to a third party or stay of legal proceedings commenced in breach of arbitration agreement;
- (2) Second are measures meant to maintain the “status quo”, such as granting interim injunctions or orders for the preservation of the subject matter of the arbitration;
- (3) Lastly are those measures which give the award the intended effect by providing means for enforcement of the award or challenging the same. Indeed, some of these measures result in the court’s direct or indirect interference in the arbitrator’s task of deciding on the merits of the dispute, hence the need to ensure that such intrusion is kept to the bare minimum and only to be exercised when absolutely necessary.

Indeed, Lord Mustill recognised the need for this balance in the *Coppee Case* (above) when he stated:

“Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in

⁶This provision was in the 1985 version of the Model Law, and was retained and not affected by the 2006 revision of the Model Law.

⁷United Kingdom Arbitration Act 1996, Section 44.

⁸D. J. Sutton, J. Kendall and J. Gill, *Russell on Arbitration*, 21st edn (London: Sweet & Maxwell, 1997).

⁹*Coppee-Lavalin SA/NV v KenRen Chemicals and Fertilizers Ltd* [1994] 2A 11 E.R.465.

some instances the intervention of the court may not only be permissible but highly beneficial.”¹⁰

The general approach on the role of the court in Kenya is outlined in Arbitration Act, 1995, which provides inter alia at Section 10:

“Except as provided in this Act, no court shall intervene in matters governed by the Act.”¹¹

The above words are in mandatory terms, restricting the jurisdiction of the court only to such matters as provided for by the Act. This in effect means that party autonomy which underlies the arbitration generally is recognized. The section also helps to achieve a key object of arbitration which is to resolve disputes between the parties fairly, without unnecessary delay and expense.

On the face of it, Section 10 permits two possibilities for court intervention in arbitration in Kenya. One is where the Act expressly provides for, or otherwise permits, court intervention. For example, the court’s intervention is permitted in matters touching on the appointment of the tribunal as provided for under Section 12 of the Arbitration Act, 1995. The second instance where court intervention, and particularly by the High Court, is permitted is when the court exercises its inherent jurisdiction to act in the public interest where substantial injustice is likely to be occasioned, even if the matter is not provided for in the Act. This is so as the Act cannot reasonably be construed as ousting the inherent power of the court to do justice, especially through judicial review and constitutional remedy. If that was the intent of Parliament, it would have made a clear provision limiting the role of the courts in arbitration even where public interest is at stake.

The courts have, however, not always been consistent in handling applications under Section 10. This is borne out by a number of decisions, for example *Sadrudin Kurji & another v Shalimar Ltd and 2 others*¹² where it was held:

“arbitration process as provided by the Arbitration Act is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This however does not mean the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of arbitration. Hence, *in exceptional cases* in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors.”(emphasis added)

The role of the courts in arbitration was also discussed in the decision of the Kenya Court of Appeals in *Anne Mumbi Hinga v Victoria Njoki Gathara*,¹³ a decision which seems to suggest that courts may intervene in arbitration since public policy is a concept whose definition is not clear and therefore not exhaustive. The Court of Appeal stated as follows:

“although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State’s powers are exercised.”

The court affirmed that the underlying principle in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. The court further stated that:

¹⁰ See Lord Mustill’s dicta in *Coppe-Lavalin SA/NV v KenRen Chemicals and Fertilizers Ltd* [1994] 2 All E.R. 465 at 469–470, on the Court’s ideal approach in such intrusion.

¹¹ This section was not affected by the 2009 amendments of the Arbitration Act 1995.

¹² *Sadrudin Kurji & another v Shalimar Ltd and 2 others* [2006] eKLR.

¹³ *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR, Civil Appeal No.8 of 2009.

“although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State’s powers are exercised.”¹⁴

Further for consideration on this point is the case of *EpcO Builders Ltd v Adam S Marjan—Arbitrator and Another*,¹⁵ where the appellant had taken out originating summons before the High Court (Constitutional Court) under, *inter alia*, Sections 10 and 11 of the old Constitution of Kenya, Section 3 of the Judicature Act and Section 3A of the Civil Procedure Act. The appellant’s contention in the constitutional application was that its constitutional right to a fair arbitration had been violated by a preliminary ruling of the arbitrator. The appellant’s main complaint was that it was *unlikely* to obtain fair adjudication and resolution of the dispute before the arbitral tribunal in view of the arbitrator’s unjustified refusal to issue summons to the project architect and quantity surveyor, whom he considered to be crucial witnesses for a fair and complete resolution of the matters before the tribunal. The lawyer for the interested party (the Chartered Institute of Arbitrators—Kenya Branch), submitted that whilst she did not refute the application under Section 77(9) of the old Constitution, she was of the considered view that the procedure laid down under the Arbitration Act should be exhausted first before such an application is made.

The majority of the Court of Appeal noted that the matter was *not* frivolous, and ordered that the appellant’s application be heard by the High Court on merit. The majority decision in the appeal was contributed to by Justice Deverell who noted that:

“If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional decisions during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation, would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the “trial” when the Arbitration Act 1995 itself has a specific provision in Section 19 stipulating that the parties shall be treated with equality and each party shall be given full opportunity of presenting his case in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using A.D.R.”¹⁶

The dissenting Judge in the *EpcO* case (Justice Githinji J.A.), who considered the merits of the application was of the view that arbitration disputes are governed by private law and not public law and by invoking Section 84 of the old Kenyan Constitution, the appellant was seeking a public remedy for a dispute in private law.

The cases I have considered above show that the courts are reluctant in dismissing the need for constitutional applications in arbitration.

Under the Kenyan Arbitration Act, 1995, it is the application for stay of legal proceedings where the court intervenes in a *matter subject to arbitration agreement, strictly before commencement of any reference of the dispute to arbitration* (emphasis added). An application for stay of legal proceedings is what Section 6¹⁷ avails the other party if it is to give effect to the arbitration. Section 6 provides:

¹⁴ See Kariuki Muigua, “Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises”, p.13, article available on the author’s firm’s website, <http://www.kmco.co.ke/index.php/publications/122-emerging-jurisprudence-in-the-law-of-arbitration-in-kenya-challenges-and-promises> [Accessed 8 September 2017].

¹⁵ *EpcO Builders Ltd v Adam S Marjan—Arbitrator and Another* unreported, Civil Appeal No.248 of 2005.

¹⁶ *EpcO Builders Ltd v Adam S Marjan—Arbitrator and Another* unreported, Civil Appeal No.248 of 2005.

¹⁷ Section 6(1), (2), (3) of the Arbitration Act, 1995, as amended by the Amending Act of 2009.

- “(1) A court before which proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds
- (a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - (b) That there is not in fact any dispute between the parties with regard to the matters to be referred to arbitration.
- (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
- (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter, is of no effect in relation to those proceedings.”

In granting a stay of proceedings, the court will have regard to the following:

- (1) That there is a valid and enforceable arbitration agreement;
- (2) That the applicant seeking a stay must be a party to the arbitration agreement. This requirement is in view of the doctrine of privity of contract;
- (3) That the dispute which has arisen must be within the scope of the arbitration clause;
- (4) That the party making the application must not have taken steps to answer the substantive claim, which means, for example, that the party must not have served defence or taken another step in the proceedings to answer the substantive claim.

As the provision of Section 6 shows, a party wishing to enforce an arbitration agreement in a situation where the other party has initiated court proceedings must apply to the court, *not later than the time he enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought* (emphasis added).

In a recent case of *Eunice Soko Mlagui*,¹⁸ where at issue in the appeal was whether the High Court (Kamau J) erred when she dismissed an application by the appellant, Eunice Soko Mlagui, for stay of proceedings and referral of the dispute between the parties in this appeal to arbitration, the Learned Judge held that Section 6(1) of the Arbitration Act did not allow the dispute to be referred to arbitration because upon being served with a summons to enter appearance by the appellant, some of the respondents, namely the first, second and third, duly and unconditionally delivered their defences to the claim, but not the fourth and fifth respondents. That is the conclusion which the appellants one, two and three contended was erroneous and should be reversed.

The Learned Judges of Appeal recalled the provision of Section 6(1) of the Act before the Amendment. It said in part:

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, *if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings*, stay the proceedings and refer the parties to arbitration.”(emphasis added)

The Judge stated that:

“The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the

¹⁸ *Eunice Soko Mlagui v Suresh Parmar and 4 others* [2017] eKLR.

proceedings. After 2009 the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. *In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the section.*”(emphasis added)

The Learned Judges continued:

“Be that as it may, to the extent that after amendment of Section 6 (1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decisions of our courts on the application of Section 6 (1) are still good law. To that extent, and in *Charles Njogu Lofty v Bedouin Enterprises Ltd*, CA No.253 of 2003, this court considered Section 6 (1) and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court will still be entitled to reject an application for stay of proceedings and referral to arbitration if the application to do so is not made at the time of entering appearance or is made after filing of the defence ...”

Finally, the Learned Judges of Appeal said in *Eunice Soko Mlagui*’s appeal, after considering all the issues raised in the appeal:

“We are not persuaded that the Learned judge erred in the exercise of her discretion because she paid due regard to the conditions to be satisfied before a dispute can be referred to arbitration under Section 6 (1) of the Arbitration Act. With respect, the conditions set out in Section 6 (1) are anything but mere procedural technicalities that may be waived, courtesy of the overriding objective.”

In the process, the Learned Judges of Appeal also considered the petition of *Lamanken Aramat v Harun Maitamei Lempaka*,¹⁹ where the Supreme Court explained the limits of Article 159 of the Constitution regarding technicalities when it stated:

“The court’s authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. *However, there are instances when the Constitution (or the Law) links certain vital conditions to the power of the court to adjudicate a matter.*”(emphasis added)

In the view of the Learned Judges, the *Eunice Soko Mlagui* Case was one such case. They proceeded to dismiss the appeal when they were satisfied that the same was bereft of merit.

Apart from the stay of legal proceedings procedure, the courts in Kenya may intervene in a potential arbitration matter in granting interim orders of protection under Section 7 of the Act. The section gives the High Court power to grant interim orders for the maintenance of the status quo, of the subject matter of the arbitration pending the determination of the dispute through arbitration. This procedure is available to the parties before or during arbitration. The power conferred on the court might include those of granting interim injunctions, interim custody or sale of goods (perishables), preserving any property or anything else to do with the reference. Section 7(1) provides²⁰:

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court

¹⁹ *Lamanken Aramat v Harun Maitamei Lempaka* SC Petition No.5 of 2004.

²⁰ Section 7(2) of the Arbitration Act, 1995.

shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.²¹ Section 7 basically limits the parties' freedom to contract any arbitration agreement which limits and/or bars seeking interim measures for protection in court. The jurisdiction to make such orders is the preserve of the High Court. However, where an application for interim relief is made, a Judge might be reluctant to make a decision that is likely to prejudice the outcome of the arbitration. This point was considered in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,²² where the court said:

“There is always a tension when the court is asked to order, by way of interim relief in support of arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and, on the other hand, the duty not to take out of the hands of arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail ... If the court now itself orders an interlocutory mandatory injunction, there will be very little for the arbitrators to decide.”

In yet another case, *Tononoka Steels Limited v E.A. Trade and Development Bank (PTA Bank)*,²³ it was stated that even where the court intervenes in any arbitration proceedings or any matter that should be referred to arbitration, it would only be in respect of peripheral matters relating to the subject matter of the dispute as opposed to dealing with substantive matters therein. In the *Tononoka* Case, the appellant wanted to set up a plant in Kenya for manufacturing steel products and he entered into a loan agreement with the PTA Bank, the respondent. There was also an arbitral clause in the contract. A dispute arose between the parties and the appellant sued in the High Court, seeking an injunction against the PTA Bank restraining it from calling for the repayment of the facility or taking possession of the project. The appellant also sued for special and general damages. A question then arose as to whether the jurisdiction of the High Court was ousted. The appellant relied on the arbitral clause and the legal notice. The Learned Judge Kwack J.A. (as he then was) in justifying jurisdiction, said that while the jurisdiction to deal with substantive disputes and differences was given to a different body, the Chamber of Commerce in London, as per the terms of the agreement, “... *the Kenyan Courts retained residual jurisdiction to deal with peripheral matters.*” (emphasis added)

Still on the interim measures of protection is the case of *Sophia Wanjiku Kimani & 2 others v Mraradia Gatuya Rumwe & 4 others*,²⁴ where the main issue for determination at the stage the application was filed, was first, whether the High Court had jurisdiction to hear the application and the suit in view of the alleged arbitration jurisdiction of the company. Secondly was the issue of whether in the circumstances of this case, and if this court has no jurisdiction, the applicants have proved a case for issuing an order for injunction sought.

The Learned Judge considered the provision of Section 6(1), (2) and (3) of the Arbitration Act as well as what he termed the conditions and terms to be fulfilled before a stay order can be issued, i.e.:

- (1) The matter before the court is the subject of an arbitration agreement or clause between the parties in the suit by the applicant;
- (2) That the application for stay must be made by a party in the proceedings and arbitration agreement or clause, not later than the time of entering appearance or acknowledging the claim against which the stay of proceedings is sought;

²¹ HCCC No. 104 of 2004 (unreported).

²² *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 367–368.

²³ *Tononoka Steels Ltd v E.A. Trade and Development Bank (PTA Bank)* 2 (2000) E.A. 536.

²⁴ *Sophia Wanjiku Kimani & 2 others v Mraradia Gatuya Rumwe & 4 others* [2014] eKLR.

- (3) The court must be convinced that the arbitration agreement in reference is still valid, operative and effective;
- (4) There is still a valid dispute in terms of the arbitration agreement or clause between the parties in the suit;
- (5) The party applying for stay must not have delivered any pleading or taken any other steps in the proceedings sought to be stayed.

The Learned Judge also considered the aspects of Section 6(1) and 6(2) of the Arbitration Act, in respect of the five points above, as was considered in the case of *UAP Provincial Insurance Company Ltd v Michael Johnson Beckett*,²⁵ where the Court of Appeal said:

“if as a result of that inquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If, on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.”

In the *Sophia Wanjiku Kimani* Case, the Learned Judge found as follows:

“The plaintiffs have found that the suit held prima facie case in their favour. They have also shown that they will incur substantial loss and damage if the shares are sold out or are in any other way alienated in a manner they do not accept or have not sought. Thirdly, it makes sense that the subject matter of the suit needs protection and preservation until the suit is determined. Finally an injunction would, in the view of the court, be a more convenient way to go at the moment ... In the circumstances, the court finds that the application for injunction only, has merit and the injunction is issued in terms of prayer (1).”

A recent decision on interim measures of protection is that of *Jung Bong Sue v Africon Ltd*²⁶ in which the plaintiff sought from the High Court an interim measure of protection by way of temporary injunction pending the hearing and determination of the intended arbitration between the parties. The applicant said that the relief sought was necessary to safeguard the subject matter of the arbitration. The application was brought under Section 7 of the Arbitration Act, and was supported by the applicant’s affidavit. There was a valid arbitration agreement which provided for the dispute resolution by way of arbitration by a single arbitrator to be agreed upon by the parties, failing which the parties shall request the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint an arbitrator.

Indeed, a dispute arose between the parties, and in particular the claim by the plaintiff that although the defendant had duly released actual possession of the aforesaid Drilling Rig to him, the defendant had, contrary to the agreement refused and neglected to facilitate perfection of ownership in the Drilling Rig to the plaintiff. The defendant raised various claims to the plaintiff’s claim, but despite all this, the plaintiff/applicant insisted that there was a real dispute pertaining to the agreement and he finally invoked the arbitration agreement, and submitted that under Section 7(1) of the Arbitration Act, the court had power to intervene and give an interim measure of protection.

The Learned Judge, in summing up the arguments of the parties, cited with approval several decided cases relied on by the parties, such as *Indigo EPZ Ltd v Eastern African Trade & Development Bank*²⁷ where the court said:

“If agreement where the parties have agreed to refer disputes to arbitration, the position is that to deal with substantive disputes and differences is given to the arbitrator and

²⁵ *UAP Provincial Insurance Company Ltd v Michael Johnson Beckett* [2013] eKLR.

²⁶ *Jung Bong Sue v Africon Ltd* [2015] eKLR.

²⁷ *Indigo EPZ Ltd v Eastern African Trade & Development Bank* [2002] IKLR.

the Kenyan courts retain residual jurisdiction to deal with peripheral matters and to see that any disputes are dealt with in the manner agreed between the parties under the agreement."(emphasis added)

The Learned Judge noted that the parties in the *Jung Bong Sue* Case argument before him related to factual matters and the substance of the arbitration. This prompted him to once again quote with approval the decision in the case of *Kenya Airports Parking Services Ltd v Municipal Council of Mombasa*,²⁸ where the High Court said:

"It is this court's view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement."

The observation by the Learned Judge was based on a decision by the Supreme Court of the United States of America in the case of *Bukeye Check Cashing Inc v Cardegana et al*²⁹ that:

"the principle of separability of an arbitration agreement is an agreement has thus been given judicial stamp of approval and is applicable even where one of the parties is challenging the validity or illegality of the agreement itself."

The final case relied on by the Learned Judge on this subject was the case of *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 others*,³⁰ where the Court of Appeal made the following observation:

"In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to Section 17 of the Arbitration Act. A court of law when asked to issue interim orders must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration."

After careful consideration of the facts, the arguments put forth by the parties in the *Jung Bong Sue* Case and the relevant law and the cases cited, the Learned Judge said:

"the recapitulation of the unfortunate facts of this case brings me to the point where I think the best course to take is not to resolve the claim on possession of the Drill of one party over the other. And instead leave the parties where I find them . . . Accordingly I dismiss the application (for an interim measure for protection) dated 3rd June, 2014."

3. Conclusion

This paper sought to discuss the status of arbitration practice in Kenya with respect to recognition and interpretation of arbitral agreements, and how the same compares with the international practices in arbitration. International investors can safely engage in business in Kenya knowing that any agreement to arbitrate and the outcome therefrom will not be frustrated by Kenyan courts, when seeking their assistance. Kenyan courts generally play a facilitative role in the process.

²⁸ *Kenya Airports Parking Services Ltd v Municipal Council of Mombasa* HCC No.434 of 2009.

²⁹ *Bukeye Check Cashing Inc v Cardegana et al* 546 US 400 (2006).

³⁰ *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 others* (2010) eKLR.

Cases

The Enforcement of Adjudicators' Awards under the Housing Grants, Construction and Regeneration Act 1996: Pt 64

Kenneth T. Salmon

1. Introduction

The Act means the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 Pt 8. The “new” provisions apply to contracts entered into on or after 1 October 2011.

The main regulations are contained in the Scheme for Construction Contracts (England & Wales) Regulations 1998 (the Principal Regulations).¹ They have been amended by the Scheme for Construction Contracts (England & Wales) (Amendment) (England) Regulations 2011.² The new Scheme applies only to contracts for construction operations in England entered into on or after 1 October 2011. For earlier contracts, the Principal Regulations apply.

There are separate regulations for contracts for work in Scotland applicable to contracts made on or after 1 November 2011.³ The new regulations apply only to contracts for work in Scotland entered into on or after this date. For earlier contracts, the Scheme for Construction Contracts (Scotland) Regulations 1998⁴ applies.

There are new separate regulations for Wales, applicable to contracts for construction operations in Wales entered into on or after 1 October 2011.⁵

A reference to “the Scheme” is to the Principal Regulations for England and Wales, or the Scheme for Scotland, as the context so requires.

The law is stated at 20 July 2017. This Part deals with such diverse topics as jurisdiction in connected or overlapping disputes, the extent of the courts' power to make a substantive determination on enforcement, the restrictive application of the principles of natural justice, the so-called slip rule, the reservation of rights and a case on the misuse of winding-up proceedings when a claim for payment is disputed.

2. Decision—meaning of—jurisdiction to consider in second adjudication

See *Waldeck Associates v Democo UK Ltd*.⁶

In a first adjudication decision number 1 between the parties, the adjudicator Mr Peter Vinden made a number of declarations reflecting agreements reached between the parties at a hearing before him. Chief among these was agreement that interim valuations were to be carried out by using rates in a schedule of rates and taking actual quantities, up to a cap of £136,500 for work within a fee proposal; and agreement to use the same mechanism to determine the value of the “final account” in due course.

¹ Scheme for Construction Contracts (England & Wales) Regulations 1998 (SI 1998/649).

² Scheme for Construction Contracts (England & Wales) (Amendment) (England) Regulations 2011 (SI 2011/2333).

³ Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 (SI 2011/371).

⁴ Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687) (S.34).

⁵ Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011 (SI 2011/1715) (W.194).

⁶ *Waldeck Associates v Democo UK Ltd* [2017] EWHC 961 (TCC) O'Farrell J, judgment 23 January 2017.

In adjudication number 2, again before Mr Vinden, he was asked to value a further invoice from Waldeck. It was apparent from his decision in adjudication number 2, that Mr Vinden was alive from the outset to the fact that his previous decision touched on matters he was required to address in the second adjudication and he recorded "I have taken cognisance of my earlier decision in order not to transgress on or open up any matter that has already been decided". He went on to award Waldeck £184,142.81 plus VAT on its further invoice. In his reasons, he said he was obliged to adhere to his previous decisions, having regard to what the parties had agreed. As he stated, it was now apparent that the parties were now in disagreement as to the effect of the first decision. He found that Waldeck had valued the works in its further invoice consistent with what the parties agreed in his first decision.

As the court noted, Mr Vinden had clearly and expressly in mind his first decision, and his second decision was consistent with and applied his first decision, as indeed was intended. The issue was whether the cap referred to in the first decision related only to the work within the fee proposal, or to all work carried out. The court found on the basis of the express findings that it was beyond doubt that it related only to the work within the fee proposal. In the second decision, the adjudicator had therefore valued works which he had decided were not within the fee proposal.

Though it was thought not necessary to the decision, the court went on to find that the question of the meaning of the first decision was clearly within the jurisdiction of the adjudicator in the second adjudication. That was so because he recited the fact that a disagreement had arisen between the parties as to the meaning of the first decision. No point was taken on that. The adjudicator clearly reached a decision as to what he had previously decided and that decision was binding in itself.

Comment

This decision is of interest for two reasons. First it confirms, if there could be any doubt, that where an adjudicator is requested to decide the meaning of an earlier decision, the parties confer on him jurisdiction to do just that. Secondly, although this was not a case of an adjudicator answering the same or substantially the same question as in a previous adjudication, by analogy the court adopted the same approach and the starting point was to look at what the adjudicator considered he had decided.

3. Dispute—crystallisation

See *Mailbox (Birmingham) Ltd v Galliford Try Building Ltd*.⁷

Mailbox employed Galliford under what was described as the JCT standard form of building contract, as amended by the parties.

There were significant delays for which Galliford sought extensions of time. Mailbox granted limited extensions and claimed liquidated damages (LADs) for delay to ss.1 to 4 of the works. Mailbox terminated Galliford's employment for reasons which included a failure to proceed regularly and diligently with the works. A dispute over its entitlement to LADs was referred to adjudication by Mailbox. The notice of adjudication covered the whole of the claim for LADs for all of the delay. Galliford in its defence relied on requests for extensions relating to three specific events relevant to the works in ss.3 and 4. It chose not to deploy its full case on extension of time, though it served a full extension of time claim on Mailbox outside the adjudication.

⁷ *Mailbox (Birmingham) Ltd v Galliford Try Building Ltd* [2017] EWHC 1405 (TCC); [2017] W.L.R. (D) 411 (21 June 2017).

The adjudicator decided that the scope of the dispute could not be unilaterally restricted by the limited nature of Galliford's defence and in November 2016, he found for Mailbox and awarded it a substantial sum for LADs.⁸

A second adjudication commenced by Galliford in April 2017 was about the lawfulness of the termination. The issue was whether Galliford had proceeded regularly and diligently with the works. This, Galliford argued, meant that the second adjudicator must also consider whether extensions of time should have been granted.

In these proceedings, Mailbox asked the court to grant certain declarations to the effect that its entitlement to LADs had been decided by the first adjudicator and that decision was binding such that no subsequent adjudicator had jurisdiction to consider any further extension of time claims.

Coulson J made a number of findings, leaving the precise wording of the declarations to be agreed:

- That it was beyond argument that Mailbox was entitled to retain the entirety of the LADs awarded by the first adjudicator, unless and until that decision was overturned by the court. The entitlement could not be modified under the contract or in any subsequent adjudication. For any subsequent adjudicator to reach a different view on the decision on LADs would be contrary to principle.⁹
- A claim for an extension of time was a potential defence to any claim for LADs for delay. It served no other purpose. A claim for loss and expense as a result of delay arose under different provisions of the contract; it was a very different claim. Here, once Mailbox's entitlement to LADs had been fixed, any further claim for an extension of time was redundant.
- By reference to the relevant material before the court, the dispute crystallised about LADs and therefore delay across all sections of the works even though some claims were detailed and some more sketchy. It encompassed all Mailbox's claims for LADs and all Galliford's entitlements to extensions of time. It therefore covered all time related issues. This accorded with commercial common sense. An adjudicator should not be required to work out the parameters of the dispute by going through the pre-adjudication correspondence "in excruciating detail" to see which parts of which claims were detailed and within his jurisdiction and which were in outline and not within his jurisdiction.
- A contractor was not entitled to advance some of the potential relevant events and keep the rest back for another day. The first adjudicator only considered three relevant events because they were the only positive defences that Galliford chose to run. *Quietfield* did not support the proposition that a contractor had an unfettered right to run different extensions of time claims in different adjudications.
- The result was not unfair. It resulted from tactical choices by Galliford which had the right to run all its arguments about extensions of time in court proceedings by way of challenge to the adjudicator's decision. Its substantive rights were unaffected.
- The dispute as to termination was not part of the crystallised dispute in the first adjudication. Mailbox had argued that because an extension of time on s.3 had been fixed, the issue of the regular performance of the s.3 work could

⁸ *Mailbox (Birmingham) Ltd v Galliford Try Building Ltd* [2017] EWHC 1405 (TCC); [2017] W.L.R. (D) 411, O'Farrell DBE J, (26 January 2017).

⁹ *Quietfield Ltd v Vascroft Contractors Ltd* [2006] EWCA Civ 1737; [2007] B.L.R. 67; [2007] C.I.L.L. 245; and *Harding (t/a MJ Harding Contractors) v Paice* [2015] EWCA Civ 1231; [2016] 2 All E.R. 819; [2016] C.I.L.L. 3785; [2016] B.L.R. 85.

only be considered by reference to that earlier finding. That was wrong. Galliford was not prevented from relying on matters that had not arisen in the first adjudication. It could not claim a different extension of time in respect of s.3, but it could rely on relevant facts and matters to show it had proceeded regularly and diligently. The second adjudicator could address the real issues without that affecting Mailbox's financial entitlement in the first adjudication.

Comment

Whilst claimants can "cherry pick" the disputes they refer, they cannot always confine the ultimate scope of the adjudication, as a responding party can raise any defence and or cross-claim in reply which may serve to widen the scope of the dispute. However, and conversely, this decision confirms that there are limits to the ability of a responding party to cherry pick issues by way of defence. As Coulson J pointed out Galliford chose a high-risk policy by "attempting to dictate which of their extension claims were in and which were not".

4. Enforcement—principles and practice—power of court to make substantive determination of issue

See *Structure Consulting Ltd v Maroush Food Production Ltd*.¹⁰

The claimant contractor (SCL) was engaged by the defendant food producer (Maroush) to design and carry out the completion of a new building including services and external works. Maroush issued a letter of intent in anticipation of entering into a JCT DB 2011 form of contract. The works were programmed to take 40 weeks with a contract sum of £6.3 million excluding VAT.

SCL's case was that the parties agreed all the essential terms including the conditions of the JCT DB 2011 contract. Maroush said that all essential terms were never agreed.

Interim payments were made pursuant to the letter of intent as the works progressed until SCL's employment was terminated. SCL issued an interim payment application (no.39) for £868,982.38 on 1 August 2016. Maroush issued no payment notice but purported to issue a pay less notice on 10 August for £61,023, which was paid.

SCL referred the payment dispute to adjudication. The adjudicator decided the pay less notice did not comply with the statutory or contractual requirements and he directed Maroush to pay £730,280.56 exclusive of VAT and his fees of £11,570.

SCL applied for summary judgment to enforce the adjudicator's decision and that application was listed for hearing on 24 January 2017. Maroush issued Pt 87 proceedings seeking a declaration as to whether the parties' contract incorporated the JCT conditions and whether its pay less notice was valid. In effect, it sought to reverse the adjudicator's decision. That application was listed for directions but not for hearing on 24 January.

There was no reservation of position on jurisdiction by Maroush in the adjudication and no substantive ground on which it could challenge the decision on enforcement. However, the company could determine the issues of contract formation and validity of the pay less notice on a final basis under Pt 8.

Failing that Maroush sought a stay of any judgment pending the hearing of its Pt 8 application or 28 days to pay instead of 14 days to preserve the cash flow of its business.

The court determined the matter as follows.

¹⁰ *Structure Consulting Ltd v Maroush Food Production Ltd* [2017] EWHC 962 (TCC), O'Farrell J (24 January 2017).

There was power to use Pt 8 to make a substantive determination,¹¹ and where there were limited factual issues, the court could adopt a hybrid procedure involving an element of fact finding or determination of some but not all of the issues.¹²

The issues here were sufficiently defined as to enable the court to determine the matter by way of Pt 8, with some room for fact finding on specific matters that might arise on the evidence. The only issues were whether the contract incorporated the JCT terms and conditions and, depending on the answer to that, and the consideration of the relevant email and attachment, whether the pay less notice was valid. No pleadings would be necessary but provision could be made for the calling of witnesses and limited cross-examination.

The court proposed the necessary directions.

That left the question of enforcement or stay, on which matters the court adopted a robust approach and decided there was no good reason to stay enforcement. This was not a case where contract formation was raised in the adjudication and SCL should not be deprived of the fruits of the decision. There were no special circumstances that would justify a stay. Judgment was given for SCL, £300,000 to be paid in 14 days and the balance in 28 days, a decision which ensured that the adjudication decision was enforced speedily without causing undue prejudice and unfairness to Maroush.

5. Jurisdiction—slip rule

See *NKT Cables A/S v SP Power Systems Ltd.*¹³

NKT sought to enforce the amended decision of an adjudicator in its favour for £2,143,712 with VAT and interest. In the alternative, it sought enforcement of the adjudicator's original decision in the sum of £1,851,408.53 plus VAT and interest.

SP Power resisted enforcement on several grounds: the adjudicator had no power to amend his decision and in any event the corrections were not within the scope of any “slip rule” that might apply; the purported correction was in breach of the rules of natural justice; the adjudicator had failed to exhaust his jurisdiction in that he failed to address substantive lines of defence or alternative valuations; and that his reasons were wholly inadequate.

The Notice of adjudication referred a dispute under a contract to supply and install high voltage electricity and pilot cable in Glasgow for the 2014 Commonwealth Games. NKT asked for a determination of the gross value and certification of the sum outstanding under the contract. The Notice stated the date of the contract, which was before the date of the amendment to the Scheme and gave rise to the question whether the Scheme in its amended form could apply to a contract entered into prior to the amendment. In the event, this did not affect the outcome.

The parties entered into an adjudication agreement with the adjudicator which provided that the adjudication should be conducted in accordance with a procedure defined by reference to the Scheme (without saying whether it was the Scheme in its amended form or not).

The adjudicator valued the works in his original decision with a sum to pay of £1,851,408.53 but the Table setting out the calculation of that net sum contained what was referred to in court as a “rogue figure”. In an exchange of emails querying the calculation, NKT asked the adjudicator to amend the calculation and correspondingly increase the net sum payable. The adjudicator accepted the error and issued an amended decision as NKT asked. To arrive at the amended net figure the adjudicator had to take into account two omitted matters (“agreed claims” and “agreed interest”) which were not mentioned in the original decision and not part of the original calculation. In its pleading, SP Power had

¹¹ *Walter Lilly 7 Co Ltd v DMW Developments Ltd* [2008] EWHC 3139 (TCC); [2009] T.C.L.R. 3; and *Geoffrey Osbourne Ltd v Atkins Rail Ltd* [2009] EWHC 2425 (TCC); [2010] B.L.R. 363.

¹² *Forest Heath DC v ISG Jackson Ltd* [2010] EWHC 322 (TCC).

¹³ *NKT Cables A/S v SP Power Systems Ltd* [2017] CSOH 38; 2017 S.L.T. 494; 2017 G.W.D. 10-135, Lady Wolfie (8 March 2017).

admitted the agreed claims but averred these had been paid. It had disputed the agreed interest. SP Power's position was that this amounted to "double counting". The amendment omitted the rogue figure, and included a revised calculation replacing the rogue figure with a new figure brought about by the recalculation taking account of agreed claims and agreed interest. Whilst the exchange of emails was copied to SP Power, it took place in the space of about four hours in the evening after business hours and they did not respond till the following morning by which time the amended decision has been issued.

The application of the slip rule

The court ruled that on the authorities, there was scope for the implication of a slip rule on the basis that "it must have gone without saying" or was of such a nature as the parties would unhesitatingly have agreed at the time. The term was such as to enable minor typographical or similar errors to be corrected. If so restricted, i.e. the giving of effect to first intentions, there was no need of a natural justice requirement for prior notice to the parties and an opportunity to make representations. If they had been asked when they entered into the adjudication agreement if the adjudicator was to have power to correct slips, they would have been bound to say yes and to have in mind reg.22A of the Scheme, or something very similar.

The changes to the amended decision and the scope of the slip rule

The formulation of the slip rule to be implied was likely to be relatively narrow having regard to reg.22A, that is, one "to correct his decision so as to remove a clerical or typographical error arising by accident or omission". It dealt with an error of *expression or calculation* of something in the decision, not an error going to *reason or intention* forming the basis of the decision. Such slips might include an arithmetical error in adding or subtracting sums, mis-transposing parties' names, a slip in carrying over a calculation from one part of the decision to another, or, as here, the mistaken insertion of a rogue number. Finally, it had to be as a result of an accident or omission. All these observations were consistent with the law in *Bloor*.¹⁴ It was not a warrant for correcting what her Ladyship called "a pure omission"—being something the adjudicator had intended to take account of but wholly omitted to do so.

NKT had directed the adjudicator to two errors in his original decision: (i) the inclusion of the rogue figure; and (ii) his omission to take account of the "agreed claims" and "agreed interest". The first mistake was a clerical error and if the slip rule was to be implied then it fell within its scope. Overcoming the omission of the agreed claims and agreed interest required an additional step. It did not reflect his first intention. It was outwith the slip rule whether as formulated in reg.22A or as might be implied at common law. That view was fortified by the decision in *Bouygues*¹⁵ which had similarities with the present case. Taking account of the agreed claims and agreed interest was impermissible beyond the accepted scope of the slip rule.

Natural justice

It was unnecessary to deal with the natural justice point but her Ladyship was of the view that natural justice did not require that the parties be given an opportunity to make representations. This ground of challenge was not well founded.

¹⁴ *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] B.L.R. 314; [2000] C.I.L.L. 1626; [2000] Adj L.R. 04/05.

¹⁵ *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [1999] EWHC 182 (TCC); [2000] B.L.R. 49.

Failure to exhaust jurisdiction

This applied in the first instance to SP Power's alternative quantification of certain VO (Variation Order) claims. Though the adjudicator failed to record them in the Table in his decision, he was seized of the valuation issue and that encompassed valuation of the VOs. His decision recorded the claims and the fact that they were not accepted and therefore formed part of the dispute. He dealt with time bar, rejection and NKT's nil valuation. He specifically said he had dealt with them and that time did not permit him to set out his detailed consideration of each item. There was a discernible reasoning process and a choice between the employer's representative's nil valuation and SP Power's valuation albeit he had regard to IEC¹⁶ figures in lieu of SP Power's figures (or conflated the two). If this was an error, it was within his jurisdiction.

The court however found that the adjudicator had not dealt with six of SP Power's seven substantive defences in relation to the various claims. There was no evidence he had engaged with them at all. He had therefore failed to exhaust his jurisdiction. The failure was material as each of the defences afforded a complete defence to the claims to which they related. This was sufficient to render the decision, or if these parts were severable, then these parts of the decision, unenforceable.

Adequacy of reasons

The adjudicator gave no reasons or indeed any indication why he rejected the six defences (even if he had considered them). He was obliged to:

“give reasons so as to make clear that he had decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that parties can understand ... what it is he has decided and why.”

The effect of the findings on the decision

The effect was that SP Power succeeded in its challenge to the amended decision. The parties had not addressed the court on the effect of the findings on the original decision and whether any and if so which parts of it might be saved and enforced. The court would rule on this matter subsequently.¹⁷

6. Natural justice—failure to ask questions

See *Willott Partnership Homes Ltd v Bethel Retirement Villages—Herne Bay Court Ltd*.¹⁸

Bethel engaged Willott to provide pre-construction services in connection with the building of a retirement village. Willott submitted an invoice for its services and receiving no response, served a payment notice in accordance with the Act. That brought no response and Willott referred the matter of payment to an adjudicator who found that the sum of £705,558 was due to Willott.

Willott now sought summary judgment to enforce that decision.

Bethel's answer to that application was that it had been a breach of the rules of natural justice for the adjudicator to order payment of such a large (and excessive) sum where the operation of complex payment rules was in dispute, and that the adjudicator himself had not asked the parties why no building contract had been entered into after the pre-construction works.

¹⁶ International Electrotechnical Commission.

¹⁷ Nothing has so far been reported.

¹⁸ *Willott Partnership Homes Ltd v Bethel Retirement Villages—Herne Bay Court*, unreported 10 April 2017, Fraser J.

Fraser J held there were only two grounds on which enforcement of an adjudicator's decision could be resisted: lack of jurisdiction and a breach of natural justice. Natural justice comprised two aspects, namely that the parties were entitled to know the case against them, and that they were entitled to have that dealt with by an impartial tribunal.

No issue had been taken as to the adjudicator's jurisdiction, and neither of the defendant's arguments raised issues of natural justice. Therefore, and following recent authority,¹⁹ the adjudicator's decision was to be enforced.

7. Natural justice—reservation of rights—request to correct decision—approbation and reprobation

See *Dawnus Construction Holdings Ltd v Marsh Life Ltd*.²⁰

The claimant, Dawnus, sought to enforce the decision of an adjudicator Mr Peter Collie made on 6 March 2017 and revised on 9 March 2017 awarding them £1,038,018.30 plus VAT plus the adjudicator's fees and expenses in the sum of £43,597 plus VAT. The defendant Marsh opposed enforcement on the grounds of breach of the rules of natural justice in an alleged failure of the adjudicator to deal with defences in a loss and expense claim, amidst a plethora of other criticisms of the decision, all of which were abandoned at the hearing.

The claimant asserted that the court need not deal with that challenge on its merits, since the defendant had accepted the validity of the decision by inviting the adjudicator to correct errors in the decision under the "slip rule", without reserving its position.

On 7 March 2017, the claimant invited the adjudicator to correct a mathematical error in the decision which if made would have had the effect of increasing the net sum payable to the claimant. On 8 March 2017, the defendant invited the adjudicator to correct his decision for a variety of what were said to be breaches of the rules of natural justice. On 9 March, the adjudicator produced a revised decision correcting a mathematical error, thereby increasing the net sum payable, and rejected the points raised by the defendant.

As the court recounted, the doctrine of election prevents a party from approbating and reprobating (blowing hot and cold) in respect of an adjudicator's award.²¹ It had also been held that whilst a party might rely on a general reservation of jurisdiction when inviting an adjudicator to make a correction under the slip rule, a non-jurisdictional challenge, such as one for inconsistency, was not covered by a general reservation.²² Marsh sought to draw a distinction between the effect of a request under the slip rule on a challenge to the jurisdiction of an adjudicator without a reservation and one where the challenge was on the grounds of breach of the rules of natural justice. It contended that no reservation was needed in the latter case. Marsh also contended that, on a fair reading, its request for correction implied that if the corrections were not made, Marsh would challenge the decision.

The court found the distinction drawn by the defendant to be conceptually unsound and contrary to authority. In reality, there was often no clear-cut distinction between excess of jurisdiction and breach of the rules of natural justice. In both cases the effect of a successful challenge would be to nullify the decision. When inviting the adjudicator to correct the decision under the slip rule Marsh could have expressly reserved its position but did not do so. In acting without reservation, the defendant waived or elected to abandon its right of challenge.

¹⁹ *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] B.L.R. 344; [2017] C.I.L.L. 3949.

²⁰ *Dawnus Construction Holdings Ltd v Marsh Life Ltd* [2017] EWHC 1066 (TCC) HH Judge McKenna (11 May 2017).

²¹ *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] C.L.C. 739; (1999) B.L.R. 93; [1999] 37 E.G. 173 per Dyson J (as he then was) followed in *Shimizu Europe Ltd v Automajor Ltd* [2002] EWHC 1571 (TCC); [2000] B.L.R. 113.

²² *Laker Vent Engineering v Jacobs* [2014] EWHC 1058 (TCC) Ramsey J.

If it was wrong about that, the court turned to consider the substantive arguments, albeit briefly. The essence of the challenge was that the adjudicator failed to deal with a defence that delay event 2 (the SSE Cable delay claim) was in fact a delay by a statutory undertaker exercising its statutory duties which entitled the claimant to time but not money. It was true that the adjudicator misunderstood the defendant's argument but what he was asked to decide was the issue of loss and expense, and properly analysed, that is what he did. He rejected the defendant's argument that the claimant had no contractual entitlement and found the claimant entitled to loss expense. The defendant might not like that conclusion but he was stuck with it.

Marsh also said the adjudicator failed to deal properly with another defence to what was called the Winter Working Delay. It was common ground that in his decision, the adjudicator wrongly recited that Marsh did not dispute liability, only proof of loss. In fact, Marsh did dispute liability. Properly analysed the decision was that the claimant had established its entitlement to the Winter Working Delay, which was not a discrete standalone claim in any event but stood or fell with the SSE Cable delay. Once the adjudicator had decided that claim he had rejected the only defence available to Marsh.

For a breach of natural justice challenge to be a bar to enforcement, the court noted that "the breach must be 'plain', 'significant' 'causative of prejudice' or 'material'".

8. Service of proceedings

See *Emile Lobo v Robert Corich*.²³

The court rejected a contractor's assertion that he had been unaware of adjudication and enforcement proceedings which had resulted in summary judgment being entered in favour of the employer. There had been effective service of all the relevant notices and orders by sending them to the contractual address for service, the contractor's last-known address, and four email addresses used by him.

9. Stay of execution

See *Structure Consulting Ltd v Maroush Food Production Ltd* (under s.4, Enforcement above).

10. Winding-up petition—disputed claim for payment

See *Breyer Group plc v RBK Engineering Ltd*.²⁴

The petitioner (RBK) alleged that Breyer was insolvent and should be wound up due to its failure to make an interim payment under a construction contract. It went further, contending that Breyer could have no valid defence because it had failed to give a valid payment notice in response to a valid payment application as required by the contract and the Act, such that the amount applied for was the sum due.

Breyer raised a number of defences and cross-claims including as to the terms of the contract, the quality of electrical work undertaken by RBK and the validity of certain testing certificates relied on by RBK.

The court found the payment terms of the contract to be complex and that there was doubt as to when any payment obligation might have arisen. It found the absence of a payment notice was not of itself sufficient to ground the claim. Crucially, it found that the absence or lateness of a payment notice would neither extinguish the right of RBK to recover payment, nor extinguish Breyer's right to assert it was not obliged to pay because the

²³ *Emile Lobo v Robert Corich* [2017] EWHC 1438 (TCC) Stuart-Smith J (21 June 2017).

²⁴ *Breyer Group plc v RBK Engineering Ltd* [2017] EWHC 1206 (Ch) Daniel Alexander QC sitting as a deputy judge.

conditions for payment had not been satisfied or it had a counterclaim. The court investigated the facts sufficient to determine the issue as to whether RBK was a “creditor” since only a creditor could present a petition. On the facts, it was not satisfied that the Breyer payment notice (including a pay less notice) was out of time but even if it was, it gave rise to the debt claimed in the petition.

It also found that Breyer was not insolvent and could pay its debts as they fell due. Applying the principles from established case law Breyer had a range of reasonable potential defences as well as significant potential counterclaims to be quantified. The debt claimed by RBK was bona fide disputed on substantial grounds and Breyer had a substantial counterclaim. RBK was not a creditor at the date of the petition and had no standing to present the petition.

The court noted yet again that such proceedings are not the place for resolving genuinely disputed debt claims which the court could not properly determine, as to either the merits or quantum at that stage. Such petitions had the potential to create injustice and a company might feel pressurised into paying simply to avoid the adverse commercial consequences of publicity. The petition was struck out as an abuse of process.

Judgment was delivered in open court despite the petition not having been advertised, as news of it had reached at least one creditor and to prevent speculation adverse to Breyer.

Comment

Though not a case of enforcement of an award, this case is reported in keeping with previous practice since it indicates the dangers that exist for a payee when instead of taking adjudication, or ordinary court proceedings, he issues a winding-up petition to compel payment. Its interest further lies in the view the court took of the effect of the alleged (but unproven) failure to serve a payment or pay less notice: that it did not make the debt indisputable. Though this would appear to run counter to case law dealing with the effect of the payment sections of the Act, it is consistent with insolvency case law, where the debt would be the amount due after taking into account any set-off or counterclaim. So, it may appear that even in a case (unlike this) where there is no payment notice and no defence, a counterclaim may still be considered. The law is not sufficiently settled to argue whether the position would have been different had RBK first obtained an adjudication award (though not a judgment) in its favour.

11. Summary

Decision—meaning of—jurisdiction to consider in second adjudication

See *Waldeck Associates v Democo UK Ltd*.

Where an adjudicator is requested to decide the meaning of an earlier decision, the parties confer on him jurisdiction to do so. Although this was not the case of an adjudicator answering the same or substantially the same question as in a previous adjudication, by analogy, the court adopted the same approach and the starting point was to look at what the adjudicator considered he had decided.

Dispute—crystallisation

See *Mailbox (Birmingham) Ltd v Galliford Try Building Ltd*.

In a dispute over liquidated damages, it is not open to the responding party to dictate which of its extension of time claims to run and which to keep back. The crystallised dispute encompassed all liquidated damages and all extensions of time.

Enforcement—principles and practice—power of court to make substantive determination of issue

See *Structure Consulting Ltd v Maroush Food Production Ltd*.

There was power to use the Pt 8 procedure to make a substantive determination. Where there were limited factual issues, the court could adopt a hybrid procedure involving an element of fact finding or determination of some but not all of the issues.

The issues here were sufficiently defined as to enable the court to determine the matter by way of Pt 8 with some room for fact finding on specific matters that might arise on the evidence. There were no special circumstances to justify a stay of execution but the defendant was given extra time to pay.

Jurisdiction—slip rule

See *NKT Cables A/S v SP Power Systems Ltd*.

The court implied into the contract a term equivalent in nature and extent to the slip rule in reg.22A of the Scheme. The operation of that implied term did not require the adjudicator to give the parties prior notice and an opportunity to make representations before correcting his decision. The right of correction did not extend to “pure” omissions.

Natural justice—failure to ask questions

See *Willott Partnership Homes Ltd v Bethel Retirement Villages—Herne Bay Court Ltd*.

No issue of natural justice arose by reason only of the adjudicator not asking why the parties had not entered into a contract following an agreement for pre-construction services.

Natural justice—reservation of rights—request to correct decision—approbation and reprobation

See *Dawnus Construction Holdings Ltd v Marsh Life Ltd*.

The doctrine of election prevented a party from approbating and reprobating (blowing hot and cold) in respect of an adjudicator’s award. No distinction was to be drawn between cases of excess of jurisdiction and breach of the rules of natural justice. In both instances, an express reservation of position was required before inviting an adjudicator to correct a decision under the slip rule.

Service of proceedings

See *Emile Lobo v Robert Corich*.

Service of adjudication notices and enforcement proceedings at the contractual address for service, the party’s last-known address, and four email addresses used by him, was effective.

Stay of execution

See *Structure Consulting Ltd v Maroush Food Production Ltd* (under s.4, Enforcement above).

Winding-up petition—disputed claim for payment

See *Breyer Group plc v RBK Engineering Ltd*.

The court decided that the absence or lateness of a payment/pay less notice would neither extinguish the right of the creditor to recover payment, nor extinguish the right of the debtor

to assert it was not obliged to pay because the conditions for payment had not been satisfied or it had a substantial counterclaim. It dismissed the winding-up petition as an abuse of process.

A Medical Drama and an Application to Remove an Arbitrator

Hew R. Dundas

The case under consideration here is *T v V, W and A*.¹

1. Introduction

The author has experienced an arbitration in which the claimant's principal witness was knocked off her motorbike and hospitalised and another where a co-arbitrator was allegedly kidnapped by gangsters and held to ransom but the present case, where the claimant underwent a liver transplant, appears to be a medical first in arbitration. An indirect consequence of the claimant's (undoubtedly very serious) medical condition was a s.24² application to remove the arbitrator. Actual s.24 removals of arbitrators are relatively rare³ and appear to be well outnumbered⁴ by unsuccessful removal applications; it seems that the courts are reluctant (in the author's view, wholly correctly) to grant removal except where the arbitrator has "gone off the rails" fairly seriously and the records show dismissal of a number of spurious challenges.

The present case arose from an arbitration between Mr T on the one hand, and Messrs V and W on the other, and was a s.24 application by T to remove A, the arbitrator. The grounds for the application were (i) that circumstances existed which gave rise to justifiable doubts as to A's impartiality (s.24(1)(a) refers) and (ii) that A had refused or failed properly to conduct the proceedings (s.24(1)(d)(i)).⁵

The dispute between T and V&W arose out of T's departure from two accountancy partnerships, one longstanding one between T and V and a second between the three participants, T, V and W. In summary, V&W claimed over £1 million as damages which were said to have arisen from misrepresentations made by T as to the state of his health and his intention to work following retirement from the partnerships. They contended that T had requested retirement on the grounds of ill-health and had represented that he would not work again, save in a consultancy capacity for the partnerships.

T denied the claim and counterclaimed over 1.3 million, contending that, following a period of illness, and having been denied access to client files and to his partnership drawings, he had been unlawfully expelled from the partnerships. His case was that his doctor had told him that he needed to have a phased return to full-time work, building up his hours gradually and that V&W had been obliged to have allowed such reasonable adjustments pursuant to the Equality Act 2010 but that they had failed to do so, instead insisting that he return full-time to work or retire, giving him no choice but to leave.⁶ The essence of the s.24 application was that the arbitrator had improperly made a peremptory order that, unless T served the documents on which he wished to rely by close of business on 5 August 2016, he would be debarred from relying on any such documents in the

¹ *T v V, W and A* [2017] EWHC 565 (Comm), Popplewell J, 7 February 2017; A, the arbitrator, was represented by David Brynmor Thomas, well known to the CI Arb e.g. as a former Trustee.

² References herein in the form s.00 are to section 00 of the Arbitration Act 1996 (the Act) unless otherwise specified.

³ e.g. (1) *Norbrook Laboratories v Tank* [2006] EWHC 1055; [2006] 2 Lloyd's Rep. 485; (2) *Sierra Fishing Co v Farran* [2015] EWHC 140 (Comm); [2015] 1 All E.R. (Comm) 560; *Sierra Fishing* was considered in Hew R. Dundas, "Arbitral Rarities: Recent Arbitration Cases in the English Courts with a Scottish Postscript" [2015] 81 Arbitration 3, 332–342.

⁴ Counting the cases in the author's database.

⁵ There was originally a third ground that the arbitrator had not possessed the qualifications required by the arbitration agreement (s.24(1)(b) refers) but that ground was abandoned.

⁶ Both V&W's claims and T's counterclaims have several dimensions but such detail is not needed here.

arbitration, and that such an order could not have been complied with because T had been suffering serious medical consequences of a liver transplant.

The partnership deed contained an arbitration clause providing for disputes to be determined by an arbitrator appointed by the President of the Institute of Chartered Accountants for England and Wales (the ICAEW) who was to ensure that the nominated person had knowledge and experience of firms of a similar size and client base.

2. The course of the arbitration proceedings

The first arbitrator appointed declined and, in November 2015, A was nominated by the President of the ICAEW as replacement arbitrator and she accepted and in December 2015 she held a preliminary hearing by telephone, both sides being represented by counsel. A was told that T had a serious liver condition and was awaiting a transplant. Each side proposed a timetable, T's being longer than V&W's, and A imposed one part-way between the two.

A ordered that (i) T should serve his defence and counterclaim (D&CC) by 26 February 2016; (ii) V&W should serve any reply and defence to counterclaim (the V&W Reply) by 18 March; (iii) T should serve any reply to defence to counterclaim (the T Reply) by 15 April; and (iv) each party should produce and provide to the other party by 20 May the documents upon which they intended to rely. The timetable led up to a four-day hearing in October/November.⁷

On 23 February (i.e. only three days before the deadline for submission of the D&CC), T instructed new solicitors, BSG, who immediately applied⁸ to A seeking a six-week extension for that submission. Two grounds were advanced: (i) BSG had only recently been instructed and would need to acquire and digest the documents held by T's former solicitors and (ii) T's ill-health. A granted a two-week extension to run to 9 March 2016. However, on 7 March, BSG emailed A attaching a letter from T's Hospital stating that he had been placed on a waiting list for a liver transplant. The covering letter explained that BSG had attended on T for the purposes of preparing the D&CC but that T had been unwell and that it had been difficult obtaining instructions from him; however, they and counsel would do their best to comply with the deadline.

The next day, BSG applied for a further extension of time (to 14 March) for service of D&CC which A granted despite V&W's protest and that deadline was met. Given the slippage, A issued a revised timetable for the Replies but the disclosure deadline remained as 20 May. However, on 22 April, BSG applied for a variation to the disclosure regime and for an extension of time for T's Reply but A declined this and the latter was served on time.

Three days before the 20 May deadline, BSG applied for a two-week extension of time because T was in hospital having his liver drained; inter alia, BSG's letter evidenced a misunderstanding of the distinction between disclosure under the applicable arbitration rules and that under CPR. V&W proposed a one-week extension which BSG accepted.

On 23 May 2016, BSG applied to have the arbitration adjourned because T had been admitted to hospital and had undergone a liver transplant operation so he would not be in a position to give instructions. A promptly responded adjourning the arbitration until T's medical advice was that he was well enough to give instructions. After further exchanges, A clarified that the adjournment would continue while T was in hospital but that, on discharge, he was to be considered well enough to give instructions; there were no objections.

T was discharged from hospital on 1 June so, absent any letter from a hospital consultant saying that T was unfit to give instructions, time started to run and the deadline became 14 June. On that day, BSG applied for yet another extension, principally because, although

⁷ The author's first response on seeing the timetable was to commend the arbitrator for her crisp and decisive approach, a model to us all.

⁸ The judgment contains detailed extracts from the correspondence but these are necessarily omitted here in view of space limitations.

they possessed all necessary documents, they had not been able to work through these with T. BSG attached a letter (dated 8 June) from Mr S, the consultant surgeon who had carried out T's liver transplant and who was responsible for T's post-discharge care, which stated "[T] is currently recovering from his major surgery and is not in a position to attend court or any public space in view of his risk of acquiring infections"; nothing in Mr S's letter suggested that there would have been any difficulty in BSG seeing T at his home. On 15 June 2016, A was copied with an email from Mr S's PA which said: "Mr S has advised that [T] should be in a position to attend the solicitors' offices in a month's time"; again, nothing suggested any difficulty in T being seen at home.

On the same day, and despite opposition from V&W, A granted an extension to 20 July for the disclosure and a telephone hearing to consider the necessary changes to the timetable was fixed for 27 June. On the morning of that day, T's counsel produced a note referring to the fact that a partner in BSG had visited T at home the previous evening in order to seek his instructions but he had been very weak and it was unclear how much T was able to take in and his family was concerned over jeopardising his recovery.

Counsel undertook to obtain medical evidence to support an application for extending the timetable and, on 11 July 2016, BSG sought a further extension of at least six weeks for the disclosure deadline, relying on a report from a Professor D who was not T's treating clinician but had been independently instructed. He had seen T once in clinic on 30 June and produced a two-page report⁹ *inter alia* stating that:

"I would advise that he has at least six weeks and ideally two months of further convalescence before he is involved in pursuing or defending court proceedings. In my view, if he does not have this period of convalescence and is instead subjected to court dealings including meetings with his legal representatives this will seriously jeopardise his prospects of recovery or at the very least his rate of recovery."

Inter alia, A was concerned that Professor D's opinion appeared to cut across Mr S's one, including (on 15 June) that [T] would be able to give instructions by 15 July. It was unclear to A why neither T's medical team nor his GP had been asked to comment further on T's fitness to instruct his solicitors concerning disclosure.

Before A responded, she received an email from the solicitors for V&W (GL) opposing the application for a stay, querying why T could not consider documents provided by his solicitors in his own time and at his own pace so that the matter could be progressed. They repeated a suggestion that had been made earlier that disclosure might take place in two stages with BSG providing immediately the documents which they had already identified as documents on which T would wish to rely, and that there be a further opportunity to produce further documents after a subsequent 42-day period. BSG rejected this outright, although Popplewell J found their explanation for rejecting it difficult to understand. Further correspondence ensued with A trying to obtain a clear understanding of T's medical condition and with GL suggesting that the load on T was not that onerous.

With Mr S unavailable until 26 July, BSG asked for an extension and A granted one to 27 July. On 26 July, BSG sent A an email letter stating that the confirmation from Mr S was being awaited including confirmation of the information contained in Professor D's report. That email was copied to T who wrongly clicked "Reply All" when responding to BSG in intemperate terms including suggesting that A resign. Later that day, A responded to BSG noting that she had not, as their letter asserted, asked BSG to request Mr S to comment on Professor D's opinion but had in fact asked whether T was now under the care of Professor D and whether Mr S had provided any opinion that invalidated the opinion he had provided on 15 June in which he expected T to be able to meet his lawyers in a month's time, in other words by 15 July. On the next day (i.e. 27 July), BSG wrote to A saying (*inter alia*): "we are so worried about our client's medical state and our forced intrusion into his

⁹ Again, the judgment contains extracts.

continuing near-death position”. As the judge noted, this language was clearly hyperbolic in the light of the actual medical evidence.

After some further exchanges concerning what A in fact required (which BSG appeared to continue to misunderstand), on 18 July, she sent Mr S’s PA her own email clarifying what it was that she was asking Mr S to do and the nature of the task required of T. BSG objected to that email but the judge considered it difficult to see any justification for that stance, A’s email making clear that what she was asking for was an update of Mr S’s letter of 15 June in which he had opined that T would be able to meet his lawyers by 15 July.

The 27 July deadline passed, therefore, without any further medical evidence and on 28 July, GL asked how the parties were to proceed and, in particular, whether A intended to extend the time further for service of documents to wait for Mr S’s report. A responded saying that, on the basis that the evidence had not yet come forward, she intended now to press ahead with the arbitration so that the deadline for service of documents was now 2 August.

On 29 July, BSG stated that they had just received an email from Mr S’s PA which indicated that he had arranged to see T at his clinic on 2 August and would then write an up-to-date letter as requested.

Late on 1 August, BSG emailed A (who did not receive it until the following morning, the date of the deadline) stating that they would need half a day to a full day to go through “all the documents with [T] that I have amassed” and asking A to review her decision. BSG also requested that if Mr S confirmed his previous advice that T was able to deal with documents, three working days be allowed from that point until the documents had to be served. On 2 August, A responded with a detailed summary of the chronology of the numerous extensions, *inter alia* stating that Mr S’s opinion of 15 June (i.e. that T would be well enough by 15 July) still stood and concluding:

“[T] has been granted twelve additional working days since 15 July to go through ‘certain documents’ with you. I am not minded to grant yet another extension. The documents must, therefore, be disclosed today.”

The 2 August deadline passed without any disclosure. On 3 August, BSG sent an email confirming that T had seen Mr S the previous day and that additional time was needed.

On 4 August, A wrote to BSG (cc GL):

“I am writing further to my order of 28 July in which para.2 of the order of 27 June 2016 shown below was amended to Tuesday 2 August 2016 at 4pm with which you have not complied.

[she then quotes it] ...

By way of peremptory order, unless [T] provides the documents on which he intends to rely to [V&W] by 5pm on Friday 5 August, he shall not be entitled to rely upon them.”

Mr S had in fact produced his report and had sent it to BSG on 2 August but, due to administrative errors within the firm, it had not reached T’s solicitor until the morning of 4 August at or around the time when A issued her peremptory order so, at 11.02am, the solicitor emailed Mr S’s report to A. The report started by setting out a diagnosis in six paragraphs, the first four referring to T’s historic liver condition, the fifth paragraph discussing T’s recent renal dysfunction and paragraph 6 addressing “stress related to a domestic dispute” including:

“... On review today he seemed a bit disorientated and distressed [following a dispute with his wife] ... I have had a long discussion with him and clearly in his current state of disorientation he is not fit to attend any court proceedings or indeed any strenuous consultations with the solicitors. ... I will keep him under close review and I have arranged to see him back in my clinic [on 16 August].”

BSG's covering letter appeared to treat that as justifying T's inability to participate in the way necessary to take any further steps towards disclosure of documents. Their request was, therefore, that the order be amended so as to give an indefinite extension of time for the next step, with BSG reverting with further medical evidence after the period of two weeks referred to by Mr S.

GL responded that (i) T's disorientation appeared to be attributed not to the liver transplant but to the recent dispute with his wife; (ii) the report only addressed "strenuous meetings" which was undefined and which did not properly identify what was required of T; (iii) it was incorrect for BSG to say that T needed to go through the documents that he had and those that he had produced and to press him, if necessary, to ensure full disclosure was made. That, again, seemed to be a misunderstanding of the nature of the disclosure exercise. BSG responded to GL the same day but in intemperate language.

That afternoon (i.e. 4 August) at 4.46pm A notified the parties that she would maintain her peremptory order:

"Having carefully reviewed the correspondence from the solicitors to the parties and to me over the past few months regarding the relevant order for disclosure and the three reports from [T's] consultant surgeon, I am not minded to change my peremptory order. [T] is to disclose the documents on which he intends to rely by Friday 5 August 2016."

Neither T, nor BSG on his behalf, made any attempt to comply with the order even in part. There was no attempt to serve any documents, even those which, it was evident from the previous correspondence, had been identified by BSG as ones upon which T would undoubtedly wish to rely. Instead BSG responded the next day that, in view of A's decision, T had no choice but to apply to the High Court to remove A as arbitrator.

3. The law

Popplewell J stated that the following principles governed the application of s.24(1)(a):

- s.33 required the tribunal to "act fairly and impartially between the parties";
- the question as to whether circumstances existed which gave rise to justifiable doubts as to an arbitrator's impartiality was to be determined by applying the common law test for apparent bias¹⁰;
- that test is whether the fair-minded and informed observer (FMIO), having considered the facts, would conclude that there existed a real possibility that the tribunal was biased¹¹;
- the FMIO is gender-neutral, is not unduly sensitive or suspicious, reserves judgment on every point until he or she has fully understood both sides of the argument, is not complacent and is aware that judges and other tribunals have their weaknesses; he/she is informed on all matters which are relevant to put the matter into its overall social, political or geographical context and these include the local legal framework including the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators¹²;
- the test is an objective one and the FMIO is not to be confused with the complainant and the test ensures that there is a measure of detachment, the

¹⁰ See *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451 at [17]; [2000] 2 W.L.R. 870; [2000] 1 All E.R. 65; *A v B* [2011] EWHC 2345 (Comm); [2011] 2 Lloyd's Rep 591 at [22]; [2011] Arb L.R. 43; *Sierra Fishing Co v Farran* [2015] EWHC 140 (Comm) at [51]; [2015] 1 All E.R. (Comm) 560.

¹¹ See *Porter v Magill* [2001] UKHL 67; [2002] 2 A.C. 357 per Lord Hope at [103]; [2002] 2 W.L.R. 37; [2002] 1 All E.R. 465.

¹² See *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 W.L.R. 2416; [2009] 2 All E.R. 1031; *A v B* [2011] EWHC 2345 (Comm); [2011] 2 Lloyd's Rep 591 at [28] to [29]; [2011] Arb L.R. 43.

litigant lacking the objectivity which is the hallmark of the FMIO and being far from dispassionate; litigation is a stressful and expensive business and most litigants are likely to oppose anything which they perceive might imperil their prospects of success even if, when viewed objectively, their perception is not well-founded¹³;

- all factors which are said to give rise to the possibility of apparent bias must be considered not merely individually but cumulatively.¹⁴

So far as concerns failure properly to conduct the proceedings (s.24(1)(d) refers) and consequent substantial injustice, the relevant principles are as follows:

- The duty of the arbitrator in making procedural decisions is reflected in s.33(1)(b) in the following terms:

“[t]he tribunal shall ... (b) 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.”

- Guidance on the application of s.24(1)(d) is to be found in para.106 of the DAC Report¹⁵ which provides:

“We have every confidence that the courts will carry through the intent of this part of the Bill, which is that [removal] should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the court to substitute its own view as to how the arbitral proceedings should be conducted. Thus, the choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by clause 33, should on no view justify the removal of an arbitrator, even if the court would not itself have adopted that procedure. In short, this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in the Bill, he is in effect frustrating that object. Only if the court confines itself in this way can this power of removal be justified as a measure supporting rather than subverting the arbitral process.”

- Accordingly, the court will only remove an arbitrator where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended as to cause substantial injustice, and only in the very rare case where an arbitrator so conducts proceedings that it can fairly be stated that instead of carrying through the object of arbitration, as stated in the Act, he/she is in effect frustrating that object.
- Against that background the court will not substitute its own view as to how the arbitral proceedings should be conducted and, if the arbitrator has adopted an appropriate procedure, the court will not, unless that test is satisfied, substitute its own view as to what decision it would have reached in all the circumstances. The court’s role is not to consider what decision it would have made on the material which was before the arbitrator. Where, as in this case,

¹³ See *Helow v Secretary of State for the Home Department* [2008] 1 W.L.R. 2416 per Lord Hope at [2] and see *Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2016] EWCA Civ 556 per Lord Dyson MR at [69].

¹⁴ See, e.g. *Cofely Ltd v Anthony Bingham & Knowles Ltd* [2016] EWHC 240 (Comm) at [115]; [2016] 2 All E.R. (Comm) 129.

¹⁵ Report on the Arbitration Bill by the Departmental Advisory Committee (February 1996).

there is no question of an arbitrator having committed any error in the way he/she has gone about the decision-making process, what must be shown is that no reasonable arbitrator could have made the decision which the arbitrator did make consistently with the duties imposed by s.33. Where a discretion is being exercised, as it is when considering an extension of time in relation to disclosure of documents, there may be a range of responses which may reasonably be adopted. The burden on the claimant in the context of the present application is a burden to show that the response was outside the range of responses which could reasonably have been adopted in fulfilling the duty to deal with the proceedings with fairness and impartiality towards the claimant as well as to the other parties.

- Those principles have been repeatedly adopted and applied; to give just one example, the decision of Dyson J (as he then was) in *Conder Structures*.¹⁶ It is an approach which is dictated by the principle of efficient and speedy finality which is enshrined in s.1(a) and the principle of minimum court intervention which is reflected in s.1(c).
- The test of substantial injustice, which is an essential ingredient in an application under s.24(1)(d), is also used as a necessary threshold ingredient for challenging an award under s.68 when the challenge is for serious irregularity. In that context, it is well established that this places a burden on the applicant to show that the arbitrator's failure caused him/her to reach a decision which, but for that failure, he/she might not have reached.¹⁷
- The same applies in an application under s.24(1)(d): in such a case, whether under s.24(1)(d) or s.68, the burden of proving substantial injustice must be addressed on the evidence and substantial injustice cannot simply be assumed.¹⁸

4. The decision

Popplewell J first applied the foregoing principles to the s.24(1)(d) ground. It was clear from the correspondence (both as cited by him and other correspondence which he had read) that the arbitrator had taken great care over her decision-making. She had read and reviewed all the relevant material and she granted a number of extensions and refused others, in each case by reference to the particular material which fell to be considered. She had applied herself to it with diligence and she was not, as the chronology shows, unsympathetic to T's medical difficulties and the constraints they placed on him and his legal team but she had rightly stated that she had to have regard to the interests of both parties to the arbitration.

The arbitrator had been entitled, and indeed had been required, to have borne in mind the imperative of speedy and efficient finality in arbitration (s.33(1)(b) and s.1(a) refer). The background was one of considerable delay since the first nomination of an arbitrator. T's counsel had submitted that, in the context of the earlier delay, which was alleged to be the fault of V&W in not progressing their claim, an extension in August 2016 of a few weeks would be all the more reasonable by comparison with that extensive earlier delay. The judge said that had the arbitrator approached the matter in that way such would have been a mistaken approach. Both parties have a duty to progress the arbitration, especially where there are claims and counterclaims (s.40 refers). T had a counterclaim and had professed throughout his desire to get on with matters quickly, as had V&W. It would not be right to characterise the delay in 2014–2015, whilst the sale of the partnerships' premises were taking place, as something which was attributable solely to the fault of V&W. However,

¹⁶ *Conder Structures v Kvaerner Construction Ltd* unreported, 15 April 1999.

¹⁷ See Andrew Smith J in *Maass v Musion Events Ltd* [2015] EWHC 1346 (Comm) at [40], *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm) at [85(7)]; [2013] 1 Lloyd's Rep. 86; 145 Con. L.R. 114.

¹⁸ See *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 at [35]; [2003] Arb L.R. 28.

that may be, and whether the earlier delay was culpable and, if so, on whose part, the fact that there had been delay made it all the more important that the arbitrator should have sought to have the dispute resolved as swiftly as fairness permitted. This dispute seemed to be one in which issues depended upon oral evidence unsupported by documentation. The longer matters were delayed the more memories would fade and, in any event, in arbitration there is the imperative the judge had already identified.

The timetable for the hearing, as the arbitrator originally ordered, was a timetable working towards a hearing in October or November 2016 for final resolution of the dispute. By August 2016, that timetable had been in place for many months. As T's counsel had very fairly accepted, what was at that stage being proposed on T's behalf would have very probably jeopardised the hearing date. That had been a matter which the arbitrator had been bound to take into account.

She had also been entitled to have taken into account the indications in the material the judge had recited that T, or those on his behalf, were not being entirely co-operative in trying to resolve matters as speedily and efficiently as possible: for example, there had been an outright rejection by BSG of the suggestion that documents might be provided in stages.

Against that background, the question for the arbitrator had been whether the time should be extended because it was necessary to do so in order to ensure that T had had a fair opportunity to comply with the order. That involved an assessment of two particular considerations, the first an assessment of the task which was involved in serving documents upon which T would wish to rely and, in particular, identifying the extent to which T himself would need to participate in that task, as distinct from the participation which could be undertaken on his behalf by his legal advisors. The second consideration was T's medical condition and, in particular, the extent to which that impaired his ability to participate in the process to the extent necessary.

What was the task which had to be undertaken? It was not standard disclosure of relevant documents as would have been required under CPR but, instead, was merely the identification of those documents upon which T wished to rely. The case which T wished to advance had been identified at the pleading stage, apparently with some care and with the benefit of counsel's advice, and was set out in the D&CC with the benefit of documents which had been received by T's former solicitors. Whilst one would not expect that exercise necessarily to have identified all the documents which would constitute those which would be relied on, at least some substantial part of the exercise of identifying such documents would have been performed at that stage. The exercise of identifying which documents were helpful to T's case was largely one which could be performed by the lawyers once the documents had been received. BSG had received all the documents previously supplied to their predecessors and had also received, at a relatively early stage, the documents which had been downloaded from T's computer. It was never suggested that there were any other sources from which documents in T's control might have come.

T's counsel submitted that amongst those documents there would have been a number of emails which would have been unclear, and on which T's instructions would be required in order to decide whether or not they were helpful; in addition, there would have been a number of emails where confidentiality issues might have arisen which, again, would necessitate taking T's instructions. The judge readily accepted that that was the case, but the arbitrator could reasonably have taken the view that, insofar as input from T himself was concerned, all that was needed was for T to give (i) consent to what the solicitors had identified as helpful, not an onerous task and not requiring lengthy review of the documents and (ii) instructions where documents were ambiguous and needed clarification or confidentiality issues needed to be dealt with.

The arbitrator had been told that it was only necessary for "certain" documents to be reviewed with T. The submissions made by his counsel referred to hundreds of pages of documents and that was what had been identified in the second letter of instruction to Mr S, but it was made clear to the judge that that was not the scope of the "certain documents"

that would need to be reviewed but was the totality of what had been downloaded from T's computer or received from his former solicitors.

It was significant that, in the communication in which BSG said that what was needed was half a day to a day to go through documents with its client, they had referred to that length of time as being necessary to go through all the documents which they had amassed. If that was what they meant, and it appeared to be what they were saying, they were proceeding on the misguided approach that the task involved having to go through all the documents with T in order to decide what was helpful.

BSG's correspondence, as the arbitrator had seen, betrayed a confusion about the nature of the exercise when, as BSG asserted on a number of occasions, what needed to be done was essentially the same as that which was required for CPR standard disclosure. The arbitrator herself had identified what she understood to be the nature of the task and she had set this out in her email of 18 July and this did not, as she had stated, require T to undergo strenuous activity or get involved in major court dealings: what was required at this stage was simply a meeting or meetings with the lawyers, and only for T to look at documents in an unpressurised way.

The judge rejected as invalid criticism T's counsel's submission that, because A was not a lawyer, she had misunderstood the nature of the exercise involved. It seemed to him that if anyone had misunderstood the nature of the exercise involved it had been BSG and there was no evidence of any misunderstanding on the arbitrator's part.

It was against that background that the judge next considered the medical evidence which was before the arbitrator. She had been entitled to have treated, as her primary source of guidance as to T's condition and capabilities, the independent evidence coming from Mr S. It had been right for her to have proceeded on the basis of independent medical evidence, all the more so because the hyperbolic tone of BSG's correspondence suggested that they had become too close to the issue and to their client's interests to be able to express any objective assessment. T's counsel's criticism that the arbitrator had failed sufficiently to take into account what BSG had been saying about their client's condition was, for that reason, misplaced.

It was not unreasonable for A to expect the independent medical evidence to come from Mr S (he being T's surgeon and his lead clinician supervising his post-operative care). He and his team would be best placed, as a result of seeing T regularly, to give full and informed information as to his continuing condition and Mr S could be expected to give a measured assessment over time. In contrast, Professor D had only seen T on one occasion, and had no details of how the latter had reacted to the operation over time and he had essentially been expressing an opinion based on a snapshot.

Further, Professor D's report had been in terms that suggested that no contact at all would be appropriate. BSG clearly did not think that he really meant that because they did, indeed, visit and seek to take T's instructions on at least one occasion. BSG asserted that they had been unable to do so for "too long" but did not provide any detail as to how long that had been or what the difficulties had been.

T's counsel submitted that the arbitrator should have concluded that the emails which T sent personally and by mistake by hitting the "Reply All" button cast doubt on his mental condition but the judge could see no reason why she should have done so, it being only BSG's suggestion, without instructions, that that was the interpretation to be put upon them. There had been no reason, in the judge's view, why the arbitrator should have taken the view that those emails had cast doubt upon T's mental condition. The arbitrator had been entitled to have concluded, had she wished to, that they suggested a conscious understanding of what was going on, a conscious desire that the arbitrator should resign and therefore a conscious desire that the arbitration proceedings should be interfered with in that way.

Mr S's reports, therefore, were a proper bedrock upon which the arbitrator could reasonably have formed her judgment as to whether T could fulfil the responsibilities that were required of him. There were, as she had said in her decision, three such reports. The

first (8 June) had said that T was recovering from his major surgery and was not in a position to attend court or any public space in view of his risk of acquiring infections but it did not suggest that he was unfit to be seen at home by BSG nor did it suggest that he had been suffering from any problems in engaging with the litigation other than attending court or a public space.

Mr S's second report (15 June) had stated that T should be in a position to attend his solicitors' offices by 15 July but that opinion had been solely confined to an ability to attend solicitors' office; it had not suggested any cognitive impairment, any neurological condition or any impediment in T's dealing with matters on being visited by BSG.

Mr S's third report (2 August) had been as notable for what it did not say as for what it did. In the diagnosis section, there was reference to stress related to a domestic dispute but there was, significantly, no suggestion of any diagnosis of any neurological condition or mental incapacity flowing from T's liver condition or his liver transplant. Further, there had been no suggestion there of any impairment of cognitive function by way of a medically caused condition giving rise to any past inability to comply with any orders.

Moreover, T's disorientation as identified by Mr S was attributable to a recent and temporary cause, namely T's dispute with his wife and he was qualitatively described as "a bit" disorientated and distressed. The assessment was of unfitness to attend court proceedings or "strenuous consultations with solicitors". That was, T's counsel had submitted, likely to be a reference back to a BSG email which had referred to hundreds of pages of documents needing to be concentrated on by T for hours at a time. The arbitrator had been entitled to have concluded that that was not the exercise which was required of T and, therefore, that there had been nothing in Mr S's final report which suggested that T would have any difficulty in performing the required task.

The arbitrator had observed, quite properly, that there had been a large number of working days as a result of the several extensions of time on which progress could have been made. She had been entitled to have concluded that T had been well enough to have participated in the limited way necessary in a number of shorter sessions over that considerable period. She could also properly have taken into account the fact that T was apparently well enough to be involved in selling properties.

A said in her witness statement:

"I considered the opinions of Mr S and the representations of the parties including representations about what the task initially will involve. Mr S's letter was concerned with [T's] current state of disorientation as a result of an altercation with his wife and stated that [T] was not fit to attend court proceedings or any strenuous consultation with his solicitors. I have in mind what BSG had stated about the time they required with [T] and the steps that had been taken by themselves and [T's] family towards completing the disclosure exercise and, after much deliberation, determined that [T] had been given a reasonable opportunity to provide the documents he intended to rely upon or, put another way, that I could not, on the basis of the various medical reports served in support, justify a further extension of time whilst being fair to both parties."

The judge considered that that was not a decision which the court could categorise as one which no reasonable arbitrator could have reached consistently with his/her duty under s.33. It could not be categorised as so far beyond anything which could be defended that the court had to intervene in order to uphold the arbitral process. On the contrary, an intervention would be improper and it would be a subversion of the process by substituting the court's own judgment on the question for that of the arbitrator appointed by a mechanism which was agreed upon by the parties and, therefore, was a decision by the arbitrator consensually chosen by the parties.

The judge considered that there was nothing which suggested that this was so far from anything which can be justified as to cause substantial injustice and, in any event, T had made no attempt to prove any. T's counsel submitted that it was obvious that there had been

substantial injustice because T had been prevented from relying on any documents in the arbitration but that was not the effect of the order which had been that he should serve the documents upon which he wished to rely by 5.00pm on 5 August. The arbitrator had been entitled to have reached the view that T had already had a reasonable opportunity to have performed that function and that would be a complete answer to the question of substantial injustice.

T's counsel further submitted that it would not have been open to BSG on T's behalf to have served, on 5 August, the documents which they had already identified as ones on which he would wish to rely but that was simply not the case since BSG could have done that rather than being obstructive. If what had taken place had been a constructive engagement in which at least some of the documentation had been served, it might very well have been that a subsequent request to revisit the peremptory order might have been met with some sympathy. Whether or not that was so, it was impossible for the judge to conclude on the basis of the evidence before the court that there had been substantial injustice when he had no evidence of the documents on which T would have wished to rely but which he said he had been prevented from relying on because they were not identifiable as such prior to 5 August.

T's counsel submitted that BSG had been hobbled by its professional obligations to a vulnerable client and that they had taken advice from an agency in contact with the Solicitors Regulatory Authority. However, it was clear from the tone of the correspondence that the characterisation of the task that BSG said it was facing, which they put in terms of harassing T, was not an accurate assessment.

Poplewell J turned, finally, to the application under s.24(1)(a) on the grounds of apparent bias: there was nothing in this ground, for all the reasons given above, for rejecting the s.24(1)(d) challenge. There had been nothing in the decision itself, or in the way in which the arbitrator had gone about it, which would give an FMIO any reason to doubt that she would approach the substantive dispute fairly and impartially. She had gone about making the decision in this case in what the FMIO would regard as an entirely proper and fair-minded way. She had dealt with sometimes intemperate and critical correspondence in a measured way. She had dealt with the application with diligence. She had explained the basis on which she was reaching her decisions, and her decision, in particular, of imposing and maintaining the peremptory order was one which she could properly have reached.

For all these reasons, Poplewell J dismissed the application.

5. Comments and concluding remarks

This case resonates with the author who had a similar one some 10–12 years ago involving a partnership dispute and medical issues (but not as serious as a liver transplant) but that was an expert determination, not an arbitration, thereby leaving the expert in greater procedural control.¹⁹

Despite T's counsel querying the non-lawyer arbitrator's ability to handle difficult issues, Poplewell J's judgment effectively represents a very high commendation of what was, in the author's respectful view, an outstanding performance in very difficult circumstances.²⁰ In particular, the arbitrator's clear focus on the medical evidence provided by Mr S and her declining to be distracted by that of Professor D also establishes a model we can all follow.

¹⁹ The parties settled a few days before the Expert Determination was to have been issued; the matter remitted to the expert was to answer a very carefully drafted question which, in its terms, allowed only 2 possible answers, "Yes" or "No", with a money number to be attached. The Determination would have read "Dear Sirs, Yes; £1,250,000.00. Yours faithfully". What grounds of challenge existed? Did the Expert comply with his instructions? Yes, he answered the question and attached the necessary money number. Did he answer the right question? Self-evidently, yes.

²⁰ The author has no knowledge either (i) of the identity of the present arbitrator or (ii) whether she is/is not a member of the CI Arb; however, having interviewed many applicants for Chartered Arbitrator status, he most respectfully commends, most strongly, the present case as representing, in all the circumstances, the very high standard to be expected of a Chartered Arbitrator, possibly even of FCIArbs.

Popplewell J's thorough summary of the law surrounding s.24 (and s.68) is also to be commended as providing a concise framework upon which we can all rely in similar circumstances.

US Supreme Court Continues to Nurse Along FAA Pre-emption: *Kindred Nursing Centers v Clark*

Steven Caplow

“You are likely to keep repeating the same mistake all over again if you do not agree it’s a mistake.”¹

Under US law, a court may invalidate an arbitration agreement based on generally applicable contract defences like fraud or unconscionability, but not on legal rules that apply only to arbitration. To ensure arbitration agreements receive treatment equal to all other contracts, the Federal Arbitration Act (FAA)² pre-empts any state rule that discriminates on its face against arbitration. The Act also displaces any rule that covertly disfavors agreements to arbitrate. Over the years, the US Supreme Court has repeatedly invoked FAA pre-emption to stamp out state courts’ creative efforts to invalidate arbitration agreements.³ Most recently, the US examined a decision in which the Kentucky Supreme Court asserted that its citizen’s “divine”, “sacred” and “inviolable” right to trial by jury precluded enforcement of an agreement to arbitrate.⁴

The Kentucky case arose from the claims of two elderly people who lived at a nursing home called Winchester Centre, operated by Kindred Nursing Centers LP. The residents, who are not related, both moved into Winchester in 2008 after their relatives, a wife and daughter respectively, signed the paperwork using powers of attorney designating them as “attorney-in-fact”. In their capacity as attorney-in-fact, they executed a contract in which they each agreed to resolve any claims arising from the resident’s stay at Winchester Centre through binding arbitration.

Both residents died the next year, and their estates brought separate suits against Kindred in Kentucky state court alleging that substandard care had caused their deaths. Kindred moved to dismiss the cases from state court on the basis that the claims were subject to arbitration. In each case, Kindred’s motion was denied at the trial court and the intermediate court of appeals. The Kentucky Supreme Court consolidated the cases and in a divided vote held that the powers of attorney did not authorise the representatives to execute an arbitration agreement. Finding that the Kentucky state constitution grants a “divine God-given right” to access the courts and to trial by jury, the Kentucky Supreme Court held that an attorney-in-fact, even if possessing broad delegated powers, could not relinquish that right on another’s behalf unless expressly provided in the power of attorney. Applying this new so-called “clear statement rule”, the Kentucky Supreme Court held that a power of attorney must explicitly confer authority to enter into contracts implicating constitutional guarantees. The US Supreme Court granted certiorari to review the decision, and reversed in a 7–1 decision (newly appointed Justice Gorsuch did not participate).⁵

¹ Israelmore Ayivor, *Become a Better You* (CreateSpace Independent Publishing Platform: 2016) at <https://www.createspace.com> [Accessed 8 September 2017].

² Federal Arbitration Act 9 U.S.C. §2.

³ e.g. in *Marmet Health Care Ctr Inc v Brown* 565 U.S. 530, 531 (2012), the US Supreme Court held that the FAA pre-empted West Virginia’s rule that arbitration provisions could not be enforced on public policy grounds in personal injury and wrongful death actions in the nursing home setting.

⁴ *Extencicare Homes Inc v Whisman* 478 S.W.3d 306 (Ky. 2015), cert. granted, *Kindred Nursing Ctrs Ltd P’ship v Clark* 137 S.Ct. 368 (2016).

⁵ *Kindred Nursing Centers LP v Clark* 581 U.S. (2017).

The Supreme Court rejects state rules tailor-made to “arbitration agreements and black swans”

At the outset, the US Supreme Court dashed the Kentucky Supreme Court’s contention that a clear statement rule in no way singles out arbitration agreements for disfavoured treatment. Relying on *reductio ad absurdum*, the US Supreme Court observed that applying the Kentucky Supreme Court’s logic, based on the Kentucky State Constitution’s grant of “inherent and inalienable” rights to “acquire[e] and protect[] property”, a valid power of attorney under the clear statement rule would now require specific authorisation to authorise the sale of the principal’s furniture. The US Supreme Court wryly observed that were it in the business of giving legal advice, it would tell the agent not to worry that a power of attorney would in fact require this level of detail.

In fact, no one had been able to identify an actual case in which a Kentucky court had demanded that a power of attorney explicitly confer authority to enter into a contract that implicated constitutional guarantees. Instead, the Kentucky Supreme Court had merely hypothesised that this rule would equally apply if a representative sought to waive her “principal’s right to worship freely”, or “consent to an arranged marriage” or “bind [her] principal to personal servitude”. The US Supreme Court dismissed these examples as “utterly fanciful contracts” and concluded that the Kentucky Supreme Court’s selection of such improbable contracts revealed that its true target was arbitration agreements. The use of such “patently objectionable” examples “makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans”.

The FAA’s equal footing principle applies to both contract formation and contract enforcement

The estates of the two nursing home residents correctly anticipated that the US Supreme Court was unlikely to uphold the Kentucky Supreme Court’s decision on the basis that a power of attorney must explicitly authorise the waiver of any right protected under the state constitution. Instead, the estates argued that the decision below should be upheld based upon the distinction between contract formation and contract enforcement. Under the estates’ proposed reading of FAA §2, states could decide matters of contract validity without reference to the FAA’s equal-footing principle, and the FAA pre-emption would apply only after a court determined that a valid arbitration agreement was formed. The US Supreme Court held that this narrow reading contravened both the FAA’s text and the case law interpreting it. As to the text, the Act itself refers to both “valid[ity]” and “enforce[ment]” and therefore equally addresses both formation and enforcement.⁶ With respect to common law, the US Supreme Court discussed recent decisions in which it had ruled that defences like duress, which involve unfair dealing at the contract formation stage, fall under the FAA’s statutory framework. This case law further corroborated that the Act applied to both formation and enforcement. The Court also observed that adopting the estates’ view would make it “trivially easy” for states to undermine the Act, since states could simply declare everyone incompetent to sign and thereby form arbitration agreements. “The FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration”.

⁶The FAA makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”, 9 U.S.C. §2.

Book Review

International Commercial Arbitration in New York, by James S. Carter (ed.) and John Fellas (ed.), (Oxford University Press, 2016), 688 pp., £175, ISBN: 978-0-19-875348-3.

The importance of this book can hardly be overstated: New York is at the pinnacle of both domestic and international arbitration in the US, some may even say the world. Readers of this book will find confirmed, what many an international arbitration practitioner has been brought up to believe, namely that New York is largely unrivalled as the centre of international commercial arbitration in the US. New York's roots as a centre of arbitration go a long way back. Its more recent world fame, however, has no doubt come from it being the birthplace of the 1958 New York Convention,¹ which is often hailed as the single most important arbitration instrument in history, giving rise to the quasi-global enforceability of Convention awards in Convention countries. New York is also home to some of the most prominent arbitral institutions and arbitration associations of the US, creating a unique social and professional environment for the domestic and international arbitral community. Last but not least, New York is a thriving centre for international commerce and as such a natural breeding ground for commercial arbitration, in terms of both practice and procedure.

The importance of New York as a centre for international commercial arbitration having been established, the ultimate quality of a book on arbitration in New York will essentially depend on the editorial ability of its editors and the specialist knowledge and writing ability of its individual contributors. On both fronts this book scores highly. The two editors, James Carter and John Fellas, are well-respected scholar-practitioners in the field and they, in turn, have taken good care to select the best-qualified academics and practitioners to contribute to the book. Their practical experience as advising counsel and/or arbitrators in New York (and elsewhere) enriches the narrative of each chapter and provides useful insights into arbitration practice where it counts.

The chapters range from an introduction, in which the editors describe the New York arbitration landscape, to challenging and enforcing international awards in New York (Ch.13), which sets out in detail the procedural (distinguishing between the proper competence of US Federal Courts and the New York courts) and substantive issues (considering in particular grounds for non-recognition under the New York Convention and grounds for vacating domestic and foreign arbitral awards under New York State law and the US Federal Arbitration Act) in actions for nullification and enforcement. This latter chapter is complemented by a further chapter on the same subject with a focus on the involvement of sovereigns (Ch.14), a topic that has gained importance in the 21st century especially within the context of investment arbitration, but is here dealt with from an international commercial arbitration perspective. In between, there are chapters with familiar titles for a book of this kind, including in particular: the law applicable to international arbitration in New York (Ch.1): this chapter introduces the operation of the US Federal Arbitration Act and the New York State Arbitration Statute and discusses in detail the law applicable to the recognition of arbitration agreements as well as the recognition and enforcement of awards; drafting considerations for clauses designating New York as a place (read: seat) of arbitration (Ch.3), highlighting considerations specific to clauses providing for arbitrations seated in New York; the selection of arbitrators (Ch.5): this chapter addresses the strategies in the selection of members of a tripartite tribunal, sources of competent (generalist and sector-specialist) arbitrators, the selection process of various relevant institutions, questions of conflicts of interest as well as the challenge and replacement of

¹ On the recognition and enforcement of foreign arbitral awards.

arbitrators; jurisdiction: courts versus arbitrators (Ch.6), including a discussion of the *kompetenz-kompetenz* principle and the scope of an arbitrator's power to make jurisdictional determinations (and the measure of deference given to these by supervisory courts at the recognition and enforcement stage in addition to judicial review upon *vacatur*); enforcing international arbitration agreements (Ch.7) and the role played by the local courts (considering court intervention by compelling arbitration, staying competing litigation in the US courts or through anti-suit injunctions); and arbitration hearings in New York (Ch.12), providing guidance on the procedural conduct of the hearing as well as hearing logistics.

Less familiar and hence the more enlightening topics for the uninitiated may be the impact of US litigation (Ch.2), which deals with the procedural specificities of bringing an action before the US and more specifically the New York courts; the application of New York law to contracts (Ch.4): this chapter discusses the fundamentals of contract formation, breach of contract, the consequences thereof, claims ancillary to breach of contract (including the arbitrability of ancillary claims) and special issues arising under the New York Law of Contracts (such as merger clauses and force majeure); obtaining preliminary relief (Ch.8), contrasting the power of the tribunals and that of the curial (i.e. New York) courts; discovery (Ch.9) (especially when contrasted with civil law-style document production); damages in international arbitration (Ch.10), which no doubt is a topic that is more appropriately dealt with by reference to the law on the merits but complements nicely the discussion of New York law as a governing law in Ch.4; and last but not least, class action arbitration (Ch.11), which has gained momentum more recently and is of heightened importance in an antitrust context. Finally, the book contains the usual front and end matter (except for a comprehensive bibliography).

The book, now in its second edition, has been endorsed by the likes of Gary Born, Gerald Aksen and Robert B. von Mehren, each of whom has contributed a foreword to the present or the previous edition. I would recommend it to anyone who is looking to learn about arbitration in New York, whether out of professional necessity or for sheer academic pleasure.

Gordon Blanke