

# JONES DAY

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February 26, 2015

## VIA EMAIL

Mr. Babak Barin  
Prof. Catherine Kessedjian  
Judge William J. Cahill

Re: DCA and ICANN; ICDR Case No. 50-20-1300-1083

Dear Mr. Chairman and Members of the Panel:

On behalf of ICANN, we are delighted that the Panel is operational again, and we look forward to working with you to complete this Independent Review proceeding in a timely fashion.

In conjunction with the hearing scheduled for May 22-23, 2015 in Washington, D.C., and given the replacement of Justice Neal by Judge Cahill, ICANN respectfully draws the attention of the Panel to Article 15.2 of the International Centre for Dispute Resolution (“ICDR”) Arbitration Rules, which provides:

“if a substitute arbitrator is appointed under this Article, unless the parties otherwise agree, the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated.”

As the panelists are aware, the ICDR Arbitration Rules govern these proceedings together with the “Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process” (hereinafter, the “Supplementary Procedures”). Paragraph 2 of the Supplementary Procedures states that “[i]n the event there is any inconsistency between these Supplementary Procedures and the [ICDR’s International Arbitration] RULES, these Supplementary Procedures will govern.” The Supplementary Rules are silent with respect to the replacement of panelists and the possibility to repeat all or part of the case.

While ICANN does not see the necessity to repeat all of this IRP, ICANN respectfully suggests that this Panel, now re-constituted, should at a minimum consider whether to revisit the part of the case relating to the issue of hearing witnesses,

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addressed in the Panel's procedural declaration dated 14 August 2014 ("14 August Order").<sup>1</sup>

It goes without saying that panelists derive their powers and authority from the relevant applicable rules, the parties' requests, and the contractual provisions agreed to by the Parties (in this instance, ICANN's Bylaws, which establish the process of independent review). The authority of panelists is limited by such rules, submissions and agreements.

Here, the Panel exceeded its authority under the Supplementary Procedures when it held in its 14 August Order that it could "order" live testimony of witnesses despite the Panel's acknowledgment that the Supplementary Procedures expressly limit any closing argument to argument only. When DCA submitted its application to ICANN for the right to operate the .AFRICA TLD, DCA agreed that its remedies would be limited to the accountability mechanisms provided for in ICANN's Bylaws, which include the Independent Review process that DCA has invoked.<sup>2</sup> The ICDR is the administrator of that process, and it has issued Supplementary Procedures that govern these proceedings. Paragraph 4 of the Supplementary Procedures provides:

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephone hearings are subject to the same limitation.

Of course, the ICDR did not create this limitation out of thin air: the limitation is based on virtually identical language in Article IV, Section 3, Paragraph 12 of ICANN's Bylaws.

<sup>1</sup> ICANN may also request that the reconstituted Panel address the issue of whether an IRP Declaration procedure is advisory or binding. If so, we will address the issue separately.

<sup>2</sup> As the Panel noted in its August 14 Order, and as DCA itself acknowledged in its submissions, DCA accepted ICANN's offer to resolve through Independent Review, based on the Supplementary Procedures and the ICDR Arbitration Rules, any and all disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws. *See* Declaration at ¶ 22-23.

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Courts have routinely recognized that parties may agree to various limitations to the procedural rules for adversary proceedings. For instance, in *Nat'l Hockey League Players' Assoc. v. Nat'l Hockey League*, 30 F. Supp. 2d 1025, 1029 (N.D. Ill. 1998), the court vacated an award when the arbitrator considered evidence the parties had specifically agreed to exclude. In *CBA Indus., Inc. v. Circulation Mgmt., Inc.*, N.Y.S.2d 234, 235 (N.Y. App. Div. 1992), the court held that an award of counsel fees and costs was properly eliminated from an arbitration award where the arbitration clause provided that each party would bear its own costs and legal expenses. And in *Muskegon Central Dispatch 911 v. Tiburon Inc.*, 462 Fed. App'x 517 (6th Cir. 2012), an arbitrator's award was vacated after the reviewing court found that the arbitrator disregarded the underlying contract, which related to the implementation of an integrated public safety computer system.

Dispute resolution rules can also limit the power of the panelists. As pointed out by the AAA in a recent White Paper, the ICDR Arbitration Rules “have a number of unique provisions which include an express waiver to punitive damages.”<sup>3</sup> Accordingly, no panel appointed under the ICDR Rules would think of awarding punitive damages, even if a panel could find such award justified by a party's behavior. Courts have also held that where an arbitration agreement unequivocally excludes punitive damages claims from the scope of arbitration, arbitrators are prohibited from awarding such damages. *See Pyle v. Secs. U.S.A., Inc.*, 758 F. Supp. 638 (D. Colo. 1991); *Porush v. Lemire*, 6 F. Supp. 2d 178, 185 (E.D.N.Y. 1998).<sup>4</sup>

Luis M. Martinez, the Vice-President of the ICDR, specifically noted in the aforementioned White Paper that dispute resolution rules such as arbitration rules do not happen in a vacuum and can be adapted and modified by users:

Users have numerous options available to them to customize their arbitration agreement and enhance predictability. They may reduce the number of arbitrators to a sole arbitrator, or include provisions to

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<sup>3</sup> Time and Costs – Taking Control of your International Arbitration, by Luis M. Martinez, American Arbitration Association, available at <https://www.adr.org>.

<sup>4</sup> Another example can be found in the UNCITRAL arbitration rules, which provide that there should be no hearing if the parties have agreed so. Article 24 of the UNCITRAL arbitration rules provides: “Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, *unless the parties have agreed that no hearings shall be held*, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.” (Emphasis added.)

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control or limit the document exchange. They may include a mediation phase prior to the arbitration or scheduled concurrently; time frames may be specified, and hearings may be waived with the matter proceeding on documents only.”

Here the Supplementary Procedures—issued by the ICDR and based on language in ICANN’s Bylaws authorizing these proceedings—provide that in-person hearings shall occur only in exceptional circumstances, and that if such hearings do occur, they shall be limited to argument only. This language is not ambiguous. When accepting their appointments in this proceeding, the members of the Panel agreed to faithfully and fairly hear and decide the matters in controversy between the parties in accordance with the rules established for this proceeding. Deciding to hear witnesses is not in accordance with the Supplementary Procedures or ICANN’s Bylaws, and is in fact in direct conflict with both.

The language limiting any hearing to “argument only” with “all evidence, including witness statements [to be] submitted in writing in advance” was added after ICANN recognized the importance of limiting costs for both ICANN (a not-for-profit public benefit corporation) and applicants for new top-level domains. Indeed, many potential applicants criticized the costs associated with the new gTLD program during public consultations preceding the launch of the new gTLD program. Notably, the amendment to the Supplementary Procedures followed the only live hearing that has been conducted in an IRP, the 2009 hearing in the *ICM* IRP, which related to ICM’s application for the .XXX string. The *ICM* hearing involved live witness testimony over a five-day period, cost the parties millions of dollars in fees, and resulted in ICANN’s decision, with the support from the Internet community, to avoid a repeat of that hearing (i.e., exactly the sort of lengthy and expensive proceeding that DCA has been requesting for this matter).

While ICANN continues to stress that compliance with the Supplementary Procedures is critical to ensure predictability for ICANN, applicants for and objectors to gTLD applications, and the entire ICANN community, ICANN wants to make clear that it is confident that a hearing of witnesses in this matter would not result in any finding adverse to ICANN. Indeed, the documents that have been provided to the Panel demonstrate the weakness of DCA’s case.<sup>5</sup>

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<sup>5</sup> The most relevant evidence in these proceedings now consists of contemporaneous documents disclosed by the GAC after DCA’s documents requests, which completely contradict DCA’s contention that the GAC was not authorized to issue, or did not in fact issue, “consensus advice” opposed to DCA’s application. The evidence further confirms that DCA’s allegations

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ICANN's request to limit the scope of any hearing to "argument only" is also fully consistent with the concerns that have been repeatedly expressed by many corporations and practitioners regarding increased costs and delays in international arbitral proceedings, which are coming to resemble full-fledged, common-law trials. A "scorched earth" policy is said to taint many proceedings,<sup>6</sup> with a frequent criticism that arbitrations have become infected with "Americanized" pre-hearing discovery.<sup>7</sup> And, of course, Independent Review proceedings are not even arbitrations and are intentionally designed to be even more streamlined.

It goes without saying that ICANN is committed to fairness and accessibility, but ICANN is also committed to predictability and the like treatment of all applicants. For this Panel to change the rules for this single applicant does not encourage any of these commitments.

Even so, DCA has argued that would be "unfair" not to allow DCA to cross-examine ICANN's witnesses, thereby admitting witness declarations into evidence "untested." But DCA's arguments cannot overcome the plain language of the Supplementary Procedures. First, and as DCA has conceded repeatedly in its previous pleadings, DCA specifically agreed to be bound by the Supplementary Procedures when it submitted its application. Accordingly, DCA has already agreed that hearings, if any, would be limited to argument only.

Second, the Supplementary Procedures apply to both ICANN and DCA. ICANN is in the same position as DCA when it comes to testing witness declarations, specifically the lengthy declaration of Ms. Sophia Bekele that DCA submitted with its last memorial.

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(continued...)

that two ICANN Board members had conflicts of interest when they voted to accept the GAC advice are simply false. In short, the witnesses would simply confirm what the documentary evidence already reveals, which is that DCA's claims should fail.

<sup>6</sup> See discussion in Klaus Peter Berger, *The Need for Speed in International Arbitration*, 25(5) *J. INT'L ARB* 595 (2008), commenting on the new DIS Supplementary Rules for Expedited Proceedings. Professor Berger goes on to note that arbitration may well be more suited than court proceedings to the resolution of complex cross-border business disputes, but that the complexity can add time and cost.

<sup>7</sup> See Roger Alford, *The American influence on International Arbitration*, 19 *Ohio State J. Disp. Resolution* 69 (2003); Bernard Audit, *L'Américanisation du droit*, 45 *Arch. philosophie du droit* 7 (2001).

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Third, parties in alternative dispute resolution proceedings where examination of witnesses is allowed often waive cross-examination. In such cases, the panel usually will not insist on hearing witness, and rather will assess the weight of the evidence without assuming the truth of the contents of the witness statements.

DCA has also argued that the IRP is the “only remedy” with respect to DCA’s application because it cannot file suit against ICANN, and that due process and procedural fairness therefore require that it be afforded the opportunity to cross-examine witnesses. DCA is correct that it cannot file suit against ICANN with respect to its application, but that does not mean that it should get the equivalent of a lawsuit as an alternative. The IRP is a very specific process, adopted following years of consultation with both experts and the Internet community and aimed at assessing whether decisions of ICANN’s Board of Directors were consistent with ICANN’s Bylaws and Articles of Incorporation. ICANN is not aware of any other corporations that offer such an opportunity to third parties, who do not ordinarily have standing to challenge a board’s decisions. ICANN has done so because of its unique role vis-a-vis the Internet community. That said, it is even clearer that third parties should not be in a position to challenge the procedural rules that ICANN has established for these proceedings.

In sum, the Independent Review process is an alternative dispute procedure adapted to the specific issues to be addressed pursuant to ICANN’s Bylaws. The process cannot be transformed into a full-fledged trial without amending ICANN’s Bylaws and the Supplementary Procedures, which specifically provide for a hearing that includes counsel argument only. Accordingly, ICANN strongly urges the Panel to follow the rules for this proceeding and to declare that the hearing in May will be limited to argument of counsel.

We thank the Panel for its attention to this matter. We suggest that DCA be given an opportunity to respond in writing, and that the Panel hold a short telephonic hearing if it has any further questions.

Very truly yours,

/s/

Jeffrey A. LeVee

cc: Counsel to DCA



179 A.D.2d 615  
Supreme Court, Appellate Division,  
Second Department, New York.

CBA INDUSTRIES, INC.,  
Appellant–Respondent,  
v.  
CIRCULATION MANAGEMENT,  
INC., et al., Respondents–Appellants.

Jan. 13, 1992.

Purchaser brought action for breach of contract under which the purchaser was to buy a corporation's assets. The Supreme Court, Nassau County, Christ, J., confirmed arbitrator's award of damages, but vacated that portion of the arbitration award directing payment of the purchaser's attorney fees. Appeal and cross-appeal were taken. The Supreme Court, Appellate Division, held that the arbitration clause of the asset purchase agreement explicitly barred either party from recovering attorney fees incurred in arbitration.

Order and judgment affirmed.

[Ritter](#), J., concurred in part and dissented in part in a memorandum in which [Miller](#), J., concurred.

#### Attorneys and Law Firms

**\*\*234** Meyer, Suozzi, English & Klein, P.C., Mineola ([Kenneth L. Gartner](#), of counsel), for appellant-respondent.

[Richard D. Furlong](#), Garden City, for respondents-appellants.

Before [KUNZEMAN](#), J.P., and [EIBER](#), [MILLER](#), [O'BRIEN](#) and [RITTER](#), JJ.

#### Opinion

MEMORANDUM BY THE COURT.

**\*615** In an action to recover damages for breach of contract, in which the parties were directed to proceed to arbitration, the plaintiff appeals from so much of an order and judgment (one paper) of the Supreme Court, Nassau County ([Christ](#), J.), entered May 23, 1990, as vacated that portion of the arbitration award which directed the defendants to pay the plaintiff's attorneys' fees, and the defendants cross-appeal from so much of the same order and judgment as (1) denied that branch of their cross motion which was to vacate so much of the arbitration award as awarded the plaintiff compensatory damages, and (2) confirmed the arbitrator's award to the extent of directing them to pay the principal sum of \$100,000.

ORDERED that the order and judgment is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

On November 30, 1988, the plaintiff entered into an agreement to purchase the accounts, contract rights, and assets of Circulation Management, Inc. The asset purchase agreement contained a provision requiring any dispute arising under the agreement to be resolved by arbitration, and expressly provided that “[t]he expense of the arbitration shall be borne equally by the parties to the arbitration, provided that each shall pay for and bear the cost of its own experts, evidence and legal counsel”.



The plaintiff subsequently commenced the instant action against the defendant corporation and its sole shareholder, alleging that they had breached the asset purchase agreement by failing to provide a true and accurate depiction of the corporation's **\*\*235** financial condition. The Supreme Court directed the parties to proceed to arbitration pursuant to the purchase agreement, and, following a hearing, the arbitrator concluded **\*616** that the defendants had breached the agreement by providing incomplete and misleading financial information about two of the corporation's major accounts. The arbitrator awarded the plaintiff compensatory damages in the sum of \$100,000, and counsel fees and costs in the sum of \$44,508.52. Although the Supreme Court thereafter confirmed the award of compensatory damages to the plaintiff, it modified the arbitration award by deleting the requirement that the defendants pay the plaintiff's counsel fees and costs. We affirm.

A determination by an arbitrator who has the power to interpret the parties' contract will be set aside only if it is “ ‘completely irrational \* \* \* or where the document expressly limits or is construed to limit the powers of the arbitrators, hence, narrowing the scope of arbitration’ ” (*Rochester City School Dist. v. Rochester Teachers Assn.*, 41 N.Y.2d 578, 582, 394 N.Y.S.2d 179, 362 N.E.2d 977, quoting *Matter of National Cash Register Co. [Wilson]*, 8 N.Y.2d 377, 383, 208 N.Y.S.2d 951, 171 N.E.2d 302, and *Lentine v. Fundaro*, 29 N.Y.2d 382, 385, 328 N.Y.S.2d 418, 278 N.E.2d 633; cf., *Matter of Ploen v. Monticello Cent. School*, 160 A.D.2d 879, 880, 554 N.Y.S.2d 311). Contrary to the

plaintiff's contention, the arbitration clause in the parties' agreement, which provided that each party would bear its own costs and legal expenses, constituted an express limitation on the arbitrator's power. Moreover, while an arbitrator's fee and other expenses incurred in the arbitration may be recovered in the award, attorneys' fees are specifically excluded (CPLR 7513) unless they are expressly provided for in the arbitration agreement (*see, Grossman v. Laurence Handprints—N.J.*, 90 A.D.2d 95, 101, 455 N.Y.S.2d 852). Accordingly, awarding of counsel fees and costs was beyond the scope of the arbitrator's power in this case (*see, CPLR 7511 [c][2], 7513; Matter of Board of Educ. of Dover Union Free School Dist. v. Dover—Wingdale Teacher's Assn.*, 61 N.Y.2d 913, 474 N.Y.S.2d 716, 463 N.E.2d 32).

Upon our review of the record, we further find that the arbitrator's determination that the defendants were liable for breach of the parties' contract was not without a rational basis. Thus, the award of compensatory damages was properly confirmed (*see, Matter of Silverman [Benmor Coats]*, 61 N.Y.2d 299, 308, 473 N.Y.S.2d 774, 461 N.E.2d 1261; *Matter of Zeller & Goldschmidt v. Cooper, Selvin & Strassberg*, 167 A.D.2d 548, 549, 562 N.Y.S.2d 217).

We have examined the remaining contentions raised by the defendants in their cross appeal, and find that they are without merit.

KUNZEMAN, J.P., and EIBER and O'BRIEN, JJ., concur.

**RITTER**, J., concurs in part and dissents in part, and votes to modify the order and judgment, on the law, by deleting the \*617 second and third decretal paragraphs thereof, and substituting therefor a provision confirming so much of the arbitrator's award as directed the defendants to pay the plaintiff's attorneys' fees, with the following memorandum, in which **MILLER**, J., concurs:

The dispute underlying this appeal arises from the sale of a business which distributed advertising circulars by inserting them in newspapers delivered in Long Island. The contract of sale fixed a purchase price of \$500,000 based on representations made by the defendants concerning the profit margin and volume of the business acquired. The arbitrator determined that these critical facts were misrepresented, justifying an award of \$100,000 in compensatory damages to the plaintiffs. That award was confirmed by the Supreme Court, and we agree with the majority that it should stand. However, we would hold that an award of attorneys' fees made by the arbitrator should also be confirmed. The Supreme Court disallowed attorneys' fees, holding that it was beyond the power of the arbitrator to award them. We find \*\*236 no such limitation in the contract. Because the portion of the contract dealing with the representations that induced the purchase was of such critical importance to the transaction, the parties agreed that any misrepresentation would result in an award of "damages, including reasonable attorneys' fees and costs, incurred by the party to whom such representations, covenants, and warranties were made". Thus, the contract expressly included attorneys' fees as an element of damages if a misrepresentation were found.

In or about January 1989 the plaintiffs commenced the instant action to recover damages for breach of contract against the defendants in the Supreme Court, Nassau County. In the complaint, it was alleged, *inter alia*, that the defendants breached the contract by making various misrepresentations. The plaintiffs sought \$450,000 in compensatory damages and \$75,000 as and for reasonable attorneys' fees, costs, and expenses. The Supreme Court, upon motion of the defendants, stayed the lawsuit, and, finding that the "subject controversy is arbitrable", directed the parties to proceed to arbitration in accordance with their agreement.

It is significant that the defendants did not contend that the plaintiff's claim for attorneys' fees should be excluded from the arbitration proceeding. Indeed, in conjunction with their motion to compel arbitration, the defendants served a demand for arbitration requesting a declaration that they had complied with the contract and seeking an interpretation of "the disputed clauses of the contract". This demand was based on \*618 the broad contract provision that "any dispute or controversy arising out of or relating to [the] Agreement shall be determined and settled by arbitration". Once again, the defendants made no effort, in their demand for arbitration, to withhold the question of whether the plaintiff was entitled to recover attorneys' fees under the express terms of the agreement.

The arbitrator, *inter alia*, found that the defendants had provided incomplete and misleading information with respect to two important customers, denied their request for

declaratory relief, and awarded the plaintiff \$100,000 with statutory interest from the date of the agreement, November 30, 1988, to the date of payment, plus the sum of \$44,508.52 representing attorneys' fees and costs.

The plaintiffs moved to confirm the award and for entry of judgment. The defendants cross-moved to vacate the award, arguing that the amount of compensatory damages was arbitrary and capricious, and that the award of attorneys' fees was both irrational and beyond the scope of the arbitrator's authority.

The Supreme Court granted the plaintiffs' motion to the extent of confirming the award of compensatory damages, but vacated the award of attorneys' fees. The court denied the cross motion to vacate the award, on the ground that that cross motion was untimely served. Although the court noted it was not considering the papers submitted by the defendants, it concluded that "the arbitrator rendered an award upon a matter not properly submitted to him".

The court erroneously concluded that the arbitrator rendered an award upon a matter not properly submitted to him. Once a party has participated in arbitration, his ability to have the award vacated or modified is limited by statute (CPLR 7511[b][1]; see also, CPLR 7511[c] ). An award may be vacated on the ground that the arbitrator "exceeded his power" (CPLR 7511 [b] [1] [iii] ), but when the arbitrator has been authorized to resolve disputes regarding the interpretation of the contract, the determination will only be set aside if it is "completely irrational" (see, *Rochester City School Dist.*

*v. Rochester Teachers Assn.*, 41 N.Y.2d 578, 582, 394 N.Y.S.2d 179, 362 N.E.2d 977). The court's power to intervene is especially limited when, as here, the arbitrator's interpretation of the agreement resolves the whole dispute submitted and not merely one aspect of the dispute (*Rochester City School Dist. v. Rochester Teachers Assn.*, *supra* ).

In the case at bar, the arbitrator decided the very question \*619 which the defendants \*\*237 themselves submitted for his resolution. Their demand for arbitration did not contain any request that the arbitrator's interpretation be limited to compensatory damages to the exclusion of attorneys' fees. They requested a decision on the merits of all the disputed clauses of the contract and raised no question as to the power of the arbitrator to decide the entire issue presented to him. By participating in the arbitration proceeding without objecting to the arbitrator's power to award attorneys' fees, the defendants became bound by his determination unless it was completely irrational (see, *Matter of County of Rockland Dept. of Social Servs. v. Rockland County Unit Local 844 Civ. Serv. Employees Assn.*, 140 A.D.2d 441, 442, 528 N.Y.S.2d 142; *Matter of National Cash Register Co. [Wilson ]*, 8 N.Y.2d 377, 208 N.Y.S.2d 951, 171 N.E.2d 302). Here, the arbitrator's determination was not irrational. Moreover, we conclude that the award of attorneys' fees was authorized under the broad scope of authority conferred by the parties' agreement.

The scope of the arbitrator's authority must be determined from the language of the agreement, using accepted rules of contract law (*Matter of Cowen & Co. v. Anderson*,

76 N.Y.2d 318, 321, 559 N.Y.S.2d 225, 558 N.E.2d 27). The essential determination of which issues should be submitted to the arbitrator for resolution must be based upon the parties' intentions, as expressed in their agreement (*see, Stanley & Son v. Trustees of Hackley School*, 42 N.Y.2d 436, 439–40, 397 N.Y.S.2d 985, 366 N.E.2d 1339).

Under paragraph 27 of the subject agreement, the arbitrator was given the broadest possible authority to determine “any dispute or controversy arising out of or relating to this agreement”. A separate clause of the same paragraph allocates the expenses of the arbitration, which were to be borne equally by the parties, and provides that each [party] shall bear the cost of its own legal counsel.

The language of this latter clause tracks the general rule regarding counsel fees codified under CPLR 7513, but it does not expressly or inferentially limit the broad scope of authority conferred upon the arbitrator by the preceding clause. More importantly, it seems to us that the parties expressly intended to deviate from the general language regarding the allocation of legal costs incurred as a result of material misrepresentations.

The arbitrator's award in this case was based on the defendants' breach of certain covenants and warranties that were critical parts of the agreement. It was expressly agreed that the plaintiff's damages, in the case of the defendants' breach of this provision, would include “reasonable attorneys' fees \*620 and costs”. Since the question of whether the defendants breached their obligations under this specific provision was properly submitted

to the arbitrator, it follows that he had the authority to resolve the entire issue, and make an award which included the full measure of damages recoverable under the agreement (*cf., Rochester City School Dist. v. Rochester Teachers Assn., supra*, 41 N.Y.2d at 582, 394 N.Y.S.2d 179, 362 N.E.2d 977).

In construing the intent of the parties, we should adopt an interpretation that gives meaning to every provision of the contract (*see, Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46, 150 N.Y.S.2d 171, 133 N.E.2d 688). An interpretation which imposes a limitation on the arbitrator's authority defeats the purpose of the parties' broad arbitration clause and will force the plaintiff to pursue further litigation in the courts in order to obtain the complete remedy contemplated under the agreement. Here, the arbitrator's authority to award attorneys' fees is sufficiently established by the express provisions of the parties' agreement (*cf., Grossman v. Laurence Handprints—N.J.*, 90 A.D.2d 95, 455 N.Y.S.2d 852; *Matter of Koenigsberg*, 51 A.D.2d 929, 381 N.Y.S.2d 248). The specific language permitting recovery of attorneys' fees would seem to be at odds with the general provision of the contract that each party shall pay for his own legal counsel in arbitrating a dispute. These separate provisions should be read together and harmonized, by holding that the parties' intention was that legal fees shall be \*\*238 awarded only for a breach of the most critical portion of the contract—the representations that induced the agreement.

The construction adopted by the Supreme Court split the cause of action to recover damages: the court found that the legal fees

portion of the contractually defined damages that resulted from misrepresentations were not arbitrable, while compensatory damages had to be determined by arbitration, so the litigants were left with the anomalous result of having compensatory damages determined by the arbitrator and damages resulting from legal expenses determined by the courts. The obvious disadvantage to all of the interests involved that attends this construction of the contract, not to mention the public policy drawbacks, is yet another reason for holding

that, under the agreement, both issues were subject to arbitration.

Accordingly we would hold that the award of attorneys' fees was within the scope of the arbitrator's broad authority. The order and judgment should therefore be modified, and the plaintiffs' motion to confirm the arbitrator's award should be granted in its entirety.

### **Parallel Citations**

179 A.D.2d 615, 578 N.Y.S.2d 234



30 F.Supp.2d 1025  
United States District Court,  
N.D. Illinois,  
Eastern Division.

NATIONAL HOCKEY LEAGUE  
PLAYERS' ASSOCIATION, Plaintiff,  
v.  
NATIONAL HOCKEY  
LEAGUE, Defendant.

No. 98 C 90. | July 8, 1998.

Labor organization representing professional hockey players sought to vacate arbitration award in favor of hockey league on grounds that arbitrator exceeded his authority. Parties cross-moved for summary judgment. The District Court, [Shadur](#), Senior District Judge, held that arbitrator exceeded scope of his authority by considering evidence that parties agreed to exclude.

Arbitration award vacated.

Opinion after return, [30 F.Supp.2d 1029](#).

### Attorneys and Law Firms

\***1025** [Michael P. Conway](#), [Michael T. Donovan](#), Grippo & Elden, Chicago, IL, for Plaintiff.

[Joseph Baumgarten](#), [Howard Z. Robbins](#), Proskauer Rose, LLP, New York City, [Thomas F. Bush, Jr.](#), [Thomas A. Doyle](#), Saunders & Monroe, Chicago, IL, for Defendant.

### **MEMORANDUM OPINION AND ORDER**

[SHADUR](#), Senior District Judge.

This action stems from an arbitration proceeding between National Hockey League Players' Association (“Association,” the loser) and National Hockey League (“League,” the winner)—hence federal jurisdiction over this contractual dispute between an association of employers and a labor organization representing employees exists under [29 U.S.C. § 185\(a\)](#), with Association's action being brought under Federal Arbitration Act (“Act”) [§ 10\(a\)\(4\)](#), [9 U.S.C. § 10\(a\)\(4\)](#).<sup>1</sup> Because each litigant believes that there are no material factual issues in dispute, each has moved under Fed.R.Civ.P. (“Rule”) 56 for summary judgment:

<sup>1</sup> As the text reflects, the Act is one statute whose internal numbering matches the section numbering within the United States Code. Further references to the statute will simply take the form “Act § —.”

1. Association's Complaint (and hence its cross-motion under Rule 56) seeks to vacate the October 10, 1997 arbitration award (“Award”) issued by arbitrator John Sands (“Sands” or the “Arbitrator” or “Impartial \***1026** Arbitrator”—the latter being the term used in the parties' agreement under which the arbitration took place).

2. League had earlier begun the summary judgment activity by asking for dismissal of this action (with Association then filing its cross-motion).

For the reasons stated in this memorandum opinion and order, League's motion is denied while Association's is granted, and the Award is therefore vacated.

### *Operative Standard*

There is no quarrel between the parties as to the exceedingly narrow range of judicial review of arbitration awards that is permissible under Act § 10(a) and the case law that applies that section. Association's attack on the Award here stems from its contention that Arbitrator Sands exceeded the authority given to him by the parties—something that if true causes the Award to run afoul of Act § 10(a)(4), which provides for the vacation of an award “[w]here the arbitrators exceeded their powers....” As our Court of Appeals has put it in terms startlingly applicable to Association's version of events (*St. Mary's Med. Ctr. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 591 (7th Cir.1992)):

If the federal policy embodied in the Arbitration Act is based on the enforcement of private agreements, we see no reason why the parties' agreement not to arbitrate is any less enforceable than their earlier agreement to arbitrate....

And similarly, *id.* at 590:

Congress's goal in enacting the Arbitration Act was to place arbitration agreements “ ‘upon the same footing as other contracts, where [they] belong.’ ” *Dean Whitter [sic] Reynolds, Inc. v. Byrd*, 470 U.S. 213,

219, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985)(quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., (1924)). In other words, the federal policy embodied in the Arbitration Act is a policy favoring enforcement of contracts, not a preference for arbitration over litigation. See *id.* at 219–21, 105 S.Ct. at 1241–43.

That same principle had been announced by the Supreme Court in the strongest terms in *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478–79, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

### *Application of the Standard*

In this instance the litigants' quarrel is not over the terms of their contractual commitment to arbitration as stated in their collective bargaining agreement (“CBA”), which is framed in classic all-encompassing terms. In that respect CBA Art. 17 sets out the procedure for the exclusive resolution of “[a]ny dispute (hereinafter referred to as a ‘grievance’) arising after the effective date of this Agreement and involving the interpretation or application of, or compliance with, any provision of this Agreement” (*id.* § 17.1), and that procedure involves the ultimate submission of unresolved grievances by submission to an Impartial Arbitrator (*id.* §§ 17.5 to 17.8). And *id.* § 17.8 expressly states:

**Arbitrator's Decision and Award.** The Impartial Arbitrator will issue a written decision within thirty (30) days of the close of the record. The decision of the Impartial Arbitrator will constitute full, final



and complete disposition of the grievance, as the case may be, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement; provided, however, that the Impartial Arbitrator will not have the jurisdiction or authority to add to, subtract from, or alter in any way the provisions of this Agreement or any NHL Player Contract or addenda. In resolving grievances, the Impartial Arbitrator has the authority to interpret, apply and determine compliance with any provision of this Agreement, or an NHL Player Contract. Otherwise, the Arbitrator shall have no authority to alter or modify the contractual relationship or status between a player and a Club, other than where such remedy is expressly provided for in this Agreement.

What happened here, though, is that the broad grant of authority contained in the CBA was modified by a mutually-agreed-upon limitation after the grievance at issue had been submitted to Sands as Impartial Arbitrator. That grievance had originally involved hockey player Kevyn Adams, but when his individual grievance was mooted by his signing with another League club, \*1027 League and Association nonetheless agreed to arbitrate the underlying “systems” issue that had been raised by the Adams grievance: whether the International Hockey League (“IHL” or simply “I”) was an “affiliated league” of League itself, so that a player who signed with a club in IHL would be characterized as a “defected player” from League pursuant to CBA §§ 8.6(c) and 10.2(b) (i).

During the first day of the arbitration (July 23, 1997), Association presented some

testimony from Association attorney Jeffrey Citron (“Citron”) about some Association–League discussions regarding the definition of “defected player” that Citron said had taken place during the parties' 1994–95 collective bargaining negotiations. At that point League attorney L. Robert Batterman (“Batterman”) stated that League contemplated presenting testimony inconsistent with Citron's, thus requiring Sands to make credibility determinations as between the witnesses. Sands responded by telling the lawyers for both sides that he thought such a procedure was not in anyone's best interest because such a credibility resolution could be harmful to the parties' relationship, so they immediately held a closed-door session and everyone (League counsel, Association counsel and Arbitrator Sands) agreed orally that Sands would not consider that earlier bargaining history. Here are the relevant portions of the affidavit by John McCambridge (“McCambridge”), the lawyer who represented Association in the arbitration, as to what happened thereafter (Aff. ¶¶ 21–25):

21. Mr. Batterman and I followed up on Arbitrator Sands' request to consider removing bargaining history from the case. I called Mr. Batterman in mid-August and told him that the NHLPA [Association] would agree to take “bargaining history” out of the case. He said that was fine with the NHL [League]. A short time later, I called Mr. Batterman back to confirm that the agreement applied to bargaining history from the 1994–95 negotiations and would not exclude events that took place prior to these negotiations. He agreed.

22. During all of these conversations, we (Mr. Sands, Mr. Batterman and I) referred to the matters to be excluded as “bargaining history.” None of us ever said that the Agreement to exclude bargaining history applied only to certain bargaining history from the 1994–95 negotiations and that other bargaining history from the 1994–95 negotiations would be allowed.

23. Except for confirming that our agreement applied only to the 1994–95 negotiations, we did not qualify or limit in any way our agreement to exclude bargaining history from the case. Arbitrator Sands had no authority under our agreement to rely upon 1994–95 bargaining history to reach his decision.

24. When the hearing resumed in late August, Mr. Batterman and I advised Mr. Sands that the NHL and NHLPA had agreed to remove bargaining history from the case. When we gave these instructions to Mr. Sands, we referred to “bargaining history” generally; neither party said anything that would have indicated that the Agreement applied only to certain bargaining history from the 1994–95 negotiations and that other bargaining history from the 1994–95 negotiations could be considered by the Arbitrator. Mr. Sands acknowledged our agreement and moved forward with the hearing.

25. In reliance on the agreement with the NHL, the NHLPA presented no additional evidence relating to the 1994–95 CBA negotiations.

Batterman's affidavit on the subject is far fuzzier, though it obviously seeks to imply that the exclusion from the Arbitrator's consideration was of narrower scope than McCambridge's just-quoted affidavit has identified in more precise terms (Batterman Aff. ¶¶ 9–11):

9. During the first day of hearing, the Union presented testimony from Jeffrey Citron, Esq. (an attorney with the NHLPA) concerning alleged discussions between the Union and League during the parties' 1994–95 collective bargaining negotiations about the definition of the phrase “defected player” in CBA Article 10.2(b)(i).

10. During Mr. Citron's testimony, I stated to the arbitrator that the NHL was prepared to present testimony inconsistent **\*1028** with Mr. Citron's, and that the arbitrator would be required to make credibility determinations concerning the witnesses. The arbitrator called a sidebar conference with Mr. McCambridge and me, and informed us that he did not believe it was in the parties' best interest for him to have to make such a credibility determination, and since it was likely that the conflicting testimony as to the contested bargaining history was likely to be “a wash,” asked whether we could agree to remove it from the case.

11. At the outset of the August 27 hearing, the NHL and the Union orally agreed to the arbitrator's recommendation that he not consider evidence relating to the disputed bargaining history about which Mr. Citron had testified. This agreement was made orally and the submission agreement was not modified as a result of this agreement.

But when Batterman's deposition was taken, he repeatedly reconfirmed that “I don't recall the specific words” (Dep.47) that Sands had used to articulate his proposal to exclude bargaining history testimony, nor did he recall how the participants in the Sands–McCambridge–Batterman meeting “were referring to the testimony that would be excluded” (*id.* 51) or “[w]hat terms [they] were... using when [they] were talking about excluding the testimony” (*id.*). Finally, Batterman did not recall what Sands said about the three-person closed-door discussion concerning bargaining history when they returned to the conference room on July 23 and when Sands then summarized that discussion for the rest of the individuals attending the arbitration (*id.* 51–52). And perhaps most importantly, Batterman has said not a word in his affidavit about his discussions with McCambridge *after* the July 23 initial hearing that had involved the Citron testimony followed by the same day's closed-door meeting and Sands' report to those assembled there. On that score McCambridge Aff. ¶¶ 21–24 are precise and unequivocal and are not countered in any respect by what League and its evidentiary submissions have provided. That being the case, McCambridge's (and hence Association's) version is therefore established for purposes of the Rule 56 cross-motions.

That turns out to be critical, because in material part Arbitrator Sands *did* look to the 1994–95 bargaining history (as to subjects that were or were not discussed there) in arriving at his conclusions in the Award (see, e.g., Award at 21–22). Although League insists that Sands would have come out the same way even without that reliance, and although

Sands does state several reasons for reaching his conclusions, this Court knows from its personal experience (and from comparable comments by fellow judges with whom it has sat by designation on Courts of Appeals panels) that despite the verbiage used in judicial opinions, only the judicial officer himself or herself really knows whether the same result would have been reached if it had not been for the decisionmaker's reliance on a consideration that later proves to be erroneous or impermissible. That mind-reading function is not the appropriate role for a reviewing court, other than by the possible application of the doctrine of “harmless error.” And particularly given the extremely narrow scope of judicial review of arbitrators' decisions—review that does *not* encompass the merits of those decisions as such—in this case the soundest approach is to leave the question to a trier of fact who has been chosen in the manner on which the parties have agreed in the CBA: an Impartial Arbitrator.

One final point should be added. Even if Batterman's less precise characterization of the scope of the bargaining history that was *not* to be considered by the Arbitrator were somehow to be credited,<sup>2</sup> Association would still prevail. In Award at 21 Sands—in the paragraph that begins “Second, bargaining history confirms that meaning”—relied on Association's assertedly having “never expressed to the League any different understanding of ‘affiliated league's meaning’”—\*1029 and Sands then went on to state in like vein (*id.*):

<sup>2</sup> That assumption is really unjustified, even in terms of the Rule 56 principle of drawing reasonable factual inferences in favor of the nonmovant. As already stated,

Batterman does not counter (indeed, does not even address) McCambridge's precise description of the post-July 23 discussions and agreement.

Indeed, the parties agree that they never discussed that subject at all.

But Batterman's own Dep. 34 says that Citron had testified to precisely the opposite—"that [Association] had intended an effect on the definition of affiliated or unaffiliated as it related to the I in the case of an unsigned draft choice." And it was at that point that Batterman indicated that the League would bring in several witnesses who would contradict Citron's testimony (Dep.34–35). Thus League R. Mem. 6 says that the Citron testimony that triggered the parties' mutual agreement not to take bargaining history into account had been intended to show that Association "had articulated a view that the 1995 revisions to Article 10.2(b)(i)(A) (C) would affect the status of the IHL" as an "affiliated league." Thus it is clear that in issuing the Award, Arbitrator Sands considered even the more limited aspect of bargaining history that League would agree the parties had mutually agreed to exclude from consideration.

### *Conclusion*

As this opinion has reflected, this is not the usual case in which the question is whether an arbitrator has exceeded the scope of his or her authority so as to trigger the applicability of Act § 10(a)(4), with the court being called upon to decide that question by determining the legal meaning of the language in the litigants' written arbitration agreement. Instead what is at issue is a later oral agreement between the parties to such a written document—an oral understanding that cabined the scope of their arbitration to a greater extent than the written document had provided. There is no genuine issue of material fact in that respect,<sup>3</sup> and Association is entitled to a judgment as a matter of law. This matter must be returned to an Impartial Arbitrator for resolution of the parties' contested grievance without resort to the 1994–95 bargaining history. To that end the Award is ordered vacated.

<sup>3</sup> As stated at the end of the preceding section, even if the facts were strained to create a dispute as to the terms of the parties' agreement, rather than by the proper crediting of McCambridge's precise recollection over Batterman's lack of recollection, the difference would not be material in the legal sense (that is, it would not be outcome-determinative).

### **Parallel Citations**

159 L.R.R.M. (BNA) 2161



6 F.Supp.2d 178  
United States District Court,  
E.D. New York.

Daniel M. PORUSH, Plaintiff,  
v.  
Claire LEMIRE, as executrix  
of the Estate of Raymond C.  
Lemire, and Management  
Realty Corporation, Defendants.

No. CV 97-2174. | May 20, 1998.

President of securities brokerage firm filed petition to vacate arbitration award entered against him and in favor of customer, and customer moved to confirm award. The District Court, [Wexler](#), J., held that: (1) arbitrators did not exceed their authority by awarding punitive damages for customer; (2) arbitrators did not exceed their authority in awarding customer compensatory damages, representing out-of-pocket costs; and (3) contract between brokerage firm and customer permitted arbitration panel to award punitive damages to customer, even though choice-of-law clause provided that New York law which prohibited such award would apply.

Award confirmed.

#### **Attorneys and Law Firms**

\*180 Tenzer Greenblatt, LLP, by [Martin P. Unger](#), New York, NY, for Plaintiff.

[John E. Lawlor](#), Mineola, NY, for Defendants.

#### **MEMORANDUM AND ORDER**

[WEXLER](#), District Judge.

Plaintiff Daniel M. Porush moves for an order pursuant to the Federal Arbitration Act, [9 U.S.C. § 10](#), vacating an arbitral award against him. Plaintiff contends that the award is unsupported by any record evidence and that the arbitrators acted in excess of their powers and in manifest disregard of the law. Because these contentions are meritless, we deny plaintiff's motion and grant defendants' cross-motion to confirm the award. The Court's jurisdiction is based on diversity between the New York plaintiff and the New Hampshire defendants.

#### **BACKGROUND**

At all relevant times, Daniel M. Porush was president of Stratton Oakmont, Inc., ("Stratton Oakmont"), a New York-based brokerage firm and member of the National Association of Securities Dealers ("NASD").<sup>1</sup> On or about July 27, 1994, the individual defendant's decedent, Raymond C. Lemire, opened a securities account with Stratton Oakmont and executed a Customer Agreement (the "Agreement") with Stratton Oakmont's clearing broker, Adler, Coleman Clearing Corporation.

<sup>1</sup> In a recent opinion, the Ninth Circuit described Porush as the "president, chief executive officer, majority owner, and control person of Stratton Oakmont." *Greening v. Stratton Oakmont, Inc.*, 113 F.3d 1241 (9th Cir.1997).

Two clauses of the Agreement are pertinent here. Through a choice-of-law clause, the parties agreed that all controversies arising under the Agreement “shall be governed by and construed, and the substantive rights and liabilities of the parties determined, in accordance with the laws of the State of New York.” (Unger Aff. ¶ 13.) Through an arbitration clause, the parties further agreed that all controversies under the Agreement would be determined by arbitration to be held in accordance with the rules of either the New York Stock Exchange or the NASD. On or about August 16, 1994, Management Realty Corporation (“MRC”), of which Lemire was sole owner, opened an account at Stratton Oakmont. Lemire, in his capacity as MRC's president, signed a Customer Agreement identical to the one he signed upon opening his individual account. Lemire and MRC (“Lemire/MRC”) stopped trading with Stratton Oakmont in September 1994.

On or about August 3, 1995, Lemire and MRC initiated an arbitration against Stratton Oakmont and three individual respondents, one of whom was Porush, by filing a Statement of Claim and a Uniform Submission Agreement with the NASD.<sup>2</sup> Lemire/MRC claimed that the arbitral respondents failed to disclose Stratton Oakmont's extensive disciplinary problems with the SEC and NASD, recklessly or intentionally misrepresented the stocks in which Lemire/MRC traded and in which Stratton \*181 Oakmont was a marketmaker, conducted unauthorized trading in the Lemire/MRC accounts, and illegally froze the Lemire/MRC accounts. The claimants sought \$602,500 in compensatory damages, and \$1,397,500

in punitive damages, treble damages, costs, interests, and attorneys' fees.

<sup>2</sup> Paul F. Byrne, Compliance Director of Stratton Oakmont, and Patrick F. McDonnell, the broker Lemire dealt with, were the other two individual respondents.

On August 10, 1995, Porush consented to submit the dispute to arbitration. On October 3, 1995, the law firm of Tenzer, Greenblatt, representing Porush and the other arbitral respondents, filed an answer and motions to dismiss the arbitral claim. The answer denied the material allegations in the Statement of Claim and asserted as affirmative defenses that punitive damages and attorneys' fees could not be awarded in the arbitration pursuant to New York law. The motion sought to dismiss all claims against Porush on the ground that the Statement of Claim failed to allege any wrongdoing by him, and to dismiss the punitive damages and attorneys' fees claims against all respondents on the ground that New York law does not permit such awards to be made in arbitration. The arbitration panel denied the motions to dismiss.

On or about February 5, 1996, nearly a year before the arbitration hearing took place, Porush was on notice that punitive damages might be awarded against him—a federal district court, presented with facts virtually identical to those here and relying on the Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), confirmed an arbitration award of punitive damages against Porush made by an NASD panel. See *Greening v. Stratton Oakmont, Inc.*, No. C-95-4288, 1996 WL 61095 (N.D.Cal. Feb 5, 1996), *aff'd*, 113 F.3d 1241 (9th Cir.1997). The court specifically rejected Porush's argument,

virtually identical to the one he raises here, that New York law bars the arbitral award of punitive damages. *Id.*, 1996 WL 61095 at \* 4.

The arbitration hearing took place on January 13, 1997. Although Tenzer, Greenblatt had withdrawn as Porush's counsel approximately one month earlier, Porush did not seek an adjournment or, as far as may be discerned from the record, attempt to communicate with either Lemire, Lemire's attorneys, or the NASD panel to advise them of this development. Porush did not attend the January 13 hearing, nor did any representative appear on his behalf. Porush did not submit any evidence to the panel after the hearing, nor does it appear that he communicated with the panel between the date of the hearing and March 12, 1997, the date the arbitration decision was rendered. On April 17, 1997, Porush, once again represented by Tenzer, Greenblatt, filed this motion to vacate.

### DISCUSSION

[1] The Federal Arbitration Act embodies a strong presumption in favor of enforcing arbitration awards. *Wall Street Assocs., L.P. v. Becker Paribas Inc.*, 27 F.3d 845, 849 (2d Cir.1994) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)); see 9 U.S.C. § 9 (court “must grant ... an order [confirming an arbitration award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title”). Consequently, “ ‘arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and

expensive litigation.’ ” *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir.1997) (quoting *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir.1997)), *cert. denied*, 522 U.S. 1049, 118 S.Ct. 695, 139 L.Ed.2d 639 (1998); see also *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir.1985) (limited review necessary for arbitration to serve as quick, inexpensive, informal means of private dispute resolution).

An arbitration award subject to review under the Federal Arbitration Act may be vacated where the arbitrators were guilty of misconduct or any other misbehavior by which the rights of any party have been prejudiced, or where the arbitrators exceeded their powers. 9 U.S.C. § 10(a)(3), (4). Additionally, courts have provided that an award may be vacated if rendered in manifest disregard of the law. See, e.g., \*182 *DiRussa*, 121 F.3d at 821; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir.1986). However, judicial inquiry under the “manifest disregard” standard is extremely limited:

The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term “disregard” implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore it or pay no attention to it.

*Bobker*, 808 F.2d at 933–34.



[2] The party seeking to vacate an arbitration award bears the burden of establishing one of the grounds for relief and the showing required to avoid summary confirmation of the award is high. *Standard Microsystems*, 103 F.3d at 12. An award will not be vacated if there is even a “barely colorable justification” for the outcome reached, *Landy Michaels Realty Corp. v. Local 32B–32J*, 954 F.2d 794, 797 (2d Cir.1992), even if the award is based on an error of fact. *Standard Microsystems Corp.*, 103 F.3d at 13; *Conntech Dev. Co. v. University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 687 (2d Cir.1996). In light of these principles, the Court considers each of Porush's arguments in favor of vacatur.

### ***Insufficient Evidence***

Porush argues that the award against him must be vacated as arbitrary and capricious because Lemire/MRC failed to present proof from which an arbitrator could conclude that Porush, as opposed to the other arbitral respondents, was liable on any of the claims asserted. He further contends that Lemire/MRC's counsel misrepresented certain facts during the hearing, thus leading the arbitrators to an unsupported conclusion.

[3] Under the circumstances presented here, however, Porush will not be heard to raise an issue regarding the purported insufficiency of the evidence upon which the arbitration panel based its decision. Porush consented to have the instant dispute arbitrated by an NASD panel, knew that damages, including punitive damages, might be awarded up to \$2,000,000, and knew that at least one court, presented with virtually identical facts, had sustained

an award of punitive damages against him. Porush, nevertheless, failed to challenge either the evidence, the offers of proof, or the legal theories presented by Lemire/MRC's counsel at the hearing, thereby impermissibly interfering with the process by which the arbitrators reached their conclusions on the facts and the law. “[A] party cannot complain about the nonproduction of evidence when it failed to offer such evidence itself ...” *Biotronik Mess–Und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*, 415 F.Supp. 133, 138 (D.N.J.1976) (relying upon *Catz Am. Co. v. Pearl Grange Fruit Exch., Inc.*, 292 F.Supp. 549 (S.D.N.Y.1968)).

Contrary to plaintiff's impression, arbitration is not a trial run in which an arbitral respondent may sit silently by, take note of the evidence presented without attempting to clarify the matters presented to the arbitrators, and then, if the result turns out unfavorably, seek judicial relief on the ground that the arbitrators misapprehended the facts. See *Marino v. Writers Guild of Am., East, Inc.*, 992 F.2d 1480, 1483 (9th Cir.1993) (“a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse”); see also *Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312, 1317 (Alaska 1997) (failure to raise defense at arbitration hearing waived defense upon judicial review); *Foster v. City of Fairbanks*, 929 P.2d 658, 661 (Alaska 1996) (employee's failure to raise at arbitration hearing fact that she had not been recalled to same position estopped her from challenging award based on arbitrator's erroneous belief that she had been recalled

to same position). If parties to arbitration could play the game that Porush and his attorneys played here, arbitration would lose its vitality as an alternative to litigation, a result not consistent with the strong federal policy favoring the enforcement of arbitration agreements and the confirmation of arbitration awards.

### **\*183 *Misconduct by the Arbitrators***

[4] Porush further argues that vacatur is required because the arbitrators engaged in misconduct. The alleged misconduct lay in “permitting the claimants to proceed against Porush at the hearing under a theory not presented in the Statement of Claim, without giving him notice or opportunity to respond to the new charges.” Pltfs. Mem. at 10. Porush refers to Lemire/MRC's contention that Porush made fraudulent statements to a Wall Street Journal reporter concerning a stock, Octagon, Inc., that Lemire/MRC had purchased at the urging of Stratton Oakmont. Porush's argument is frivolous. The Statement of Claim filed by Lemire/MRC expressly names Porush as a respondent, states in its opening paragraph that claimants seek damages for, *inter alia*, “reckless or intentional misrepresentations concerning stock in which [Stratton Oakmont] was a marketmaker,” and expressly refers both to respondents' conduct in encouraging Lemire/MRC to purchase the shares of Octagon, Inc., and to Porush's statements to the Wall Street Journal. The record belies Porush's contention that he was caught by surprise. Moreover, Porush waived the issue because he failed to appear at the hearing where, clearly, he could have raised the argument he now puts before the Court.

### ***Excess of Authority***

Next, Porush contends that the arbitrators exceeded their authority by awarding punitive damages because “the parties did not submit the issue of punitive damages to the arbitrators for decision.” Pltfs. Mem at 16. He reaches this conclusion by noting that his submission agreement stated that it was “subject to the affirmative defenses contained in [his Answer to Lemire/MRC's claim],” *id.*, one of which was that the arbitration was subject to New York law and New York law bars arbitrators from awarding punitive damages.

Plaintiff's contention to the contrary, it is clear that the issue of punitive damages was placed before the arbitrators. Porush's inclusion of an affirmative defense against punitive damages and his motion to dismiss such claims is a concession that the punitive damages issue was before the arbitrators. The argument fails because it mistakes a defense to punitive damages for an exclusion from the scope of arbitrability.

[5] In any event, the Agreement's arbitration clause expressly states that the arbitration may be conducted under the NASD's Code of Arbitration Procedure which permits the imposition of punitive damages. *See Americorp Sec., Inc. v. Sager*, 239 A.D.2d 115, 656 N.Y.S.2d 762, 764 (1st Dep't 1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adler*, 234 A.D.2d 139, 651 N.Y.S.2d 38, 38–39 (1st Dep't 1996). A manual provided to NASD arbitrators expressly notes that the issue of punitive damages may arise with great frequency in arbitrations and adds that “parties to arbitration are informed that arbitrators can consider punitive damages as a remedy.”

*Mulder v. Donaldson, Lufkin & Jenrette*, 224 A.D.2d 125, 648 N.Y.S.2d 535, 538 (1st Dep't 1996). In short, this Court fully agrees with the observation that:

The Customer Agreement's reference to NASD as one of the forums of arbitration and the Uniform Submission Agreements executed by the parties made clear that the parties were subjecting themselves to NASD's rules, which clearly permit arbitrators to award punitive damages.

*Arbitration between R.C. Layne Constr. Inc. and Stratton Oakmont, Inc.*, 228 A.D.2d 45, 651 N.Y.S.2d 973, 976 (1st Dep't 1996).<sup>3</sup> The issue was properly before the arbitrators.

<sup>3</sup> The Court notes its displeasure with plaintiff's counsel for not bringing this case to the Court's attention even though he briefed it on behalf of Stratton Oakmont for the Appellate Division. The Court further notes that the argument raised here was raised in identical terms and rejected in *R. Allen Fox, Ltd. v. Stratton Oakmont, Inc.*, No. 93 C 2228, 1996 WL 288771 (N.D.Ill. May 26, 1996), another case not brought to the Court's attention by plaintiff's counsel.

Porush next contends that the arbitrators exceeded their authority in awarding \$496,825 in compensatory damages, representing out-of-pocket loss, when a portion of that out-of-pocket loss was in position to be returned to Lemire/MRC. During the hearing, Lemire/MRC's counsel indicated that \$62,510.37 \*184 of Lemire/MRC's funds were in the hands of Stratton Oakmont's clearing broker, Adler, Coleman, and was subject to retrieval upon execution of a satisfactory

release. Counsel further indicated that another \$100,000 could be released from another broker, Joseph Dillon & Co. (not a party to the arbitration), if the NASD arbitration panel ordered Joseph Dillon & Co. to make such release.

[6] Plaintiff's argument is unavailing. Despite the nomenclature, the gist of Porush's argument is simply that the arbitrators miscalculated the amount of compensatory damages. The arbitrators did not, nor were they required to, provide an explanation for their decision to award \$496,825 in compensatory damages. A court must confirm an arbitration decision if any ground for the decision can be inferred from the facts of the case, even if the ground is based on an error of fact. *Standard Microsystems*, 103 F.3d at 13. Such a ground for decision exists here because there is no indication in the record that any funds were actually released to Lemire/MRC from either Adler, Coleman or Joseph Dillon & Co. The arbitrators could have concluded that Lemire/MRC required the full \$496,825 to be made whole. This may have been an error in fact, but there is, at the very least, a colorable justification for the award. In any event, Porush waived any argument on the matter by failing to attend the arbitration hearing where he could have raised the issue.

### *Punitive Damages*

[7] Porush objects to the imposition of punitive damages on the ground that the arbitrators imposed punitive damages under New Hampshire law, notwithstanding the fact that the arbitration agreement clearly provided for the application of New York law. The Court agrees that the application of New Hampshire

law was error, but because the arbitrators could have awarded punitive damages under the Agreement, even with its New York choice-of-law clause, the arbitrators' error was harmless.

The Agreement's choice-of-law clause provides, in pertinent part, that the Agreement “shall be governed by and construed, and the substantive rights and liabilities of the parties determined, in accordance with the laws of the State of New York.” Pursuant to *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 834, 353 N.E.2d 793 (1976) (“the Garrity Rule”), New York law forbids arbitrators to award punitive damages. Therefore, Porush argues, had New York law been applied, punitive damages could not have been awarded. Plaintiff's argument is foreclosed by the Supreme Court's ruling in *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).

In *Mastrobuono*, a securities brokerage firm and its customers entered into a standard-form Client Agreement (“agreement”). *Id.* at 54, 115 S.Ct. 1212. As here, the agreement provided for arbitration in accordance with the rules of the NASD. *Id.* at 58, 115 S.Ct. 1212. The agreement was silent as to punitive damages but stated that the agreement “shall be governed by the laws of the State of New York.” *Id.* After a hearing, an arbitration panel awarded plaintiffs compensatory and punitive damages. *Id.* at 54, 115 S.Ct. 1212. On review, the district court held that the arbitrators lacked power to award punitive damages; the Seventh Circuit affirmed. *Id.* The issue before the Supreme Court was whether a contractual choice-of-law provision may preclude an arbitral award

of punitive damages that otherwise would be proper. *Id.* at 55, 115 S.Ct. 1212. Reversing the Seventh Circuit, the Court held that the arbitral award of punitive damages should have been enforced as falling within the scope of the contract. *Id.* at 63–64, 115 S.Ct. 1212.

The agreement in *Mastrobuono* did not contain an express reference to punitive damages and was ambiguous inasmuch as the NASD rules referred to in the arbitration clause provide for the award of punitive damages while the New York law selected through the choice-of-law clause forbids them. The Court resolved the ambiguity both by reference to public policy and through two canons of statutory construction. As a matter of public policy, “when a court interprets [this sort of ambiguity] in an agreement covered by the FAA, ‘due regard must be given to the federal policy favoring \*185 arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.’ ” *Id.* at 63, 115 S.Ct. 1212 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). As a matter of statutory construction, the Court construed the agreement against the party that drafted it, namely, the brokerage house respondent. Finally, the Court noted that it is “a cardinal principle of contract construction ... that a document should be read to give effect to all its provisions and to render them consistent with each other,” and concluded:

We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read “the laws of the State of New York” to encompass substantive principles that New York courts would

apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

*Id.* at 64, 115 S.Ct. 1212. Thus, unless the arbitration agreement provides an “unequivocal exclusion of punitive damages claims” from the scope of arbitration, it will be read to empower arbitrators to award punitive damages. *Id.* at 60, 115 S.Ct. 1212.

Porush argues that *Mastrobuono* is inapposite because the choice-of-law clause in the Agreement provides that New York law shall determine the substantive rights and liabilities of the parties whereas the agreement in *Mastrobuono* provided that the agreement would be governed by New York law. According to plaintiff, the difference in language takes the present case outside the reach of *Mastrobuono* and demonstrates a “clear contractual intent” by the parties to exclude punitive damages from the scope of the arbitration. This Court disagrees.

The choice-of-law clause at issue here says nothing about the authority of the arbitrators to award punitive damages and, hence, does not amount to an unequivocal agreement to exclude such relief. Moreover, the Supreme Court anticipated Porush's argument and rejected it. The Court observed that even if the choice-of-law clause before it were construed to include New York's “substantive rights and obligations,” that clause would be ineffective to demonstrate a clear intent to exclude punitive damages absent an expression of the parties' intent regarding the “State's allocation of power

between alternative tribunals.” *Id.* at 60, 115 S.Ct. 1212. In short, it is clear that the choice-of-law clause at issue here does not reflect an unequivocal agreement between the parties to exclude punitive damages from the scope of arbitration.<sup>4</sup>

<sup>4</sup> Porush further asserts that *Mastrobuono* is inapposite because the Court resolved the ambiguity in the agreement at issue by construing the ambiguity against the drafter. Porush asserts that he is not the drafter of the Agreement and, hence, should not be subject to the adverse construction. The argument mischaracterizes the Supreme Court's ambiguity analysis which was premised principally on public policy and the rule that, where possible, conflicting contractual terms should be read to give each other effect. Because these two factors clearly apply to the instant matter, *Mastrobuono* cannot be distinguished on the basis offered by plaintiff.

The Court notes that Porush raised the identical argument on identical facts in *Greening v. Stratton Oakmont, Inc.*, No. 95–4288, 1996 WL 61095 (N.D.Cal. Feb 5, 1996), *aff'd*, 113 F.3d 1241 (9th Cir.1997); his argument was rejected then, just as it is now.<sup>5</sup> *Stratton Oakmont* raised the same argument on the same facts in *R. Allen Fox, Ltd. v. Stratton Oakmont, Inc.*, No. 93 C 2228, 1996 WL 288771 (N.D.Ill. May 29, 1996), and *Arbitration between R.C. Layne Constr., Inc. and Stratton Oakmont, Inc.*, 228 A.D.2d 45, 651 N.Y.S.2d 973 (1st Dep't 1996), both with the same result as in *Greening*. See also *Americorp Securities*, 656 N.Y.S.2d at 764 (choice-of-law clause stating that the “rights and liabilities” of the parties shall be determined in accordance with New York law did not amount to unequivocal exclusion of punitive damages from scope of arbitration); *cf. Mulder*, 648 N.Y.S.2d at 538 (“In sum, the decision of the Supreme Court in *Mastrobuono* \*186 makes it clear that, with respect to arbitration proceedings

governed by the FAA which preempts the Garrity Rule, the arbitration of punitive damage claims is required except where the parties have unequivocally agreed otherwise.”).

5 The *Greening* decision is another highly persuasive but adverse authority that plaintiff's counsel failed to bring to the Court's attention.

[8] Porush further contends that the arbitral award of punitive damages violates his right to due process under the Fifth and Fourteenth Amendments. This contention is without merit. Simply put, private arbitrators are not state actors and, absent state action, there can be no violation of either amendment. See *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1190–93 (11th Cir.1995); *Austern v. Chicago Bd. Options Exch., Inc.*, 716 F.Supp. 121, 125 (S.D.N.Y.1989), *aff'd*, 898 F.2d 882 (2d Cir.1990).

### **Attorneys' Fees**

[9] Reprising the argument raised earlier regarding punitive damages, Porush contends that the arbitrators exceeded their authority by awarding attorneys' fees because New York law bars arbitrators from awarding such fees. The Second Circuit, in a case involving an NASD arbitration of a dispute between a securities broker and its customer, has already held that arbitrators may award such fees unless the parties expressly exclude them from the scope of arbitration:

[A] choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act, including

the right to arbitrate claims for attorneys' fees [citing *Mastrobuono* ]. Therefore, [broker] cannot rely on the New York choice-of-law provision to prevent the [customer] from seeking in arbitration a remedy that is not foreclosed by the Agreement.

*PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir.1996). Porush does not attempt to distinguish *Bybyk*, and the Court finds it to be controlling authority on this issue.

### **Procedural Misconduct**

[10] Finally, Porush contends that the award must be vacated because the arbitrators erroneously considered materials that Lemire/MRC failed to send him prior to the arbitration and took the testimony of witnesses whom Lemire/MRC failed to identify before the hearing in violation of NASD Code of Arbitration Procedure, Rule 10321(c). It does not follow, however, that the award must be nullified. The NASD Code does not have the force of law. *Card v. Stratton Oakmont, Inc.*, 933 F.Supp. 806, 814 (D.Minn.1996). Porush “must point to a statutory violation to warrant vacation of an arbitral award, not a violation of the Code of Arbitration Procedure.” *Id.* at 815. Porush cites no authority suggesting that the award must be vacated for these procedural violations. In any case, Porush waived any complaint about the conduct of the arbitration by not presenting his objections to the arbitrators in the first instance.

***CONCLUSION***

For the foregoing reasons, plaintiff's motion to vacate the arbitration award is denied and

defendants' cross-motion to confirm the award is granted. The award is confirmed in all respects. The Clerk of the Court shall enter judgment in favor of defendants, with prejudice and with costs.

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758 F.Supp. 638  
United States District Court,  
D. Colorado.

In the Matter of the  
Arbitration Between  
William H. PYLE, Petitioner,  
v.

SECURITIES U.S.A., INC., David  
Williams, Joel Brody, Scott Carothers,  
Deborah Hootman, and E.B.  
Williamson & Co., Inc., Respondents,  
National Association of  
Securities Dealers, Inc.,  
Arbitration Case No. 89-01641.

Civ. A. No. 90-B-  
1674. | March 8, 1991.

Investor sought to confirm arbitration award made in his favor. The District Court, [Babcock](#), J., held that Colorado arbitration law restricting arbitrator's power to award punitive damages did not apply in an action brought under the Federal Arbitration Act, absent an agreement between the parties that state arbitration law will govern.

Petition for confirmation of arbitration award granted.

#### Attorneys and Law Firms

\*[638 William R. Fishman](#), Denver, Colo., for petitioner.

\*[639 James Halpin](#), Chesteen & Halpin, Littleton, Colo., for Brody & Hootman.

J. Patrick Madigan III, Aurora, Colo., for Williams.

### MEMORANDUM OPINION AND ORDER

[BABCOCK](#), District Judge.

Petitioner William H. Pyle (Pyle) seeks to confirm an arbitration award made in his favor against respondents Securities U.S.A., Inc., David Williams (Williams), Joel Brody (Brody), and E.B. Williamson & Co., Inc. Only Williams and Brody seek to vacate the award. Respondents Deborah Hootman and Scott Carothers were dismissed from the arbitration proceeding and no damages were assessed against them. For the reasons set forth below, I confirm the award.

#### I.

Pyle brought an arbitration proceeding before the National Association of Securities Dealers, Inc. (NASD) in which he alleged that Williams and Brody improperly recommended that he purchase unsuitable securities. He sought damages for violations of section 12(2) of the Securities Act of 1933, [section 10\(b\)](#) of the Securities Exchange Act of 1934, [sections 11-51-125\(2\) and \(3\)](#) or the Colorado Securities Act of 1981, as well as Colorado common law fraud and misrepresentation. The arbitration proceeded under NASD's Code of Arbitration Procedure. After a hearing, the arbitrators awarded Pyle compensatory damages, punitive damages, and attorney fees. Pyle now seeks

to confirm the award under [section 9](#) of the Federal Arbitration Act (FAA), [9 U.S.C. § 9](#). Williams and Brody move to vacate the award.

## II.

### A.

Under [9 U.S.C. § 10\(d\)](#) Williams and Brody seek to vacate that portion of the arbitration award which granted punitive damages. [Section 10\(d\)](#) provides that an award may be vacated where the arbitrators “exceeded their powers.” Williams and Brody argue that [Colo.Rev.Stat. § 13–21–102\(5\)](#) barred the arbitrators from awarding punitive damages and, thus, the arbitrators exceeded their powers. [Section 13–21–102\(5\)](#) provides that “unless otherwise provided by law, exemplary damages shall not be awarded in administrative or arbitration proceedings, even if the award or decision is enforced or approved in an action commenced in a court.” I conclude that this section did not bar the arbitrators from awarding punitive damages.

[1] [2] [3] Federal arbitration law governs arbitration agreements that are within the FAA's coverage. [Moses H. Cone Memorial Hospital v. Mercury Construction Corp.](#) 460 U.S. 1, 24–25, 103 S.Ct. 927, 941–42, 74 L.Ed.2d 765 (1983); [Foster v. Turley](#), 808 F.2d 38, 40 (10th Cir.1986). There is no dispute that the FAA applies to this case. I hold that absent an agreement by the parties that state arbitration law should govern, state arbitration law restricting an arbitrator's power to award punitive damages does not apply to

an action under the FAA. [Raytheon Co. v. Automated Business Systems, Inc.](#), 882 F.2d 6, 11 n. 5 (1st Cir.1989); [Bonar v. Dean Witter Reynolds, Inc.](#), 835 F.2d 1378, 1386–87 (11th Cir.1988). [Compare Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University](#), 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (state arbitration law applies if parties agreed that it should apply). Because there has been no showing that the parties agreed that Colorado arbitration law should govern in this FAA action, [Colo.Rev.Stat. § 13–21–102\(5\)](#) does not apply.

[4] Williams and Brody rely on [New England Energy Inc. v. Keystone Shipping Co.](#), 855 F.2d 1 (1st Cir.1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989), which held that a district court could order consolidation of two arbitrations under a state law specifically providing for consolidation. Reliance on this case is misplaced. The court's holding was based on its view that “state law may supplement th[e FAA] on matters collateral \*640 to the agreement to arbitrate.” *Id.* at 4 n. 2. Even assuming this to be true, I conclude that whether an arbitrator may award punitive damages is a matter central, not collateral, to the agreement to arbitrate. Moreover, as the First Circuit itself held in a later case, federal, not state law, applies in determining whether an arbitrator may award punitive damages. [Raytheon](#), 882 F.2d at 11–12 n. 5.

Relying on three labor arbitration cases, Williams and Brody argue that absent an express provision in the arbitration contract, arbitrators lack the power to award punitive

damages (citing *International Ass'n of Heat & Frost Insulators & Asbestos Workers, Local Union 34 v. General Pipe Covering, Inc.*, 792 F.2d 96, 100 (8th Cir.1986); *Howard P. Foley Co. v. International Brotherhood of Electric Workers, Local 639*, 789 F.2d 1421, 1424 (9th Cir.1986); *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir.1979)). I disagree.

[5] “[T]he concerns which may warrant such a rule in the labor arbitration field are not present in the commercial arbitration context.” *Raytheon*, 882 F.2d at 10. In the commercial arbitration context, punitive damages may be awarded although the arbitration agreement contains no express mention of such relief. *Id.* at 10–12 (citing cases); *Bonar*, 835 F.2d at 1386–87.

Lastly, Williams and Brody argue that punitive damages are outside the scope of the arbitration agreement. Again I disagree.

[6] By incorporating into their arbitration agreement the NASD Code of Arbitration Procedure, the parties agreed to arbitrate “any dispute, claim or controversy arising out of or in connection with the business of any member of the Association.” NASD Code § 1. I conclude that “any dispute, claim or controversy” includes a claim for punitive damages. As the *Raytheon* court stated in determining that a similar contractual provision allowed punitive damages to be awarded, “[s]ince courts are empowered to award punitive damages with respect to certain types of claims [alleged here], the ... arbitrators would be equally empowered.” *Raytheon*, 882 F.2d at 10.

## B.

Williams and Brody also seek to vacate the award of attorney fees. The arbitrators were authorized to make this award. See Colo.Rev.Stat. § 11–51–125(2).

## C.

[7] Williams and Brody next argue that the arbitrators committed error by refusing to postpone the hearing. 9 U.S.C. § 10(c) allows a court to vacate an arbitration award “[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown....” The arbitrators were well within their discretion in refusing to postpone the hearing. See, e.g., *Storey v. Searle Blatt, Ltd.*, 685 F.Supp. 80 (S.D.N.Y.1988).

## D.

Lastly, Brody argues that the award should be vacated because the arbitrators acted in manifest disregard of the law by finding fraud against him. A court may vacate an arbitration award that was in “manifest disregard of the law.” See *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). However, review on this ground is very limited. See *Jenkins v. Prudential–Bache Securities, Inc.*, 847 F.2d 631, 634–35 (10th Cir.1988).

[8] Brody maintains that the arbitrators' award was in manifest disregard of the law because

it was factually and legally impossible for him to have had fraudulent intent or to have caused damages. Even assuming that I have power to review the arbitrators' factual determinations, I conclude that Brody has not met his substantial burden. To decide this issue, I would need to examine the record of the arbitration proceeding. Brody has failed to provide a transcript of the proceeding. Consequently, he has failed to meet his burden because on the record before me I cannot say that the arbitrators acted in manifest disregard of the law.

Accordingly, it is ORDERED that:

**\*641** (1) Pyle's Petition for Confirmation of Arbitration Award is GRANTED;

(2) Brody's and Williams' Motions to Vacate Arbitration Award are DENIED; and

(3) final judgment shall enter with Pyle awarded costs against Brody and Williams.

**Parallel Citations**

Fed. Sec. L. Rep. P 96,111



462 Fed.Appx. 517

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28) United States Court of Appeals, Sixth Circuit.

MUSKEGON CENTRAL  
DISPATCH 911, Plaintiff–Appellee,  
v.  
TIBURON, INC., Defendant–Appellant.

No. 09–2214. | Feb. 2, 2012.

### Synopsis

**Background:** Consortium of police, fire and emergency medical service agencies moved to vacate an arbitration award regarding a dispute with a contractor retained to create and implement an integrated automated public safety system, and the contractor cross-moved to confirm the award. The United States District Court for the Western District of Michigan, [Robert J. Jonker, J.](#), [652 F.Supp.2d 862](#), vacated the arbitration award. Contractor appealed.

**Holdings:** The Court of Appeals, Barrett, District Judge, sitting by designation, held that:

[1] Michigan Arbitration Act, rather than Federal Arbitration Act (FAA) standards, applied to action;

[2] arbitrator exceeded scope of his authority; and

[3] remand to new arbitrator was warranted.

Affirmed and remanded.

\*518 On Appeal from the United States District Court for the Western District of Michigan.

BEFORE: [CLAY](#), and [STRANCH](#), Circuit Judges; [BARRETT](#), District Judge.\*

\* Honorable [Michael R. Barrett](#), United States District Judge for the Southern District of Ohio, sitting by designation.

### OPINION

[BARRETT](#), District Judge.

Plaintiff–Appellee Muskegon Central Dispatch 911 (“MCD”) and Defendant–Appellant Tiburon, Inc. entered into an agreement to implement an integrated public safety computer system. A dispute \*519 arose under the agreement, and the parties agreed to privately arbitrate the matter. The arbitrator found that MCD did not properly terminate the contract and awarded Tiburon damages and costs. MCD filed a complaint in state court seeking to vacate the arbitration award. Following removal to federal court based

on diversity of citizenship, the district court concluded that the arbitrator exceeded his powers and vacated the award. For the reasons set forth below, we **AFFIRM** the district court's decision vacating the award, but remand the dispute to a new arbitrator.

## STATEMENT OF FACTS

### I. Factual Background

MCD represents a consortium of Muskegon County, Michigan police, fire, and emergency medical service agencies that share an emergency response system. Tiburon is a supplier of public safety software systems. On December 30, 2003, MCD and Tiburon entered into a System Implementation Agreement (“SIA”) under which Tiburon was to design, implement, and maintain an integrated public safety computer system for MCD. (R. 28, Ex. A.) Under the SIA, contract termination is either for cause or without cause:

**13.1. Termination for Default.** Subject to completion of the dispute resolution procedures set forth in Section 12.1 hereof, in the event that either party hereto materially defaults in the performance of any of its obligations hereunder, the other party may, at its option, terminate this Agreement by providing the defaulting party thirty (30) days' prior written notice of termination delivered in accordance with Section 34 hereof, which notice shall identify and describe with specificity the basis for such termination. If, prior to the expiration of such notice period, the defaulting party cures such default to the satisfaction of the non-defaulting party (as evidenced by written

notice delivered by the non-defaulting party in accordance with Section 34 hereof), termination shall not take place.

**13.2. Termination Without Cause.** [MCD] may terminate this Agreement without cause by providing Tiburon at least thirty (30) days' prior written notice of termination delivered in accordance with Section 33 hereof.

The dispute resolution procedures (“DRP”) referenced in Section 13.1 are explained in Section 12.1 of the SIA as follows:

### 12. Informal Dispute Resolution

**12.1.** The parties to this Agreement shall exercise their best efforts to negotiate and settle promptly any dispute that may arise with respect to this Agreement in accordance with the provisions set forth in this Section 12.1.

(a) If either party (the “Disputing Party”) disputes any provision of this Agreement, or the interpretation thereof, or any conduct by the other party under this Agreement, that party shall bring the matter to the attention of the other party at the earliest possible time in order to resolve such dispute.

(b) If such dispute is not resolved by the employees responsible for the subject matter of the dispute within ten (10) business days, the Disputing Party shall deliver to the first level of representatives below a written statement (a “Dispute Notice”) describing the dispute in detail, including any time commitment and any fees or other costs involved.

(c) Receipt by the first level of representatives of a Dispute Notice shall commence a time period within which the respective representatives must exercise their best effort to resolve the dispute. If the respective representatives cannot \*520 resolve the dispute within the given time period, the dispute shall be escalated to the

**Escalation Timetable  
(Business Days)**

0 to 5th

6th to 10th

11th to 15th

**Tiburon  
Representative**

Project Manager

Operations Manager

Executive Officer

**Client Representative**

Project Manager

COPS Coordinating  
Committee Chair<sup>1</sup>

Chairman of COPS Board

If a party terminates the SIA “without cause” under Section 13.2, the termination is considered to be for “convenience” under Section 13.3(d). In the event of a termination for convenience by MCD, the SIA provides that Tiburon is entitled to payment for:

all outstanding invoices submitted to [MCD] prior to the effective date of the termination and for all costs and expenses incurred prior to the effective date of the termination to the extent not invoiced prior to the effective date of the termination, based upon Tiburon's then-current labor rates.

In Section 13.5, the SIA also provides that “[t]he termination of this Agreement shall in no way relieve either party from any obligations

next higher level of representatives in the sequence as set forth below.

(d) If the parties are unable to resolve the dispute in accordance with the escalation procedures set forth below, the parties may assert their rights under this Agreement.

hereunder nor limit the rights and remedies of the other party in any manner.”

MCD alleges that during the implementation of the system, Tiburon caused numerous delays and failed to respond to concerns raised by David McCastle, MCD's Executive Director. On July 19, 2006, McCastle sent an email to Tiburon's Project Manager, Glenn Matsushima, and his immediate supervisor, Darrell Richards. (R. 29, Ex. 25.) McCastle copied Tiburon's President, Gary Bunyard, and its Board Chairman, Brad Wiggins, on the e-mail, along with the COPS Board of Directors. (*Id.*) In his email, McCastle detailed a number of concerns left unresolved by Tiburon. (*Id.*) In response, Tiburon replaced Matsushima with Robert Towery, who was the fifth project manager over the course of a two and a half year period.

MCD also alleges that there were problems with the actual functioning of the system. In an internal email, Towery acknowledged as



much, stating: “In reviewing the contract, we are clearly in material default however, the client has not yet made this connection.” (R. 29, Ex. 32.)

On August 25, 2006, in a letter from counsel, MCD notified Tiburon that it was terminating the SIA for cause, effective thirty days thereafter. (R. 29, Ex. 37.) Following the August 25, 2006 letter, there were a number of meetings and communications between the parties. Despite these efforts, MCD reaffirmed its termination of the contract in a letter to Tiburon's counsel dated December 21, 2006. (R. 29, Ex. 40.)

## II. Procedural Background

### A. Arbitration Proceedings

On February 28, 2007, Tiburon filed a demand for arbitration with the American Arbitration Association. However, the parties subsequently agreed to privately arbitrate the dispute and entered into an Agreement to Submit to Private Arbitration (“Arbitration Agreement”). (R. 28, Ex. B.)

\*521 In the arbitration proceedings, Tiburon filed a statement of claim asserting that MCD terminated the SIA without cause pursuant to Section 13.2 and claiming damages of \$456,662.97 pursuant to Section 13.3(d) of the SIA. (R. 1, Ex. B.) MCD denied liability and argued that it had terminated the SIA for cause in the August 25, 2006 letter. MCD counterclaimed for breach of contract in the amount of \$516,104.03, plus costs and expenses.<sup>2</sup> (*Id.*, Ex. C ¶¶ 23, 28.) The Arbitrator denied the parties' cross-motions for summary disposition on MCD's claim, finding

the existence of genuine issues of material fact regarding MCD's compliance with the dispute resolution procedures in the SIA. (R. 36, Ex. 45, at 6.)

- 1 The Central Operations Police Services (“COPS”) Board controls the MCD.
- 2 MCD also asserts claims of common law fraud/misrepresentation; unfair and deceptive acts under M.C.L. § 445.901, *et. seq.*; and a violation of the Magnuson–Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* In a decision not before us, the Arbitrator granted summary disposition for Tiburon on these other claims.

The parties agreed to bifurcate the proceedings in order to present the liability issues first, which would then be followed by evidence on damages. The hearing on liability consisted of twelve days of testimony and presentation of evidence.

In his written opinion at the close of the liability phase, the arbitrator found that “[t]he language of the SIA leaves no doubt that this dispute resolution process [in Section 12.1] was intended as a condition precedent to the termination of the contract for cause.” (R. 1, Ex. D, at 3.) The arbitrator found that the language of Section 12.1 was “generally clear and unambiguous,” but did not “specifically identify which party has the responsibility to initiate the escalation procedures contained in Section 12.1(d).” (*Id.* at 4.) The arbitrator reasoned that:

Section 12.1(a) requires that the Disputing Party “shall bring the matter to the attention of the other party.” Thus, the Disputing Party clearly has the obligation to initiate the dispute resolution process. I conclude from a reading of Section 12.1 of the SIA in context that the intent of the parties was to place

the responsibility on the Disputing Party not only to initiate the process, but to complete the process and bring it to conclusion. That includes the initiation and conclusion of the escalation procedures in Section 12.1(d).

(*Id.*) The arbitrator identified MCD as the Disputing Party. (*Id.*) The arbitrator found that the July 19, 2006 email sent by McCastle on behalf of MCD constituted a Dispute Notice under Section 12.1. (*Id.* at 7.) After a review of the evidence, the arbitrator concluded MCD had not met the requirements of the “Escalation Timetable” in Section 12.1(d). (*Id.* at 9.) Therefore, the arbitrator concluded that MCD's termination was for convenience under Section 13.2. (*Id.*)

On September 4 and 5, 2008, the arbitrator heard evidence on Tiburon's claim for damages under Section 13.3(d). The arbitrator concluded MCD owed \$452,579, “together with interest running at the statutory rate allowed under Michigan law, and taxable costs.”

MCD filed a complaint in the Muskegon County Circuit Court to vacate the arbitration award. (R. 1, Ex. A2.) Tiburon then removed the action to the U.S. District Court for the Western District of Michigan. (R. 1.) In cross-motions before the district court, MCD sought to vacate the arbitration award, and Tiburon sought to have the award confirmed. (R. 27, 35.)

## B. District Court Opinion

The district court found that in accordance with the Arbitration Agreement, the Michigan Arbitration Act and Michigan \*522 Court Rules, not the Federal Arbitration Act, applied.

*Muskegon Cent. Dispatch 911 v. Tiburon, Inc.*, 652 F.Supp.2d 862, 867 (W.D.Mich.2009). The district court explained that under Michigan law, a court is required to vacate an arbitration award if “ ‘the arbitrator exceeded his or her powers’ ” or “ ‘refused to hear evidence material to the controversy.’ ” *Id.* (quoting M.C.R §§ 3.602(c), (d)). The district court applied the following standard under Michigan law:

“Where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.”

*Id.* (quoting *Detroit Auto. Inter-Ins. Exch. v. Gavin*, 416 Mich. 407, 331 N.W.2d 418, 430 (1982)). The district court concluded that MCD met this high standard and vacatur of the arbitration award was appropriate.

The district court explained that there was “no basis in the language of the contract for the Arbitrator to allocate responsibility for proceeding through the DRP to a single party.” *Id.* at 868. The district court pointed out that the plain language of Section 12.1(d) contemplates mutuality of obligation by referring to the parties in the plural: “ ‘[i]f the parties are unable to resolve the dispute in accordance with the escalation procedures set forth below,

*the parties* may assert their rights under this Agreement.’ ” *Id.* The district court found “[i]n assigning the burden to only one party, the Arbitrator read his own additional terms into the SIA.” *Id.* The district court explained that “[b]y adding words to make the escalation process the obligation of just one party, rather than the mutual obligation the SIA describes; and by treating the DRP not merely as an exhaustion requirement, but as a winner-take-all bet, the Arbitrator exceeded the scope of his authority.” *Id.* at 869.

The district court also found that the arbitrator exceeded the scope of his authority by reading Section 13 as the mandatory and exclusive procedure for a party seeking breach of contract damages. As the district court explained:

a decision by one party to terminate the contract does not automatically negate all possible bases for contract liability generated before termination. Termination generates one set of potential rights and liabilities for each party, but it does not subsume all other possible claims the contracting parties may have against each other. See *Mead Corp. v. ABB Power Generation, Inc.*, 319 F.3d 790, 796 (6th Cir.2003) (parties may invoke independent remedies to the extent not explicitly limited by contract). Termination liability or its absence is just one aspect of the

overall contractual rights and liabilities of the parties.

*Id.* at 869–70. Accordingly, the district court issued an order vacating “the arbitral decisions on liability, damages and costs” and remanding “to address issues submitted to the Arbitrator but not resolved.” *Id.* at 870. The district court concluded that a remand to the same arbitrator was appropriate. *Id.*

## DISCUSSION

### I. Legal Standards

#### A. Choice of Law

[1] This case falls within the scope of the Federal Arbitration Act (“FAA”) because the Arbitration Agreement, read together with the SIA, is a “contract evidencing a transaction involving commerce.” 9 U.S.C. § 2. Although the FAA “governs all aspects of arbitration procedure and preempts inconsistent \*523 state law[,]” *Stout v. J.D. Byrider*, 228 F.3d 709, 716 (6th Cir.2000), where “the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); see also *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 288–89 (3d Cir.2010).

In making a choice of law determination, the central inquiry is whether the parties’ agreement evinces an unambiguous intent to

“predicate[ ] the court's judicial action on the parties' having agreed to specific standards.” *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 n. 6, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 66, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (stating that parties' intent controls); *Pub. Serv. Credit Union v. Ernest*, 988 F.2d 627, 629 (6th Cir.1993) (finding that district court erroneously relied on FAA, where “both parties agreed that the Michigan statute controlled their agreement” to arbitrate). Ambiguities are resolved in favor of the federal standard. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293 n. 9, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002).

In this case, the Arbitration Agreement evidences the unambiguous intent of the parties to apply Michigan law in any subsequent appeal of the arbitration award. Paragraph 1 of the Arbitration Agreement explicitly refers to the Michigan Arbitration Act in stating that disputes “shall be submitted to final and binding arbitration in accordance with the provisions of this Submission Agreement and pursuant to the provisions of [MCL 600.5001–600.5035](#).” (R. 28, Ex. B ¶ 1.) The Arbitration Agreement makes numerous other references to Michigan law, (*id.* ¶¶ 3 (applicable law generally); 6 (disqualification); 9(h) (discovery)), and most notably, Paragraph 18 states that:

¶ 18. *Award* .... Judgment upon the [arbitration] decision may be entered in any court that has jurisdiction over the parties, in accordance with the Michigan Arbitration Act, being [MCL 600.5001](#), et seq. Appeals from the arbitration award

shall be conducted as provided for in [MCL 600.5001](#), [et] seq. and [MCR 3.602](#)[.]

(*Id.*)

Moreover, the Arbitration Agreement neither refers to the Federal Arbitration Act, nor otherwise suggests that either party sought to “invoke[ ] the FAA in the arbitration agreement.” *Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 303 (6th Cir.2008) (concluding that federal law governed, where the parties' choice of law provision referenced both the state and federal arbitration acts). To the contrary, Paragraphs 1 and 18 expressly incorporate the Michigan Arbitration Act into the agreement, and Paragraph 18 provides that state law will govern entry of judgment by a court and all appeals. See, e.g., *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir.2005) (concluding that a generic choice-of-law provision does not displace the federal standard for vacating an arbitration award), *abrogated on other grounds by Hall Street Assoc.*, 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

Accordingly, because the Arbitration Agreement unambiguously provides that the Michigan Arbitration Act will govern subsequent proceedings, we find that the parties intended to displace the federal standard and that Michigan law provides the legal standard.

#### **\*524 B. Standard of Review**

When reviewing a district court's decision to vacate an arbitration award, we review factual findings for clear error and questions of law *de novo*. *Green v. Ameritech Corp.*, 200 F.3d 967, 974 (6th Cir.2000).

Under Michigan law, a court's power to modify, correct, or vacate an arbitration award is limited by the Michigan Court Rules. *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 438 Mich. 488, 475 N.W.2d 704, 709 (1991). A court shall vacate an arbitration award if “(a) the award was procured by corruption, fraud, or other undue means; (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights; (c) the arbitrator exceeded his or her powers; or (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.” Mich. Ct. Rule § 3.602(J)(2). Michigan courts have explained that “arbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.” *Gavin*, 331 N.W.2d at 430; see also *Gordon Sel-Way*, 475 N.W.2d at 709. Thus, “ ‘where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.’ ” *Gavin*, 331 N.W.2d at 434 (alteration omitted) (quoting *Howe v. Patrons' Mut. Fire Ins. Co. of Michigan*, 216 Mich. 560, 185 N.W. 864, 867–68 (1921)).

Michigan courts have explained that “[j]udicial review of an arbitrator's decision is narrowly

circumscribed.” *City of Ann Arbor v. Am. Fed'n of State, Cnty., & Mun. Emps. Local 369*, 284 Mich.App. 126, 771 N.W.2d 843, 854 (2009) (citing *Police Officers Ass'n of Mich. v. Manistee Cnty.*, 250 Mich.App. 339, 645 N.W.2d 713 (2002)). Specifically, “[a] court may not review an arbitrator's factual findings or decision on the merits.” 771 N.W.2d at 854. A reviewing court is also prohibited from engaging in contract interpretation, which is an issue for the arbitrator to determine. *Id.* (citing *Konal v. Forlini*, 235 Mich.App. 69, 596 N.W.2d 630 (1999)).

## II. Analysis

Tiburon appeals the district court's two holdings in support of vacatur, namely that the Arbitrator exceeded his powers (1) by concluding MCD had the responsibility to escalate and complete the DRP; and (2) by reading Section 13 as the exclusive remedy for breach of contract. In support, Tiburon argues that a court may not interfere with the arbitrator's judgment on procedural issues. Tiburon maintains that the arbitrator decided, and the parties agreed, that the sequencing of his decision on the issues presented was such that the arbitrator would only reach Tiburon's alleged breach of contract if the DRP completion issue was decided in MCD's favor. Although procedural issues are generally reserved for the arbitrator, *Bennett v. Shearson Lehman-Am. Exp., Inc.*, 168 Mich.App. 80, 423 N.W.2d 911, 913 (Mich.Ct.App.1987), MCD's assignments of error are not properly characterized as procedural matters beyond the scope of our review. For this reason, and as fully explained below, we will affirm.

### A. Burden to Escalate under Section 12

Tiburon argues that the district court erred in ruling that the arbitrator had \*525 exceeded his powers by concluding that under Section 12 of the SIA, MCD had the responsibility to escalate and complete the DRP. Tiburon points out that the SIA was silent as to which party has the burden to escalate and complete the DRP.

[2] In addressing this argument, the district court applied reasoning found in the Michigan Supreme Court's decision in *Detroit Automobile Inter-Insurance Exchange v. Gavin*:

As *Gavin* points out, in agreeing to arbitration, the parties' central focus is the benefit of the bargain they entered—the substantive terms of the agreement—not process. Where parties to a contract provide specifically for the use of arbitration to resolve significant disputes, “it is clear that the primary concern of the parties is the enforcement of the terms of the agreement which they have made, securing to each of them the benefits to which they are entitled under the applicable law, including their own agreement.” Of secondary concern are the procedural mechanisms by which disputes will be resolved. “The process of dispute resolution and the procedural advantages of arbitration are the servants of the law governing the issues in dispute, not the reverse.”

*Muskegon Cent. Dispatch 911*, 652 F.Supp.2d at 867–68 (citations omitted). The district court found that the reasoning in *Gavin* applies “not only to the ultimate arbitration process, but also to the preliminary dispute resolution steps

leading to the eventual arbitration.” *Id.* at 868. The district court found that under *Gavin*, “the DRP of Section 12 imposes mutual obligations that are the servant, not the master of the substantive contract obligations.” *Id.* (emphasis omitted).

The district court explained that incorporating mutual obligations to carry out the escalation process makes practical sense:

The purpose of an escalation process such as the DRP is to resolve as many disputes as possible on business terms, leaving only the most intractable and substantive problems for arbitration. Business solutions by their nature require both parties to engage and compromise. When one or both parties loses interest in or the ability to reach a business solution, the practical value of the DRP is exhausted—it is no longer a servant of the parties' mutual obligation to work for informal resolution.

*Id.* at 868. The district court noted that it was Tiburon that initiated the arbitration, and thus “[i]t would be especially odd to penalize MCD for failing to exhaust informal means when Tiburon actually initiated the arbitration process.” *Id.* at 868–69.

Tiburon argues that by engaging in this analysis, the district court was engaging in contract interpretation, which is a duty reserved for the arbitrator. Tiburon would be correct

if the SIA was indeed silent as to which party has the responsibility to complete the escalation procedures. However, as the district court explained, the plain language of the contract expressly refers to both parties: “[i]f *the parties* are unable to resolve the dispute in accordance with the escalation procedures set forth below, *the parties* may assert their rights under this Agreement.” *Id.* at 868. Any fair reading of the contract language makes it clear that the parties intended a mutual obligation to carry out the escalation process. See *Morley v. Auto. Club of Mich.*, 458 Mich. 459, 581 N.W.2d 237, 240–41 (1998) (quoting *Maclean v. Fitzsimons*, 80 Mich. 336, 45 N.W. 145, 146 (1890) (explaining rule that “what is plainly implied from the language used in a written instrument is as much a part thereof as if it was expressed therein”)). By ignoring this language, the arbitrator exceeded his power. See *Gavin*, 331 N.W.2d at 430. Therefore, it was not error for the \*526 district court to vacate the award of the arbitrator.

### **B. Section 13 as Exclusive Remedy for Breach of Contract**

The district court found that the arbitrator exceeded the scope of his authority by applying Section 13 as the exclusive procedure for a party seeking breach of contract damages. *Muskegon Cent. Dispatch 911*, 652 F.Supp.2d at 869. As a result, the arbitrator never reached the merits of MCD's breach of contract claim. See *id.* at 868. Tiburon argues that MCD did not argue before the arbitrator that its breach of contract claim should be decided independent of the issue of completion of the DRP. Tiburon argues that this constituted a waiver of the issue. However, in the brief MCD submitted

during the damages phase of the arbitration proceedings, MCD stated:

Given the lack of any discussion in the Opinion regarding any breach of the SIA by either party, MCD can only assume that the Arbitrator concluded that MCD waived its right to sue for breach of contract by falling short of successfully invoking the SIA's termination for cause provision. MCD disagrees with this implied conclusion and further disagrees that terminated the SIA “without cause,” but is nevertheless proceeding to the hearing based on the belief that the Arbitrator's ruling has foreclosed MCD's opportunity to prove its damages.

(R. 43, Ex. 1.)

After reviewing the record, the district court found that the Arbitrator was presented with the issue of MCD's breach of contract claim, but never reached the issue:

In neither his opinion on liability nor his opinion on damages did the Arbitrator address the merits of MCD's breach of contract claim. Indeed, the arbitrator never made any findings on whether Tiburon breached its

own contractual obligations, as MCD claimed, and as Tiburon's own project manager believed. Instead, the Arbitrator treated what he found as MCD's failure to comply with the DRP, coupled with the termination provisions, as essentially a forfeiture of MCD's right to assert breach. The Arbitrator's decision resulted in MCD losing entirely and Tiburon winning entirely, without any finding on whether Tiburon was in material breach of substantive obligations.

*Muskegon Cent. Dispatch 911*, 652 F.Supp.2d at 866–67.

The district court correctly concluded that the Arbitrator's decision resulted in a forfeiture of MCD's breach of contract claim. This result is contrary to Michigan law, which provides that “where one party to a contract commits a material breach, the nonbreaching party is entitled to terminate the contract.” *Convergent Grp. Corp. v. Cnty. of Kent*, 266 F.Supp.2d 647, 657–58 (W.D.Mich.2003) (citing *Lynder v. S.S. Kresge Co.*, 329 Mich. 359, 45 N.W.2d 319, 325 (1951)). Parties are free to modify this rule by conditioning the right to terminate upon some condition precedent. *Id.* at 658. However, as the district court noted, the parties in this instance did not do so. There was no language in the SIA stating that Section 13 is the exclusive remedy for a party seeking breach of contract damages. *Cf. Short v. Hollingsworth*, 291 Mich. 271, 289 N.W. 158, 159 (1939)

(holding that “[i]f it appears to have been the intention that the remedy specified in the contract should be exclusive, the rights of the parties will be controlled thereby”). Therefore, the district court did not err by vacating the award of the arbitrator and remanding the case to the arbitrator for decision on the merits of MCD's breach of contract claim.

### \*527 C. Arbitrator on Remand

[3] The district court held that the Arbitrator originally selected by the parties is the appropriate person to handle any further proceedings. We disagree.

The Michigan Court Rules permit a court to vacate an arbitration order and remand for rehearing. *Mich. Comp. Laws* § 3.602(J). However, the *functus officio* doctrine provides the circumstances in which remand to the original arbitrator, rather than a new arbitrator, is appropriate. *Green*, 200 F.3d at 976–77.

The Latin term “*functus officio*” means that “having performed his or her office,” an official is “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” *Black's Law Dictionary* 743 (9th ed.2009). “The policy behind the doctrine is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which has already been rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion.” *Oakwood Labs. v. Howrey Simon Arnold & White, LLP*, 2007 WL 1544577, at \*2 (N.D. Ohio May 24, 2007) (internal citations omitted).



In general, “ ‘once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration.’ ” *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734 (9th Cir.1982) (quoting *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir.1967)); see also *Beattie v. Autostyle Plastics, Inc.*, 217 Mich.App. 572, 552 N.W.2d 181, 184 (1996) (recognizing the doctrine of *functus officio* ). This means that where a vacated arbitration award is remanded and requires a reopening of the merits of a claim, remand to a new arbitrator is appropriate. Cf. *Green*, 200 F.3d at 977–78 (noting that if remand was warranted, remand would be to original arbitrator because he would simply be completing his duties by clarifying his reasoning, not reopening the merits of the case); *M & C Corp. v. Erwin Behr GmbH & Co.*, 326 F.3d 772, 783 (6th Cir.2003) (remanding to original arbitrator is proper where arbitrator is not reopening the merits of a case).

However, there are exceptions to the *functus officio* doctrine that direct when remand to the original arbitrator is appropriate: “(1) an ‘arbitrator can correct a mistake which is apparent on the face of his award’; (2) ‘where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination’; and (3) ‘[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.’ ” *Green*, 200

F.3d at 977 (quoting *La Vale Plaza*, 378 F.2d at 573).

In the instant case, there are two reasons supporting our decision to vacate the award and remand: (1) the Arbitrator exceeded his powers when he reviewed Tiburon's contract claim and decided that MCD had the burden to escalate, and (2) the Arbitrator was presented with MCD's contract claim but failed to review the merits of it.

We decide that Tiburon's contract claim should be remanded to a new arbitrator. Where an arbitration award is vacated because the arbitrator exceeded his or her powers, the Michigan Court Rules grant the court discretion to remand to a new arbitrator or the original arbitrator. Mich. Comp. Laws § 3.602(J)(4). Because the original arbitrator here would also be \*528 required to reopen the merits of Tiburon's contract claim, remand to the original arbitrator “implicate[s] ... the concerns underlying the *functus officio* doctrine.” *Green*, 200 F.3d at 978. Thus, a new arbitrator should review Tiburon's contract claims.

We decide that MCD's contract claim should also be reviewed by the new arbitrator. The original arbitrator, although presented with the MCD's contract claim, did not review the merits of it. Under the second exception to *functus officio*, we would normally remand the unreviewed claim to the original arbitrator to give him the opportunity to review it for the first time and complete his duty with respect to that claim. However, submitting Tiburon's contract claim to a new arbitrator and MCD's contract claim to the original arbitrator would be inefficient. In the interest of fairness and

efficiency, we remand all claims to a new arbitrator.

For the foregoing reasons, we **AFFIRM** the decision of the district court, but remand the dispute to a new arbitrator.

## CONCLUSION

## Parallel Citations

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# UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments  
as adopted in 2006



The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

# UNCITRAL Model Law on International Commercial Arbitration

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## Resolutions adopted by the General Assembly

### *40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*

*The General Assembly,*

*Recognizing* the value of arbitration as a method of settling disputes arising in international commercial relations,

*Convinced* that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

*Noting* that the Model Law on International Commercial Arbitration<sup>1</sup> was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

*Convinced* that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>2</sup> and the Arbitration Rules of the United Nations Commission on International Trade Law<sup>3</sup> recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Requests* the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the *travaux préparatoires* from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

*112th plenary meeting  
11 December 1985*

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<sup>1</sup>Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.

<sup>2</sup>United Nations, Treaty Series, vol. 330, No. 4739, p. 38.

<sup>3</sup>United Nations publication, Sales No. E.77.V.6.

[on the report of the Sixth Committee (A/61/453)]

*61/33. Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*

*The General Assembly,*

*Recognizing* the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

*Recalling* its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,<sup>1</sup>

*Recognizing* the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

*Believing* that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

*Noting* that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

*Believing* that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,<sup>2</sup> is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,<sup>3</sup> and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on

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<sup>1</sup>*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.*

<sup>2</sup>United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>3</sup>*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17).*

International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,<sup>2</sup> the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;<sup>3</sup>

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

*64th plenary meeting  
4 December 2006*

## *Part One*

# **UNCITRAL Model Law on International Commercial Arbitration**

(United Nations documents A/40/17,  
annex I and A/61/17, annex I)

**(As adopted by the United Nations Commission on  
International Trade Law on 21 June 1985,  
and as amended by the United Nations Commission  
on International Trade Law on 7 July 2006)**

## **CHAPTER I. GENERAL PROVISIONS**

### *Article 1. Scope of application<sup>1</sup>*

(1) This Law applies to international commercial<sup>2</sup> arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

*(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)*

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

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<sup>1</sup>Article headings are for reference purposes only and are not to be used for purposes of interpretation.

<sup>2</sup>The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(b) one of the following places is situated outside the State in which the parties have their places of business:

- (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
- (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

## *Article 2. Definitions and rules of interpretation*

For the purposes of this Law:

(a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;

(b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

(c) “court” means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

#### *Article 2 A. International origin and general principles*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

#### *Article 3. Receipt of written communications*

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

#### *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.



*Article 5. Extent of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law.

*Article 6. Court or other authority for certain functions of arbitration assistance and supervision*

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

*Option I*

*Article 7. Definition and form of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not

limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

## *Option II*

### *Article 7. Definition of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

### *Article 8. Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

### *Article 9. Arbitration agreement and interim measures by court*

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

### CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

#### *Article 10. Number of arbitrators*

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

#### *Article 11. Appointment of arbitrators*

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no

appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

#### *Article 12. Grounds for challenge*

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

#### *Article 13. Challenge procedure*

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

*Article 14. Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

*Article 15. Appointment of substitute arbitrator*

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

*Article 16. Competence of arbitral tribunal to rule on its jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the

matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

#### CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

##### ***Section 1. Interim measures***

###### *Article 17. Power of arbitral tribunal to order interim measures*

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

*Article 17 A. Conditions for granting interim measures*

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

*Section 2. Preliminary orders*

*Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

*Article 17 C. Specific regime for preliminary orders*

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

### ***Section 3. Provisions applicable to interim measures and preliminary orders***

#### ***Article 17 D. Modification, suspension, termination***

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

#### ***Article 17 E. Provision of security***

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.



*Article 17 F. Disclosure*

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

*Article 17 G. Costs and damages*

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

***Section 4. Recognition and enforcement of interim measures***

*Article 17 H. Recognition and enforcement*

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

*Article 17 I. Grounds for refusing recognition or enforcement<sup>3</sup>*

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
- (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

*Section 5. Court-ordered interim measures**Article 17 J. Court-ordered interim measures*

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in

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<sup>3</sup>The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

## CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

### *Article 18. Equal treatment of parties*

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

### *Article 19. Determination of rules of procedure*

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

### *Article 20. Place of arbitration*

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

### *Article 21. Commencement of arbitral proceedings*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

*Article 22. Language*

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

*Article 23. Statements of claim and defence*

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

*Article 24. Hearings and written proceedings*

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

*Article 25. Default of a party*

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

*Article 26. Expert appointed by arbitral tribunal*

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

*Article 27. Court assistance in taking evidence*

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

## CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

### *Article 28. Rules applicable to substance of dispute*

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

### *Article 29. Decision-making by panel of arbitrators*

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

### *Article 30. Settlement*

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

*Article 31. Form and contents of award*

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

*Article 32. Termination of proceedings*

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

*Article 33. Correction and interpretation of award; additional award*

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral

tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

## CHAPTER VII. RECOURSE AGAINST AWARD

### *Article 34. Application for setting aside as exclusive recourse against arbitral award*

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not



- valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

### *Article 35. Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the

competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.<sup>4</sup>

*(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)*

### *Article 36. Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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<sup>4</sup>The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
  - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

## *Part Two*

### **Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006<sup>1</sup>**

1. The UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”. The Model Law was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission (see below, paragraphs 4, 19, 20, 27, 29 and 53). The General Assembly, in its resolution 61/33 of 4 December 2006, recommended “that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws (...)”.

2. The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

3. The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make

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<sup>1</sup>This note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI — 1985, United Nations publication, Sales No. E.87.V.4).

as few changes as possible when incorporating the Model Law into their legal systems. Efforts to minimize variation from the text adopted by UNCITRAL are also expected to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State.

4. The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”). The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).

#### **A. Background to the Model Law**

5. The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.

##### ***1. Inadequacy of domestic laws***

6. Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

7. The expectations of the parties as expressed in a chosen set of arbitration rules or a “one-off” arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions found in national

laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

## **2. *Disparity between national laws***

8. Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

9. Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

## **B. Salient features of the Model Law**

### **1. *Special procedural regime for international commercial arbitration***

10. The principles and solutions adopted in the Model Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have.

(a) *Substantive and territorial scope of application*

11. Article 1 defines the scope of application of the Model Law by reference to the notion of “international commercial arbitration”. The Model Law defines an arbitration as international if “the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States” (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

12. In respect of the term “commercial”, the Model Law provides no strict definition. The footnote to article 1 (1) calls for “a wide interpretation” and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, “whether contractual or not”. The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of “commercial law” that may exist in some legal systems.

13. Another aspect of applicability is the territorial scope of application. The principle embodied in article 1 (2) is that the Model Law as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1 (2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined). These articles are the following: articles 8 (1) and 9, which deal with the recognition of arbitration agreements, including their compatibility with interim measures ordered by a court, article 17 J on court-ordered interim measures, articles 17 H and 17 I on the recognition and enforcement of interim measures ordered by an arbitral tribunal, and articles 35 and 36 on the recognition and enforcement of arbitral awards.

14. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a “foreign” law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of

arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20 (2).

*(b) Delimitation of court assistance and supervision*

15. Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

16. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

17. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).

## *2. Arbitration agreement*

18. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

*(a) Definition and form of arbitration agreement*

19. The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York



Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute (“*compromis*”) or a future dispute (“*clause compromissoire*”). It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of “an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another”. It also states that “the reference in a contract to any document” (for example, general conditions) “containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract”. It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made “by reference”. The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

20. In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958” (A/61/17, Annex 2).<sup>2</sup> The General Assembly, in its resolution 61/33 of 4 December 2006 noted that “in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and

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<sup>2</sup>Reproduced in Part Three hereafter.

Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely". The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the "more favourable law provision" contained in article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

### *(b) Arbitration agreement and the courts*

21. Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modelled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. This provision, where adopted by a State enacting the Model Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

22. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

### *3. Composition of arbitral tribunal*

23. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the

general approach taken by the Model Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

24. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable.

#### **4. *Jurisdiction of arbitral tribunal***

##### **(a) *Competence to rule on own jurisdiction***

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of “*Kompetenz-Kompetenz*” and of separability or autonomy of the arbitration clause. “*Kompetenz-Kompetenz*” means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators’ jurisdiction be made at the earliest possible time.

26. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

(b) *Power to order interim measures and preliminary orders*

27. Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of the original 1985 version of the Model Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.

28. Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. Article 17 B (1) provides that “a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested”. Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if “it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure”. Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case “at the earliest practicable time”. In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court enforcement and does not constitute an award. The term “preliminary order” is used to emphasize its limited nature.

29. Section 3 sets out rules applicable to both preliminary orders and interim measures.

30. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that “a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts”. That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.

## 5. *Conduct of arbitral proceedings*

31. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

(a) *Fundamental procedural rights of a party*

32. Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.

33. Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering his or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24 (3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24 (2)).

(b) *Determination of rules of procedure*

34. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

35. Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise (see above, paras. 7 and 9). The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law.

36. In addition to the general provisions of article 19, other provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language to be used in the proceedings.

*(c) Default of a party*

37. The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 (b)). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 (c)). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 (a)).

38. Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

**6. *Making of award and termination of proceedings***

*(a) Rules applicable to substance of dispute*

39. Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of “rules of law” instead of “law”, the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

40. Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

*(b) Making of award and other decisions*

41. In its rules on the making of the award (articles 29-31), the Model Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

42. Article 31 (3) provides that the award shall state the place of arbitration and shall be deemed to have been made at that place. The effect of the deeming provision is to emphasize that the final making of the award constitutes a legal act, which in practice does not necessarily coincide with one factual event. For the same reason that the arbitral proceedings need not be carried out at the place designated as the legal “place of arbitration”, the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place.

43. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is “on agreed terms” (i.e., an award that records the terms of an amicable settlement by the parties). It may be added that the Model Law neither requires nor prohibits “dissenting opinions”.

**7. *Recourse against award***

44. The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.

That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

*(a) Application for setting aside as exclusive recourse*

45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating “recourse” (i.e., the means through which a party may actively “attack” the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

*(b) Grounds for setting aside*

46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

47. The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.



48. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

### ***8. Recognition and enforcement of awards***

49. The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

#### *(a) Towards uniform treatment of all awards irrespective of country of origin*

50. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between “international” and “non-international” awards instead of relying on the traditional distinction between “foreign” and “domestic” awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic”, should be governed by the same provisions.

51. By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

#### *(b) Procedural conditions of recognition and enforcement*

52. Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

53. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

*(c) Grounds for refusing recognition or enforcement*

54. Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if “the parties to the arbitration agreement were, under the law applicable to them, under some incapacity”) was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

Further information on the Model Law may be obtained from:

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### *Part Three*

## **Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session**

*The United Nations Commission on International Trade Law,*

*Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

*Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

*Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

*Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,<sup>1</sup> has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

*Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes”,

*Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

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<sup>1</sup>United Nations, *Treaty Series*, vol. 330, No. 4739.

*Taking into account* article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

*Considering* the wide use of electronic commerce,

*Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,<sup>2</sup> as subsequently revised, particularly with respect to article 7,<sup>3</sup> the UNCITRAL Model Law on Electronic Commerce,<sup>4</sup> the UNCITRAL Model Law on Electronic Signatures<sup>5</sup> and the United Nations Convention on the Use of Electronic Communications in International Contracts,<sup>6</sup>

*Taking into account also* enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

*Considering that*, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

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<sup>2</sup>*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I, and United Nations publication, Sales No. E.95.V.18.

<sup>3</sup>*Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

<sup>4</sup>*Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

<sup>5</sup>*Ibid.*, *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

<sup>6</sup>General Assembly resolution 60/21, annex.

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## TIME AND COSTS – TAKING CONTROL OF YOUR INTERNATIONAL ARBITRATION

BY LUIS M. MARTINEZ, AMERICAN ARBITRATION ASSOCIATION

While the economic crisis has had an impact on international arbitration, the writing was on the wall even before its full financial toll was realised across global markets. From the perspective of an institution that provides a full range of conflict management services, the message was all too clear that users of international arbitration and mediation were concerned with the escalating time and costs of the alternative dispute resolution (ADR) mechanisms they were selecting for their cross-border contracts. In response, the International Centre for Dispute Resolution (ICDR), which is the international division of the American Arbitration Association (AAA), has taken steps to address these concerns and these efforts have resulted in providing users with additional services and options available to them for their dispute resolution processes.

For example, one of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. In response to that problem (the overly broad discovery requests also known as ‘fishing expeditions’) the ICDR has promulgated its Guidelines for the Exchange of Information. The purpose of these guidelines is to make it clear to ICDR arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process for the exchange of information.

As a result, users are now more frequently considering their options and moving away from just copying and pasting their old arbitration clauses from previous contracts. They are taking a fresh look at the institution’s rules, staff and processes and considering all of the time and costs saving options that are now available to them. They are taking a more proactive role in designing, controlling and participating in their international arbitrations and mediations.

Before selecting the administering institution, an examination of its applicable rules and policies will be an important step to ensure they complement the user’s ADR conflict management expectations. For example, the ICDR’s International Arbitration Rules (IAR) have a number of unique provisions which include an express waiver to punitive damages, language of the process provisions, default provisions for the number of arbitrators and for selecting the place of the arbitration as well as appointment mechanisms for cases with multiple parties and parties have access to an emergency arbitrator at the time the case is filed. (See IAR Articles. 28 (5), 14, 5, 13, 6 (5) and 37.) For emergency relief the ICDR provision in Article 37 provides parties with access to an arbitrator to hear a motion for emergency relief at the moment the case is filed. In international arbitration it normally takes some time to have an arbitrator appointed, and parties in need of an emergency measure in the past would have to turn to the courts for such relief. The ICDR will provide for an emergency arbitrator to be appointed within 24 to 48 hours with notice to the other side to make a determination regarding the specific request for emergency relief obviating the need to go to the courts.



The ICDR recognises that this process is not suitable for all cases. The fact that notice is required and that in some jurisdictions arbitrators do not have the authority to grant interim relief nor would the local courts enforce those awards requires the parties to analyse whether invoking Article 37 makes sense. Parties can still request interim relief from a judicial authority directly, without fear of waiving the right to arbitrate. Article 37 in the right circumstances provides the parties with the opportunity to remain within the arbitral regime for all phases of their case.

The ICDR, as of this writing, has successfully administered 24 Article 37 cases. Information on the first four cases filed can be found on the ICDR's website. These Article 37 cases move at a frantic pace, with the majority having their arbitrators appointed in one business day and the longest was five business days, where the ICDR went through the disclosure and challenge procedure for the first two emergency arbitrators and finally clearing the third for the case. The nationalities of the emergency arbitrators have varied extensively, with the ICDR appointing Article 37 emergency arbitrators from Belgium, Brazil, Canada, Republic of Korea, Republic of Singapore, United Kingdom and the United States. The emergency relief requested covered issues from broad range of industries – for example, in an oil and gas case one party wanted to relocate its heavy duty equipment prior to the conclusion of the arbitration; in another case one party wanted to prevent the further use of its confidential client list. Other cases have dealt with requests for injunctive relief concerning the use of trademarks, breach of exclusive distribution and licensing agreements. Not all institutions offer access to an emergency arbitrator at the time of filing, which could be a significant disadvantage if such relief is needed in an international arbitration.

Arbitrations do not occur in a vacuum. They exist because the parties have agreed to an arbitration agreement. Parties familiar with the ICDR system and the types of disputes they are likely to face from their own experience with past cross-border transactions will consider all of these factors and draft their arbitration agreement accordingly. Users have numerous options available to them to customise their arbitration agreement and enhance predictability. They may reduce the number of arbitrators to a sole arbitrator, or include provisions to control or limit the document exchange. They may include a mediation phase prior to the arbitration or scheduled concurrently; time frames may be specified, and hearings may be waived with the matter proceeding on documents only. These options and more are available under the ICDR system. The ICDR can be consulted regarding the drafting of the arbitration agreement and the various ADR options that could be added to the ICDR model clause to further maximise efficiencies and reduce time and costs.

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The global leader in conflict management since 1926, the **American Arbitration Association (AAA)** is a not-for-profit, public service organisation committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. In 2011, over 187,000 cases were filed with the AAA in a full range of matters including commercial, construction, labour, employment, insurance, international and claims program disputes. The AAA has promulgated rules and procedures for commercial, construction, employment, labour and many other kinds of disputes. It has developed a roster of impartial expert arbitrators and mediators through 30 offices in the United States, and with the ICDR, which has offices in Mexico, Singapore, and Bahrain through the BCDR-AAA.

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## L'américanisation du droit Introduction

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RÉSUMÉ. — Dans la mesure où l'on peut parler d'« américanisation » du droit, il s'agit d'un phénomène d'influence et non de réception. On peut attribuer à cette influence une plus grande considération du droit dans la vie publique ; et de nouvelles pratiques contractuelles dans la vie économique, conséquence de la plus grande souplesse de la *common law* face à des besoins nouveaux. Une influence s'est également fait sentir dans la pratique du droit du fait du dynamisme des praticiens américains en France. Mais l'approche civiliste reste fondamentale tant elle est liée à la méthode d'enseignement du droit.

Personne ne peut douter que ce colloque ne vienne à son heure et ne réponde à une préoccupation véritable, puisqu'il a eu au moins deux précédents au cours des huit derniers mois. On note que dans l'un d'eux, l'un des thèmes du programme était intitulé « L'efficacité comparée des systèmes de *common law* et de *civil law* », en anglais dans le texte : preuve indubitable – et intrinsèque – qu'il ne s'agit pas d'un phénomène imaginaire, puisque nous en sommes venus à utiliser l'anglais pour qualifier notre propre système juridique.

La source de cette préoccupation est au demeurant parfaitement connue. Chacun sait que nous sommes engagés dans un mouvement dit de mondialisation, dont l'initiative est due principalement aux États-Unis. L'aspect premier de ce mouvement est la libéralisation des échanges ; mais en raison du poids économique des États-Unis, il s'accompagne d'une forte influence culturelle, au sens le plus large du mot. En ce qui concerne le droit, cela se traduit au premier chef et directement par une implantation de pratiques américaines. Mais aussi par des phénomènes sociologiques plus vastes : une propension nouvelle à invoquer le droit et à recourir aux tribunaux. Devant les prétoires, précisément, l'influence américaine se manifeste de manière inattendue et pittoresque puisque, paraît-il, de nombreux justiciables s'adressent aujourd'hui au Président en l'appelant « Votre Honneur ». Ils s'étonnent également – mais ceci doit donner davantage à réfléchir – qu'il ne soit pas possible d'interroger librement les témoins et même les

parties, comme ils le voient faire à peu près chaque soir à la télévision (à vrai dire en matière pénale, mais la procédure civile américaine est, elle aussi, de type accusatoire).

Le droit comparé connaît bien le phénomène de la réception d'un droit. On ne manque jamais de citer dans les cours et les manuels l'exemple des Codes européens en Extrême Orient au début du XX<sup>e</sup> siècle, ou celui du droit suisse des obligations en Turquie. Mais le phénomène qui nous occupe aujourd'hui est très différent, à un double titre. D'une part, il ne s'agit que d'une influence, et dont la mesure reste au demeurant à prendre ; ce sera, espérons-le, un effet de ce colloque que d'y contribuer. D'autre part, cette influence n'a pas été recherchée : elle suscite chez beaucoup l'inquiétude, parfois l'hostilité. Vient-il à un magistrat de prétendre appliquer la loi à un élu que l'on entend crier au gouvernement des juges (expression qui évoque effectivement un épisode de l'histoire constitutionnelle américaine, mais qui n'a rien à voir avec ce que l'on prétend dénoncer). Un patient mal soigné envisage-t-il de demander réparation que l'on évoque les avocats chasseurs d'ambulances... Agiter ainsi le spectre d'une influence étrangère diabolique semble plutôt relever d'une crispation face à toute évolution. Sans doute existe-t-il des excès dans tous les domaines, mais nous en sommes sans doute bien loin en France où l'on devrait au contraire se réjouir de voir le droit mis en pratique et non maintenu en formules. Alors en particulier qu'il est devenu de mode dans la classe politique, depuis une quinzaine d'années, d'évoquer l'« État de droit », il ne paraît pas inutile de rappeler que sa première manifestation est la soumission des gouvernants au droit et qu'un Président des États-Unis fut il y a vingt-cinq ans – et à la stupéfaction des Français – acculé à la démission pour une « petite histoire » d'écoutes téléphoniques.

Y a-t-il cependant une véritable américanisation du droit en France ? Dans ce simple propos introductif, je voudrais évoquer quelques thèmes qui ne manqueront sans doute pas d'être développés au cours de ces deux jours. Abordant la question du plus haut, comme il sied dans un entretien placé sous les auspices de l'Association française de philosophie du droit, il convient de partir de la conception du droit. Mais de là procèdent deux autres aspects : la pratique du droit et le mode d'enseignement du droit.

Au départ, nous sommes en présence de deux modes de pensée radicalement différents : rationaliste d'un côté, empiriste de l'autre. Le droit civil, ou romaniste ou romano-germanique, dans la forme qu'il a prise au XIX<sup>e</sup> siècle, est un droit savant et déductif. Il entend procéder de principes généraux d'où se déduiront les solutions particulières. Les règles se situent donc souvent à un niveau élevé de généralité (voir l'art. 1382 c. civ.). Le reste ne relève plus que de l'application, dont on se soucie beaucoup moins que des principes : ce n'est tout simplement pas la partie noble du droit. Le juge lui-même est moins soucieux de justifier la solution qu'il rend par les caractéristiques du cas que de la rapporter à un principe supérieur. La concision est pour lui comme pour le législateur une forme de majesté, et la décision est rédigée d'une manière qui pourrait donner à penser que toute autre solution serait absurde. Le génie de la *common law* est au contraire de résoudre les difficultés les plus étroites d'une manière qui satisfasse le sentiment de la raison. Une solution étant apportée à une difficulté précise, elle ne sera reproduite dans une affaire voisine que s'il n'existe aucune raison de s'en départir ; si au contraire il en existe, on formulera une autre solution en s'expliquant longuement sur ce qui justifie cette distinction et l'on donnera naissance à une autre règle, tout aussi

étroite. Selon une formule célèbre du juge américain Holmes, « General propositions do not decide concrete cases ».

Tout cela est connu, mais il reste à expliquer pourquoi l'un de ces modes de pensée donne l'impression aujourd'hui de devoir l'emporter sur l'autre (ce qui n'est, en réalité, nullement certain, car alors que beaucoup de pays émergents cherchent à se doter d'institutions juridiques, le droit écrit est beaucoup plus facilement transplantable qu'un système de *common law* ; mais nous ne parlons ici que de la France). Il est possible que le droit écrit et le raisonnement déductif conviennent mieux à un monde stable, comme le fut celui du XIX<sup>e</sup> siècle ; tandis que l'approche de la *common law* serait mieux adaptée à un contexte de changement social permanent tel que nous le connaissons : en raison de l'approche inductive évoquée à l'instant, l'innovation est en quelque sorte naturelle à la *common law*, l'adaptation permanente son mode d'existence.

Ces propositions trouvent probablement une bonne illustration dans le droit des contrats. Un système de droit écrit et codifié comporte un droit supplétif important (en sus d'un certain nombre de règles impératives). Les principaux contrats, dits nommés, sont ainsi balisés. Cela se traduit chez les praticiens par une rédaction extrêmement concise, d'autant que le rédacteur, comme le juge, s'efforce parfois d'imiter le style du législateur (la formule même employée à l'art. 1134 al. 1<sup>er</sup> c. civ. y incite). On se repose donc sur un droit supplétif et des principes généraux ; et puisque la concision est une vertu, à quoi bon énoncer ce qui va sans dire ? Cette manière de pratiquer présente sans doute des avantages ; mais, fortifiant l'idée de subordination du contrat à une loi écrite et préexistante, elle ne prédispose pas à l'innovation. L'idée ne paraît pas tellement éloignée, chez les Français, que tout ce qui n'est pas expressément permis est défendu.

Le juriste de *common law* n'est pas ainsi bridé ou inhibé. Il ne peut en général compter ni sur un droit supplétif, ni sur le juge pour découvrir dans le contrat des obligations qui n'y figurent pas (telle qu'une obligation de sécurité). Cela se traduit par des excès tout aussi condamnables que la rédaction excessivement concise de nombreux contrats français, mais inverses, certains vocables étant répétés sous différentes formes jusqu'à épuisement du vocabulaire pour être bien certain qu'aucune équivoque ne subsiste quant à la portée des engagements assumés. Mais le fait est que cet environnement juridique a rendu le juriste de *common law* parfaitement à l'aise pour élaborer des contrats suscités par des biens ou des services nouveaux (par exemple, la licence de logiciel il y a une quinzaine d'années). Or l'infiltration de la *common law* se fait largement par le contrat. Il y a une trentaine d'années déjà, un professeur dont j'étais alors l'assistant me disait envisager de donner pour titre à son prochain cours de doctorat portant sur le droit des obligations : « les contrats en 'ing' ». Il visait par là le *leasing*, le *factoring*, le *franchising*, le *renting*, le *merchandising*, et d'autres... (ajouterai-je qu'il était beaucoup plus exaspéré qu'admiratif ?).

Confronté à l'un de ces nouveaux contrats, le civiliste cherchera à le rapporter à une figure connue en s'interrogeant aussitôt sur sa « nature juridique » (est-ce un bail, une vente, un prêt ?) : à la fois pour rechercher les règles supplétives susceptibles de s'y appliquer et pour se demander avec inquiétude si l'opération est licite. Il conclura souvent qu'il s'agit d'un contrat *sui generis*, constatation souvent suivie de la remarque que le législateur devrait intervenir pour le réglementer ; par quoi l'on voit que l'on confond souvent – et naturellement à tort – vide législatif et vide juridique. Rien ne manifeste

mieux la différence d'état d'esprit du juriste français et du juriste de *common law* face à la loi que la rédaction d'une clause de droit applicable dans un contrat international : là où le Français écrit que le contrat sera *régi* par telle loi, soulignant la subordination du contrat à la loi, l'Américain écrit tout naturellement qu'il sera *interprété* selon telle loi, car pour lui le contrat est d'abord ce que les parties ont voulu qu'il soit.

Si l'on se tourne vers l'exercice des professions juridiques, le tableau est différent. D'une part, le rapprochement incontestable des pratiques françaises de celles en vigueur aux États-Unis est davantage consenti (efficacité oblige...) ; mais, d'autre part, il doit davantage à l'action de la Communauté européenne sur l'organisation des professions.

Sur ce plan institutionnel ou statutaire, la pratique française était marquée par la séparation du juridique et du judiciaire, ainsi que par un morcellement considérable des professions, l'une et l'autre inconnus du droit américain. Des progrès importants ont été accomplis depuis 1971, mais il reste encore à faire. Il existe peut-être malheureusement en France une propension à prêter un caractère nécessaire à des institutions qui ne sont que des vestiges de l'histoire : quiconque a eu un jour à exposer à un auditoire américain l'organisation judiciaire française et a dû expliquer ce qu'est un avoué d'appel ne peut qu'en être convaincu. Aux États-Unis, non seulement n'existe-t-il qu'une seule profession mais l'on ne sépare même pas l'avocat du juriste d'entreprise. Ce qui fait discussion à l'heure actuelle est la création de *Professional Partnerships*, que l'on peut qualifier de SCP pluridisciplinaires. Celles-ci associeront notamment avocats et experts-comptables, en vue de ce qui constitue le souci permanent des professionnels du droit : la plus grande efficacité à l'égard des clients.

Au-delà du statut professionnel, il existe une pénétration du mode américain qui s'est opérée à partir des années soixante, avec le développement des investissements américains en France. Les investisseurs recouraient à des cabinets américains, quelques-uns installés depuis longtemps, d'autres, en nombre croissant, ouvrant des bureaux à mesure des besoins. Comme il fallait à un certain stade recourir à des juristes français, ceux-ci ont pu découvrir une pratique professionnelle bien différente de celle ayant cours en France : cabinets tout à fait polyvalents, travail d'équipe, facturation des honoraires à l'heure – à des tarifs inimaginables en France à l'époque, mais liés à une disponibilité totale et à un service de première qualité. Ces cabinets ont recruté un nombre croissant de Français, à tel point qu'après un certain nombre d'années, le conquérant s'est trouvé d'une manière conquis, le nombre des associés français dépassant souvent celui des Américains ; mais le *modus operandi* est bien celui du cabinet d'origine et a exercé une influence considérable au-dehors. En particulier, beaucoup de jeunes avocats ont quitté ces cabinets après quelques années pour fonder le leur et ont ainsi répandu les méthodes acquises.

On ne constate absolument rien de semblable dans l'enseignement du droit. La constatation ici est simple : c'est celle d'une ruée vers les *law schools* américaines, qui n'est pas propre aux étudiants français car l'attraction est mondiale. Ces *law schools* n'en finissent pas d'ouvrir chaque année de nouvelles formations dites LL. M., pour répondre à la demande d'étudiants étrangers (d'autant que ceci est devenu pour elles une

source de revenus appréciable). Or ce n'est pas seulement la connaissance du droit américain qui justifie cet engouement ; c'est également l'organisation de l'enseignement. En quoi se distingue-t-elle de la nôtre ?

Tout d'abord, ce n'est pas un enseignement de masse (l'idée d'un amphithéâtre conçu pour recevoir plusieurs centaines d'étudiants fait sourire). L'enseignement ne descend pas du haut vers le bas, c'est un échange. Il n'est pas reçu de manière passive mais suppose un lourd travail préalable (à vrai dire, est-il permis de penser, beaucoup plus utile que le cours lui-même, dont on ne retire souvent pas grand-chose). Enfin et surtout, il ne fait pas appel à la mémoire, mais à la réflexion et au raisonnement, comme en témoigne la pratique usuelle des examens à livre ouvert (et même rédigés chez soi). Cette formation prépare donc parfaitement au monde réel, dans la mesure où le praticien de haut niveau se distingue par la capacité à traiter des situations qui n'entrent pas dans les schémas déjà connus : on l'a vu il y a un instant à propos des contrats.

Ce n'est pas, heureusement, que le système ne présente que des avantages. Le coût financier pour l'étudiant est énorme, et l'on me permettra d'oser affirmer qu'il ne reflète en rien une différence du même ordre, ou même approchante, dans la qualité des études. Le civiliste qui est amené à enseigner aux États-Unis peut également s'irriter à l'occasion d'être entraîné dans des discussions sur des questions qui pour lui sont réglées depuis plusieurs siècles. Mais aussi, il aura ainsi parfois l'occasion de remettre en question certains dogmes qu'il a reçus puis propagés. Un bon exemple – d'actualité dans le cadre d'un projet de convention universelle sur la compétence des tribunaux en matière civile et commerciale – est notre vieille règle de procédure *Actor sequitur forum rei*. Règle de droit naturel, enseigne-t-on aux étudiants français : ce n'est pas au défendeur de se déranger, par hypothèse il ne réclame rien. Présenter cette règle comme allant de soi à un auditoire pour lequel elle n'existe pas amène à prendre conscience que le demandeur n'est pas toujours un gêneur, un trouble-fête qu'il convient de décourager, et que la justice veut au contraire parfois qu'il puisse saisir un autre tribunal. Au demeurant, nous admettons nous mêmes de nombreuses exceptions à cette règle présentée comme fondamentale, ce qui met en relief le caractère très théorique de notre approche.

Par quoi l'on revient au fond : rationalisme et empirisme, dogmatisme et pragmatisme, droit écrit et pratique évolutive, tels sont je n'en doute pas des thèmes qui seront évoqués de manière récurrente au cours des travaux qui s'ouvrent.

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# The Need for Speed in International Arbitration

## *Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration (DIS)*

Klaus Peter BERGER\*

*On April 25, 2008, the German Institution of Arbitration (DIS) presented the new Supplementary Rules for Expedited Proceedings. The new Rules allow parties and arbitrators to conduct an arbitration within six months (sole arbitrator) or nine months (three-member tribunal). To achieve this goal, the time limits provided for in the DIS Arbitration Rules 1998 for the nomination of arbitrators are shortened, four-week deadlines for the submission of briefs are fixed in the Supplementary Rules and the common interest of the parties in the expedition of the arbitration becomes a guiding maxim for the exercise of the tribunal's procedural discretion. Also, the arbitral tribunal is expected to establish at the outset of the proceedings a procedural timetable and to identify to the parties at an early stage of the proceedings the issues that it regards as relevant and material to the outcome of the case.*

### I. INTRODUCTION

Much has been said and written about “the need for speed” in international arbitration: the necessity to expedite arbitration proceedings.<sup>1</sup> While in previous decades, it was the length of proceedings before state courts which led parties to consider dispute settlement through arbitration as an attractive alternative, the picture has changed in recent years. Today, users increasingly consider the length of arbitral proceedings as a disadvantage of arbitration as an effective means of dispute resolution. Users of the arbitral process argue that prolonged and expensive dispute resolution procedures are often tantamount to a “scorched earth” policy.<sup>2</sup> To a certain extent, arbitration has fallen victim to its own success. Arbitration lends itself much more to the resolution of complex cross-border business disputes than court proceedings, but complexity necessarily leads to lengthy and

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<sup>1</sup> Cf. M. McIlwrath & R. Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution*, 74 ARBITRATION 3, 4 (2008) (“There is no need to explain why businessmen like speed, are impatient with delay, and abhor unnecessary cost”) and *id.* at 10 (“frustration with the length and expense of the arbitration process is increasingly cited as the rationale for favouring court resolution (or at least for no longer favouring arbitration)”); R. Fiebinger & C. Gregorich, *Arbitration on Acid: Fast-Track Arbitration in Austria from a Practical Perspective*, AUSTRIAN ARB. Y.B. 237 (2008); G. KAUFMANN-KOHLER, ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW 30 (2001) (“In traditional commercial arbitration, there is much talk about speed: speed and justice—speed versus justice—speed versus quality—speed versus freedom and flexibility, to name just a few of the concerns raised in recent debates”); see also the discussion of the “users” of arbitration during the Sixth Petersberger Schiedstage (Arbitration Conference) on March 1, 2008, L. Kleine, *Die Schiedsgerichtsbarkeit aus Sicht ihrer Nutzer*, SCHIEDSVZ 145 (2008).

<sup>2</sup> P. Hobeck, V. Mahnken & M. Koebeke, *Time for Woolf Reforms in International Construction Arbitration*, INT’L A.L.R. 84, 86 (2008).

more costly proceedings.<sup>3</sup> It is argued that the failure of arbitral tribunals to conduct arbitrations expeditiously and efficiently can often lead the parties to settle their dispute, not because they believe their case is strong or weak but because they have become frustrated with the arbitration process, especially its length and the costs involved.<sup>4</sup> Also, senior management is becoming more critical with respect to the costs and time involved in an international arbitration:

[W]hen businesses pay for private adjudication, they rightly expect speed and efficiency from the process, just as they expect these qualities from other service providers ... [R]ealistically, [however,] it is difficult to comfortably predict an arbitration of any commercial complexity ending in fewer than two or three years ... a time frame ... [which] is simply too long, particularly for a private process ... in which any right to appeal is largely given up ... While business leaders also expect a fair resolution, taking excessive time can often be just as damaging as a wrong decision.<sup>5</sup>

To address this problem, the recent Report of the ICC Commission on Arbitration (*Techniques for Controlling Time and Costs in Arbitration*)<sup>6</sup> (“the Report”) expressly recommends that the parties give consideration to setting out fast-track procedures in their arbitration clause. At the same time, however, the Report notes that experience shows that in actual practice, it is difficult at the time of drafting the arbitration clause to predict with a reasonable degree of certainty the nature of possible disputes and the fast-track procedures that will be suitable for those disputes.<sup>7</sup> Once the dispute has arisen, it will often be difficult for the parties to agree on anything, let alone on tailor-made fast-track arbitration rules. This is the *raison d’être* for institutional fast-track rules.<sup>8</sup> The parties can agree on them easily and without much discussion because they have already agreed on the general arbitration rules of the same arbitral institution.

A number of arbitral institutions have reacted to these concerns and have issued fast-track rules. In April 2008, the DIS issued the most modern set of institutional fast-track rules, the Supplementary Rules for Expedited Proceedings (SREP).<sup>9</sup>

## II. DRAFTING HISTORY AND REGULATORY PHILOSOPHY

### A. DIS WORKING GROUP “MODEL CLAUSES”

The SREP were drafted by the DIS working group “Model Clauses.” The inaugural meeting of that group took place in Cologne on December 12, 2005. At the outset of

<sup>3</sup> A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* paras. 6–43 (4th ed. 2004).

<sup>4</sup> McIlwrath & Schroeder, *supra* note 1, at 6 (“justice delayed is justice denied”).

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

<sup>6</sup> REPORT FROM THE ICC COMMISSION ON ARBITRATION, *TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION* (ICC Publication No. 843, 2007).

<sup>7</sup> *Id.* at 15.

<sup>8</sup> See FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 1248 (E. Gaillard & J. Savage eds., 1999) (“The development of such procedures is welcome because they depart from the traditional image of arbitration as a process which is often less rapid than one might wish for. They reflect the tendency to accelerate resolution of business disputes and the need for increased certainty.”).

<sup>9</sup> See the appendix to this article for the full text of the SREP.

the group's deliberations, two possible areas of activities were identified: model clauses for special types of arbitral proceedings and model clauses intended to regulate certain aspects of standard arbitration proceedings. The working group decided to start with expedited proceedings. That topic seems to stand between the two categories of tasks just mentioned. However, while the term "fast-track" may imply a distinct system of arbitration, it is in fact merely an accelerated standard arbitration procedure in which "time is of the essence."<sup>10</sup> The dominance of the time element in these proceedings simply requires that the standard institutional arbitration rules be supplemented with some extra provisions. Parallel to this work, the members of the group also began to draft a model clause for intra-corporate disputes,<sup>11</sup> a multi-tier clause<sup>12</sup> and a commentary of the standard DIS model clause. The group assigned the task of drafting the SREP to the author of this article. The various drafts were discussed extensively and redrafted by the members of the working group. The final version of the SREP was presented at the DIS Spring Meeting in Munich on April 25, 2008.

## B. BASIC POLICY DECISION BY THE DIS WORKING GROUP

Very early in their deliberations, the members of the DIS working group made a number of important policy decisions relating to the underlying philosophy of the new SREP and the drafting process. The significance of these policy considerations goes well beyond the drafting of the SREP. They provide useful guidance for any arbitral institution which considers drafting fast-track arbitration rules.

### 1. *Special, Detailed Set of Rules for Expedited Proceedings*

Agreement was reached at the outset of the deliberations of the working group that the goal was not to formulate a rather rudimentary fast-track provision such as Article 32 of the ICC Arbitration Rules. That provision simply states that the parties may shorten the various time limits set out in the ICC Arbitration Rules and that such a party agreement concluded after the constitution of the arbitral tribunal becomes effective only with the approval of the tribunal. The first part of that provision is declaratory in nature because the authority of the parties to modify the time limits set out in the ICC Arbitration Rules follows from the notion of party autonomy as the "Magna Carta" of the arbitral process. The second part of the provision contains an important indication of the fact that any modification of time limits agreed upon by the parties while the arbitration is running and after the tribunal has been constituted necessarily affects the position of the

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<sup>10</sup> See REDFERN & HUNTER, *supra* note 3, paras. 6-43; see for the notion of "time is of the essence" as a general principle of transnational contract law CENTRAL'S TRANSNATIONAL LAW DIGEST & BIBLIOGRAPHY, available at <[www.tldb.net](http://www.tldb.net), Principle IV.5.5>.

<sup>11</sup> See for this (multiparty) issue under German law BGHZ 132, 278; W. Kühn, *Arbitration and Corporate Law*, in *LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY: LIBER AMICORUM KARL-HEINZ BÖCKSTIEGEL* 443 (R. Briner et al. eds., 2001).

<sup>12</sup> On this issue, see K.P. Berger, *Law and Practice of Escalation Clauses*, 22 *ARB. INT'L* 1 (2006).

members of the arbitral tribunal who, when they accepted to act as arbitrators in that case, were acting under the assumption that they would have to deal with a standard and not an expedited timetable. Issues of availability and workload which any arbitrator typically takes (or should take) into consideration when deciding whether to accept or to refuse to act as arbitrator in a given case, appear in a completely different light when the arbitrator is suddenly faced with shortened time limits and an accelerated schedule for the arbitration. The arbitral tribunal must therefore have a veto right or, as *ultima ratio*, the right to withdraw if the parties insist on the conduct of the arbitration on the basis of the shorted time limits.

Thus, Article 32 of the ICC Arbitration Rules sends a clear message to the drafters of fast-track arbitration rules: it is of utmost importance for the success of any set of fast-track rules to make it clear for parties and arbitrators alike at the very outset of the proceedings how “fast” the track will really be. A further problem with Article 32 of the ICC Arbitration Rules perceived by the members of the DIS working group is that it does not spell out any further details of such a fast-track arbitration. While it was obvious to the members of the DIS working group that shortening of time limits is necessarily an essential element of any set of fast-track rules, it was equally clear that the new set of rules should not be limited to a mere shortening of the time limits set out in the DIS Arbitration Rules 1998. Rather, the new rules should indicate clearly the time frame of a fast-track arbitration envisaged by the rules and further details of the expedited arbitral proceedings. The DIS working group decided to seek guidance for this more detail-oriented approach from Article 42 of the Swiss Rules<sup>13</sup> which provides detailed regulations on the conduct of expedited proceedings under the Rules.<sup>14</sup> However, it was agreed upon in the DIS working group that the new rules should not follow the model of Article 42(2) of the Swiss Rules and provide for an automatic application in cases where a certain amount in dispute is not exceeded (1 million Swiss francs). The DIS working group decided to leave the decision whether to apply the new rules or not entirely to an agreement of the parties, thereby relying on party autonomy rather than on a decision made for the parties by the DIS itself.

## 2. *Annex to DIS Arbitration Rules 1998*

It was also agreed very early during the deliberations of the DIS working group that the new SREP should be drafted and published as an annex to the DIS Arbitration Rules 1998 (“DIS Rules”).<sup>15</sup> That annex should display only those provisions which modify the DIS Rules. The clear intention of the working group was to supplement the DIS Rules,

<sup>13</sup> Text in several languages available at <[www.sccam.org/sa/en/rules.php](http://www.sccam.org/sa/en/rules.php)>.

<sup>14</sup> See M. Scherer, *Acceleration of Arbitration Proceedings—The Swiss Way: The Expedited Procedure under the Swiss Rules of International Arbitration*, SCHIEDSVZ 229 (2005).

<sup>15</sup> Text of the DIS Arbitration Rules available at <[www.dis-arb.de/scho/schiedsvereinbarung98-e.html](http://www.dis-arb.de/scho/schiedsvereinbarung98-e.html)>; for the DIS Arbitration Rules, see also K.-H. BÖCKSTIEGEL, S. KRÖLL & P. NACIMIENTO, *ARBITRATION IN GERMANY, THE MODEL LAW IN PRACTICE* 655 (2007); K. Sachs & T. Lörcher, *Taktik in M&A-Schiedsverfahren*, in *TAKTIK IM SCHIEDSVERFAHREN* 153, 170 (T. von Bodungen, W. Eberl, R. Geimer et al. eds., 2008).



not to replace them with a complete set of new rules to be applied in fast-track scenarios. The working group wanted to avoid the impression of a completely new and separate set of arbitration rules for fast-track proceedings. In the interests of user-friendliness and clarity of the new SREP and their interaction with the standard DIS Rules, the group decided not to follow the approach taken by the World Intellectual Property Organization (WIPO). The WIPO Expedited Arbitration Rules which entered into force in October 2002<sup>16</sup> consist of the complete set of the WIPO Arbitration Rules into which certain modifications for the conduct of expedited proceedings have been integrated. The user of the new SREP is in a position to realize immediately where and to what extent the SREP deviate from the standard DIS Rules.

### 3. *Agreement on Application only Prior to Commencement of Arbitration*

The members of the DIS working group were also in agreement that the parties should be able to agree on the application of the new rules only *prior* to the commencement of the arbitration, but not while the arbitration is under way. This approach was intended to avoid possible uncertainties that might arise in cases where the deadlines set out in the standard DIS Rules had started to run and after the parties agreement on the application of the SREP. This approach also avoids questions concerning whether the running of those deadlines should be counted against the shorter deadlines contained in the SREP. At the same time, this approach helps to meet the concerns mentioned above<sup>17</sup> that any agreement of the parties to expedite their arbitration made after the constitution of the arbitral tribunal has a considerable impact on the position of the arbitrators. The problem remains, however, that the parties have the authority to modify the time limits set out in the SREP.

### 4. *No Achievement of Speed at All Costs*

Finally, a basic premise for the members of the DIS working group when drafting the new SREP was to achieve a fair balance between thoroughness of the tribunal's decision-making and expedition of the arbitration proceedings.<sup>18</sup> The goal was not to achieve speed at any cost.<sup>19</sup> On the other hand, however, all options for the expedition of arbitral proceedings were considered and evaluated by the working group and, in the case of a positive evaluation process, implemented in the new Rules. It was primarily

<sup>16</sup> For the full text of the WIPO Expedited Arbitration Rules, see WIPO ARBITRATION AND MEDIATION RULES, WIPO Publ'n No. 446 53 (WIPO Arbitration and Mediation Center ed.).

<sup>17</sup> See *supra*.

<sup>18</sup> Cf. M. Rubino-Sammartano, *The Time Element in Arbitration*, in LIBER AMICORUM IN HONOUR OF OTTO SANDROCK 801, 802 (K.P. Berger ed., 2000) ("It does not ... seem reasonable to take position *a priori* against quickness and in favour of slowness. The notion of rush is equally a negative element. A decision made in a rush is rarely a good decision and this rule could not be changed by the French saying 'jouez mal mais jouez vite.' A balanced solution in general, and in particular in arbitral proceedings, will be to avoid on the one hand slowness and on the other hand rush and proceed quickly.")

<sup>19</sup> On this point, see Scherer, *supra* note 14, at 230 ("speed is not a goal in itself").

through this balanced drafting approach that the members of the DIS working group intended to meet the concerns<sup>20</sup> raised by users against the increasing length of arbitration proceedings.

### III. CONTENT

The SREP consists of seven paragraphs. The Preface and section 1.1 SREP clarify that the DIS Rules remain applicable to proceedings conducted under the Supplementary Rules to the extent that the SREP do not contain more specific provisions. The parties may agree on the application of the SREP in their arbitration agreement<sup>21</sup> or prior to filing a statement of claim, which, in this case, must be filed with the DIS Main Secretariat in Cologne.

#### A. STANDARD DURATION OF FAST-TRACK ARBITRATION; CONSTITUTION OF THE TRIBUNAL; SHORTENING OF TIME LIMITS

A core provision of the new SREP is section 1.2. It provides that the duration of arbitral proceedings conducted under these rules should be no longer than six months (in the case of a sole arbitrator) or nine months (in the case of a three-member tribunal) after the filing of the statement of claim. The six-month deadline is the general rule. In deviation from section 3 of the DIS Rules, section 3.1 SREP provides that the dispute shall be decided by a sole arbitrator, unless the parties have agreed prior to the filing of the statement of claim that the dispute shall be decided by a three-member tribunal. Article 42(1)(d) of the Swiss Rules provides in a more general manner that expedited proceedings should last no longer than six months. Pursuant to Article 42(2)(b) of the Swiss Rules, the dispute shall be decided by a sole arbitrator where the amount in dispute does not exceed 1 million Swiss francs. The rule adopted in the SREP is not connected to the amount in dispute and avoids any doubts that may rise with respect to the determination of that amount.<sup>22</sup> The Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce of January 1, 2007<sup>23</sup> provide in their Article 36 that the arbitral award shall be rendered within three months after the case has been presented to the arbitral tribunal. However, practice shows that in approximately 50 per cent of the cases the award is actually rendered within four to six months.<sup>24</sup>

<sup>20</sup> Cf. Hobeck, Mahnken & Koebke, *supra* note 2, at 87 (“A company having to choose between a highly detailed and well founded decision from a neutral third party in the course of prolonged and costly proceedings and a less perfectionist but still well argued decision in less costly and lengthy proceedings of a more summary nature will frequently opt for the second of these two alternatives.”).

<sup>21</sup> The DIS recommends the following model clause: “All disputes arising in connection with the contract [description of the contract] or its validity shall be finally settled according to the Arbitration Rules and the Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration e.V. (DIS) without recourse to the ordinary courts of law.”

<sup>22</sup> Cf. Scherer, *supra* note 14, at 232 et seq.

<sup>23</sup> Text available at <[www.sccinstitute.com/uk/Rules/](http://www.sccinstitute.com/uk/Rules/)>.

<sup>24</sup> Cf. Presentation of SCC Fast-track Arbitration in Istanbul, Turkey, available at <[www.sccinstitute.com/\\_upload/shared\\_files/artikelarkiv/fast\\_track\\_arbitration\\_istanbul.pdf](http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/fast_track_arbitration_istanbul.pdf)>.

Apart from the payment of the advances for costs by the parties,<sup>25</sup> it is the phase of the constitution of the tribunal which contains a major potential for delay of the proceedings.<sup>26</sup> For that reason, the SREP contains specific modifications of the appointment mechanism of the DIS Rules which are intended to ensure the expedition of the proceedings.

If the parties have agreed on the individual who is to act as sole arbitrator prior to the filing of the statement of claim, the claimant must nominate the arbitrator in its statement of claim. In the absence of such agreement, section 3.2 SREP provides that the Appointing Committee of the DIS shall appoint the sole arbitrator without undue delay upon request by one of the parties. Such request may be made together with the statement of claim. Until such request is received by the DIS Main Secretariat, a joint nomination of the sole arbitrator by the parties will be permissible.

If, however, the parties have agreed on a three-member tribunal, the respondent's time limit to nominate an arbitrator is shortened from thirty days (section 12.1 of the DIS Rules) to fourteen days from the receipt of the statement of claim by the respondent. If the respondent fails to nominate an arbitrator within this time limit, the claimant may request nomination by the Appointing Committee of the DIS. The chairman of the arbitral tribunal will be appointed in accordance with the procedure provided for in section 12.2 of the DIS Rules, subject to a shortening of the time limit mentioned therein from thirty to fourteen days. Section 3.4 SREP provides that if the appointment of a party-nominated arbitrator or the chairman cannot be confirmed within seven days of receipt of the request to submit his declaration of independence and impartiality pursuant to section 16.1 of the DIS Rules, the Appointing Committee of the DIS shall nominate a substitute arbitrator. This latter provision is intended to avoid situations in which the tardy approach of a nominee or his temporary unavailability threatens to torpedo the accelerated schedule of the expedited proceedings even before the tribunal has been constituted.

## B. SCHEDULE OF THE ARBITRATION

In order to ensure and safeguard the basic goal of the SREP, i.e., the termination of the arbitration within the six-month (rule) or nine-month (exception) time limit set out in section 1.2 SREP, the new rules aim not only at the expedition of the constitution of the tribunal but also at a significant acceleration of the schedule of the arbitration.

While section 9 of the DIS Rules leaves it to the discretion of the arbitral tribunal to set a deadline for the respondent to submit its statement of defence, that deadline is fixed in the new rules for expedited proceedings. Section 4.2 SREP provides that the statement of

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<sup>25</sup> Section 2 SREP provides that in deviation from DIS Rules, s.7.1 as read with No. 17 of the Appendix to DIS Arbitration Rules, s.40.5, the advance to be paid by the claimant upon filing the statement of claim shall cover the full amount of the arbitrators' fees. This rule is intended to avoid the potential loss of time caused by a delayed payment of the respondent's share of the advance on costs.

<sup>26</sup> Cf. C. Borris, *Streiterledigung bei (MAC-)Klauseln in Unternehmenskaufverträgen: ein Fall für "Fast-Track"-Schiedsverfahren*, B.B. 294, 296 (2008); see also Fiebinger & Gregorich, *supra* note 1, at 249 ("Ultimately, the process of selecting a tribunal took almost a year—four times as long as the actual arbitration").

defence shall be filed by the respondent within four weeks of receipt of the statement of claim pursuant to section 8 of the DIS Rules. Further written submissions by the parties are to be filed within four weeks of receipt of the other party's submission, unless the tribunal determines otherwise. The oral hearing (which may of course last more than one day) must be held at the latest four weeks after receipt of the final written submission. The arbitral award must be rendered at the latest four weeks after the closing of the oral hearing.

There may be cases where it appears appropriate to modify the schedule for expedited proceedings laid out in the SREP. This may be true for both longer and shorter proceedings.

Section 6.1 SREP provides that the provisions and time limits contained in the SREP may be modified by agreement between the parties. After the constitution of the arbitral tribunal, any modification will require the consent of the arbitral tribunal. This rule concerns primarily scenarios in which the parties agree to further shorten the already tightened time limits set out in the SREP. As indicated above, such agreements directly affect the position of the members of the arbitral tribunal. Upon their appointment, they have accepted the accelerated schedule set out in the SREP.<sup>27</sup> In case of an agreement by the parties to further shorten the schedule of the expedited arbitration, the arbitrators must have the right to veto any further expedition of the proceedings which was not foreseeable by them at the moment of their appointment. In such scenarios, each member of the arbitral tribunal must have the right to terminate the arbitrator's contract (*receptum arbitri*) which he or she has concluded with the parties of the arbitration.

Section 6.1 SREP provides a solution for the converse scenario in which the arbitral tribunal intends to extend the time limit set out in the new Rules without consent of all parties. In such a case, the arbitral tribunal may extend a time limit contained in the SREP only for good cause, such as serious illness, death or unavailability for compelling reasons<sup>28</sup> of an arbitrator or obvious delaying tactics by one party which are clearly against the spirit enshrined in the SREP.<sup>29</sup> The extension must be effected by an order in writing, which must state the reasons for the extension and be transmitted to the parties and the DIS Main Secretariat. The inherent purpose of that provision is to prevent a tribunal acting under the SREP from "converting" an expedited arbitration into a regular arbitration for reasons that are contrary to the underlying spirit of the new Rules, e.g., merely because of the increased workload of some or all members of the arbitral tribunal.

Section 6.2 SREP aims in the same direction. It provides that if the arbitral proceedings cannot be concluded within the six or nine-month time frame set forth in section 1.2 SREP, the arbitral tribunal will inform the DIS Main Secretariat and the parties of the reasons in writing. At the same time, that provision clarifies that the competence of

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<sup>27</sup> Cf. *infra* note 42.

<sup>28</sup> Cf. Borris, *supra* note 26, at 297.

<sup>29</sup> Cf. A.J. van den Berg, *The WIPO Expedited Arbitration Rules: Fast-Track Arbitration*, available at <[www.wipo.int/amc/en/events/conferences/1995/denberg2.html](http://www.wipo.int/amc/en/events/conferences/1995/denberg2.html)> ("All kinds of things may happen in your fast-track arbitration: ... a co-arbitrator may be uncooperative; a party may be uncooperative; a party can even blackmail you, knowing that the time limit is running out and then, after expiry of the time limit, you will no longer have the mandate to act as arbitrator. Be sure that you have this power to extend time limits in exceptional circumstances.").

the arbitral tribunal will remain unaffected if these time frames are exceeded. That provision aims at avoiding potential legal problems<sup>30</sup> that may arise in cases in which the tribunal exceeds the time limits set forth in the SREP. Also, inventive parties are deprived of the option to misuse the approaching end of a time limit as a means to exert pressure on the other party and/or the tribunal.<sup>31</sup>

### C. GUIDING PROCEDURAL MAXIMS

The SREP contain a number of guiding procedural maxims which, together with the shortening of time limits provided for therein, are intended to ensure and safeguard the expedition of the arbitral proceedings conducted under those Rules.

#### 1. *Parties' Common Interest to Expedite the Proceedings*

One of those basic guiding principles is contained in section 1.4 SREP. It provides that the arbitral tribunal shall at all times exercise its discretion to determine the procedure under section 24.1 second sentence of the DIS Rules in the light of the parties' interest in expediting the proceedings, as reflected by the parties' agreement to apply the SREP. This principle applies in particular to possible extensions of time limits provided for in the Supplementary Rules. Together with section 6.1 and 6.2 SREP<sup>32</sup> this provision sends a very important signal to parties and arbitrators alike, in that it clarifies that "the need for speed" as the basic premise underlying the SREP is not empty words but that the parties' intent to expedite the proceedings determines all aspects of the arbitration, even the application by the tribunal of those provisions of the DIS Rules which are not modified by the SREP.

#### 2. *Schedule of the Proceedings*

In accordance with the overriding goal to expedite the proceedings, section 5.1 SREP provides that the arbitral tribunal shall, at the outset of the proceedings and in agreement with the parties, establish a schedule to ensure that the arbitral proceedings can be concluded within the six or nine-month time frame. Again, the purpose of that provision is to make sure that parties and arbitrators are forced to make themselves aware at a very early stage of the proceedings of the need to expedite the proceedings and of ways and means to achieve that goal through an efficient structure of the arbitral schedule.<sup>33</sup> With their consent to that schedule prepared by the tribunal, the parties once again indicate that they agree with the conduct of the arbitration in an expedited fashion. Such "informed consent" can help to avoid subsequent allegations of violations of arbitral due

<sup>30</sup> Cf. Scherer, *supra* note 14, at 234 et seq.

<sup>31</sup> For this constellation, see Van den Berg, *supra* note 29.

<sup>32</sup> Cf. *supra*.

<sup>33</sup> Cf. Fiebinger & Gregorich, *supra* note 1, at 251 ("In a fast-track arbitration, time management becomes the most essential thing. Therefore, much more so than in a standard arbitration, it is required to plan ahead very carefully.")

process caused by the shortening of deadlines or other procedural means which are inherent in any expedited arbitration procedure.<sup>34</sup>

### 3. *Two Rounds of Briefs, One Hearing, No Set-Off/Counterclaim*

All other procedural maxims laid down in section 5 SREP are subject to a different determination by the arbitral tribunal. In giving such directions and in exercising its procedural discretion, the tribunal must always take into account the interest of the parties to expedite the proceedings.

The exchange of written submissions is limited to the statement of claim within the meaning of section 6 of the DIS Rules and the statement of defence within the meaning of section 9 of the DIS Rules, as well as one further written submission by each party.

Section 5.2 SREP further provides that only one oral hearing, including any taking of evidence, shall be held. To allow proceedings without a hearing (“DONT = documents only, no talk”)<sup>35</sup> was not considered a sensible option by the DIS working group in view of the necessarily limited time for the presentation of law and facts under the SREP. The working group decided not to modify section 29 of the DIS Rules which requires the tribunal to keep a record of the hearing. The DIS working group thought that such a record might be sensible and necessary in cases where witnesses are heard during the hearing. Also, section 29 of the DIS Rules allows for the production of a summary protocol or for an agreement of the parties that no records shall be produced.

In order to further enhance the expedition of the proceedings, section 4.4 SREP provides that in proceedings under the Supplementary Rules, counterclaims and set-offs shall only be admissible with the consent of all parties and the arbitral tribunal. Also, pursuant to section 5.2 SREP no further written submissions (“post hearing briefs”) shall be exchanged after the closing of the oral hearing. This means that, contrary to modern arbitral practice, the hearing ends with closing statements by the parties, which requires a substantial amount of flexibility from counsel.<sup>36</sup>

### 4. *Early Legal Guidance by the Arbitral Tribunal*

It has been said that in standard arbitrations, the most common complaint of the users involves the relatively straightforward disputes that could easily have been resolved or settled expeditiously if the key issue(s) had been addressed by the tribunal head-on at the beginning of the proceedings.<sup>37</sup> This proactive approach to the determination of the legal issues of the dispute becomes even more important in fast-track arbitrations. For that reason, section 5.3 SREP requires the tribunal, at the earliest possible stage of the proceedings, to identify to the parties and as a rule after each round of written submissions,

<sup>34</sup> Cf. Scherer, *supra* note 14, at 235.

<sup>35</sup> Art. 42(1)(c) of the Swiss Rules of International Arbitration explicitly provides that the parties may agree that the dispute shall be decided on the basis of documentary evidence only.

<sup>36</sup> Cf. Fiebinger & Gregorich, *supra* note 1, at 252.

<sup>37</sup> McIlwrath & Schroeder, *supra* note 1, at 8.

the issues it may regard as relevant and material for the outcome of the case. This formula was adopted from paragraph 3 of the Preamble to the IBA Rules on the Taking of Evidence.<sup>38</sup> The fact that this language is contained in the IBA Rules as “codified” best practice rules makes it clear that, today, this “proactive” approach to conducting an arbitration is acceptable also for lawyers from the common law world. In effect, such “early guidance” from the tribunal is essential for the success of any expedited arbitral proceedings since it may lead to an early focus of the parties on those issues of the dispute which the tribunal considers as key for the resolution of the dispute and may thus help to shorten the parties’ briefs, since relevant and irrelevant issues are separated as early as possible during the expedited proceedings.<sup>39</sup>

#### D. TIME LINE OF AN ARBITRATION CONDUCTED UNDER THE SREP

Based on what has been said so far, a time line can be designed for expedited arbitrations conducted under the SREP. That time line is based on an “ideal case scenario” in which the statement of claim filed with the DIS Main Secretariat is delivered to the respondent pursuant to section 8 of the DIS Rules without undue delay (mail delivery time three days), all further briefs are submitted by e-mail or other means of electronic telecommunication,<sup>40</sup> the constitution of the arbitral tribunal is effected parallel to the running of the deadlines for the submission of further briefs by the parties<sup>41</sup> and the nominees for sole arbitrator/party nominated arbitrator and chairman accept their office without undue delay.<sup>42</sup> Any disruption of this ideal scenario will necessarily lead to a delay and thus to an extension of the time line reproduced below.

|                |   |
|----------------|---|
| X =            | Filing of statement of claim with the DIS Main Secretariat in Cologne |
| X + 3 days =   | Receipt of statement of claim by respondent                           |
| X + 31 days =  | Submission of statement of defence                                    |
| X + 59 days =  | Submission of claimant’s second brief                                 |
| X + 87 days =  | Submission of respondent’s second brief                               |
| X + 115 days = | Hearing   |
| X + 143 days = | Award   |

<sup>38</sup> IBA Rules on the Taking of Evidence in International Commercial Arbitration, 1999, Preamble, para. 3 (“Each Arbitral tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate”).

<sup>39</sup> Cf. Scherer, *supra* note 14, at 237 (“Get quickly a good grasp of the file and the relevant issues. Give directions on what issues you wish the parties to deal with in their briefs and the hearing.”).

<sup>40</sup> Cf. Fiebinger & Gregorich, *supra* note 1, at 250 (“In a fast-track arbitration, these modern means of communication are not just optional, they are absolutely necessary for completing the procedure within a short time frame.”).

<sup>41</sup> Section 4.1 SREP provides that, before the tribunal is constituted, briefs have to be submitted to the DIS Main Secretariat, while after the constitution of the tribunal (DIS Rules, s.17.3) briefs have to be submitted to the tribunal itself. In any case the briefs also have to be submitted to the other party.

<sup>42</sup> The DIS will inform the nominee(s) that the arbitration will be conducted under the SREP and that the nominee(s) should react without undue delay.

This time line of a little over five months can be further shortened through shortening of deadlines provided for in the SREP and/or the parties' agreement to have only one round of briefs.<sup>43</sup> In the case of a three-member tribunal, the time line will most likely be extended. However, in an ideal case scenario, it should make no difference whether the dispute will be decided by a sole arbitrator or a three-member tribunal. In the latter case, it follows from section 3.3 SREP that the tribunal will be constituted when the four-week deadline for the submission of the respondent's statement of defence set out in section 4.2 SREP expires.

#### E. ARBITRAL AWARD

In the interest of a certain degree of quality control of arbitral decision-making in expedited proceedings, the DIS working group after intensive deliberations finally rejected the idea contained in Article 42(1)(e) of the Swiss Rules which allows the tribunal to give only summary reasons for its decision in the award. A further reason for that decision was the fact that section 34.3 of the DIS Rules provides the tribunal with a certain leeway as to how it wants to give reasons for its decision in the award. Under German law, the standards to be applied to the reasons contained in an arbitral award are less stringent than those that apply to court judgments.<sup>44</sup> Also, section 34.3 of the DIS Rules is subject to a contrary agreement of the parties which implies that the parties may agree that the tribunal need not state any reasons at all in its award (arg. e. section 1054(2) German Code of Civil Procedure) or that only summary reasons will be given in the award.<sup>45</sup>

The DIS working group did, however, see the need for the time constraints caused by the accelerated schedule for the expedited arbitration conducted under the SREP to have an impact on the tribunal's duty to draft the award. Therefore, section 7 SREP provides that, unless the parties have agreed otherwise, the arbitral tribunal may abstain from stating the facts of the case in the arbitral award. This rule takes account of the fact that the drafting of the summary of facts can be a time-consuming part of the overall drafting process.

#### IV. POSSIBLE FIELDS OF APPLICATION

Expedited arbitral proceedings conducted under the SREP are possible and recommended in all those areas in which the interest of the parties in a speedy and final resolution of their dispute outweighs their interest in a decision that takes account of every single tiny detail of their dispute. Ultimately, this is a decision that the parties have to make and that no one can make for them.<sup>46</sup>

<sup>43</sup> See *supra*.

<sup>44</sup> Cf. BGHZ 30, 89; BGHZ 96, 47; BGH RIW 1990, 495; H. RAESCHKE-KESSLER & K.P. BERGER, RECHT UND PRAXIS DES SCHIEDSVERFAHRENS para. 863 (3d ed. 1999).

<sup>45</sup> Cf. Borris, *supra* note 26, at 297.

<sup>46</sup> Cf. Scherer, *supra* note 14, at 230; Borris, *supra* note 26, at 297.



Such a decision in favour of speed could be made in construction disputes where the need to continue with the project requires a quick resolution of disputes.<sup>47</sup> In disputes concerning the termination of a merger and acquisition contract in the period between signing and closing based on a “material adverse change” (MAC) clause,<sup>48</sup> the time pressure inherent in such transactions makes it inevitable for the parties to consider dispute resolution through fast-track arbitration.<sup>49</sup> Also, certain banking and capital markets disputes lend themselves to dispute settlement through fast-track arbitration, at least in b2b-scenarios such as international loan agreements or contracts related to the trading of modern financial instruments like swaps, options or other derivatives. Over the past decades, banks and other financial institutions have argued that disputes arising out of such transactions, which typically involve simple legal questions and no issues of fact that require complex expert reports, do not lend themselves to time-consuming dispute resolution by arbitration. In such cases, the banks argue that the appointment of an arbitral tribunal would not guarantee a speedy resolution of the dispute.<sup>50</sup> The new SREP provide an answer to these concerns. At the same time, the new Rules may be adapted to the circumstances and particularities of the individual case. Thus, inter-bank swap contracts<sup>51</sup> are characterized by the fact that over the life of the contract, payment obligations arise for both sides which are then included in any dispute resolution process by way of set-off or counterclaim. Section 4.4 SREP allows the parties to agree, already in their arbitration agreement, on the admissibility of set-off and counterclaims in expedited proceedings to be conducted under the SREP. In view of such a party agreement, the arbitral tribunal must admit set-off and counterclaim for two reasons: first, because the arbitration clause contained the relevant agreement of the parties so that the arbitrators must have been aware of that potentially extra workload; and secondly, because in such cases of standardized derivatives transactions, there is no extra workload caused by the admission of set-off and counterclaim in an expedited arbitration.

## V. CONCLUSION

The new DIS Rules for Expedited Proceedings provide parties and arbitrators with a well-balanced system of procedural rules for the conduct of fast-track arbitrations within the institutional framework of the DIS.

<sup>47</sup> Cf. Hobeck, Mahnken & Koebke, *supra* note 2, at 86.

<sup>48</sup> Cf. K.P. Berger & E. Filgut, *Die Zulässigkeit von MAC-Klauseln nach Sec. 18 WpÜG*, W.M. 253 (2005).

<sup>49</sup> Borris, *supra* note 26, at 295; as to the use of fast-track arbitrations in merger and acquisition transactions, see also S.H. Elsing, *Probleme bei M&A Schiedsverfahren*, in Festschrift für Hans-Jochem Luer zum 70 Geburtstag 517, 520 (W. Moll ed., 2008). K. Wach, *Die Wahl der “richtigen” Verfahrensregeln*, in Taktik im Schiedsverfahren, *supra* note 15, at 57, 65.

<sup>50</sup> Cf. the discussion during the DIS Autumn Session 2007 on the topic *Schiedsgerichtsbarkeit in Finanz- und Kapitalmarkttransaktionen*, M. Wiebecke, ... und es gibt sie doch – Schiedsgerichtsbarkeit in Finanz- und Kapitalmarkttransaktionen, *SCHIEDSVZ* 34 (2008); see also P.R. Wood, *INTERNATIONAL LOANS, BONDS AND SECURITIES REGULATION* paras. 5-59 (1995); A. Connerty in 14 *J. INT'L BANKING L.* 65 (1999).

<sup>51</sup> The International Swaps and Derivatives Association (ISDA) is currently developing a master agreement for derivatives transactions with Islamic countries based on the ISDA Master Agreement, 2002, in which the parties are given the opportunity to agree on arbitration as the method of dispute resolution; cf. *A RETROSPECTIVE OF ISDA'S ACTIVITIES 2006-2007*, 28 (ISDA ed., 2007).

However, even the most sensible set of institutional fast-track rules will remain an empty shell unless arbitrators, counsel and parties alike, in each individual case, make themselves aware of their enhanced responsibility for the efficiency and success of the expedited conduct of the arbitration.<sup>52</sup> Candidates for the position of sole arbitrator, party-nominated arbitrator or chairman who are approached in the context of a fast-track arbitration should therefore consider very carefully whether they will in fact be able to meet the time frame laid down in the SREP until the very end of the proceedings, i.e. until their signature under the final award.<sup>53</sup> Once they are appointed, the members of the arbitral tribunal must conduct the arbitration in a much more proactive fashion than a regular arbitration in order to ensure the effectiveness of the expedited procedure.<sup>54</sup> Counsel must be aware from the very outset of the proceedings that they are required to submit briefs and appear and plead in the hearing within a much tighter time frame. Also, a much higher degree of cooperation is required from them as compared to a standard arbitration.<sup>55</sup> This is a point which, in arbitral practice, has caused the failure of many accelerated arbitration proceedings.<sup>56</sup> Finally, the parties should ask themselves whether possible disputes arising out of their contract or a specific dispute that has arisen between them lend themselves to dispute resolution in expedited arbitration proceedings.<sup>57</sup> Thus, complex issues of fact or law which require lengthy “battles of experts” will typically speak against dispute resolution in fast-track proceedings. If the parties want to keep their options open until the dispute has arisen and until they are able to determine whether a specific dispute is apt for fast-track dispute resolution, they may consider providing for a choice in their arbitration clause between standard DIS arbitration and expedited DIS arbitration under the new Supplementary Rules for Expedited Proceedings.

<sup>52</sup> See REDFERN & HUNTER, *supra* note 3, paras. 6–43 (“Unfortunately, it soon became clear that no system would work properly unless all the parties and the arbitral tribunal were ready to co-operate in achieving the accelerated time table”); McIlwrath & Schroeder, *supra* note 1, at 11 (“Of course, arbitral institutions will have to do more than simply enact or modify their rules; they will have to ensure that the reform becomes effective by developing a culture that encourages key issues to be identified and addressed as early in the process as possible.”).

<sup>53</sup> Cf. Scherer, *supra* note 14, at 237 (“Be candid about your availability ... Once you accept the appointment you cannot step down”); see also Van den Berg, *supra* note 29 (“There are at least three persons in this world who believe firmly that a fast-track international arbitration is a very bad concept. That is my wife, my daughter and my son. The experience was a rather complex energy dispute between an American and Asian party, where the place of arbitration was, unfortunately from my perspective, in the Asian country. The award, according to the arbitration agreement, had to be rendered within three months after the commencement of the arbitration. There was no possibility of an extension of time provided for ... The hearings took place on New Year’s day ... we made it, but the consequence was no Christmas turkey, no New Year’s Eve parties, three months out of practice and clients wondering whether I still existed.”).

<sup>54</sup> See J. LEW, L. MISTELIS & S. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* paras. 21–89 (2003) (“In all fast-track arbitrations the tribunal plays a significant role in ensuring that arbitration will be efficient and as rapid as possible.”).

<sup>55</sup> Cf. Van den Berg, *supra* note 29 (“Consider whether the parties are indeed cooperative, and not only cooperative in agreeing to it, but also cooperative in the fast-track process. If one of the parties does not wish to cooperate, notwithstanding having signed the agreement to a fast-track arbitration, you may run into trouble. Then, a fast-track arbitration may become a snail track.”).

<sup>56</sup> See REDFERN & HUNTER, *supra* note 3, paras. 6–43 (“The insuperable hurdle, with a few notable exceptions, was that in most disputes one of the parties had a positive disincentive to cooperate with an accelerated procedure”); one notable exception was the *Panhandle* arbitration, in which the award was rendered nine weeks after the request for arbitration was filed with the ICC International Court of Arbitration, see FOUCHARD, GAILLARD, GOLDMAN, *supra* note 8, at 1248.

<sup>57</sup> *Id.* (“Parties would be well advised to use these accelerated procedures only for issues where they are truly warranted, and which are capable of being resolved on a fast-track basis”).

## Appendix: Annex to the DIS Arbitration Rules 1998: Supplementary Rules for Expedited Proceedings (April 2008)

### INTRODUCTION AND ARBITRATION CLAUSE FOR THE SUPPLEMENTARY RULES FOR EXPEDITED PROCEEDINGS

The parties may agree on the following Supplementary Rules for Expedited Proceedings (“Supplementary Rules”) supplementing the DIS Arbitration Rules. The DIS Arbitration Rules remain applicable to proceedings conducted under the Supplementary Rules to the extent that these Supplementary Rules do not contain more specific provisions.

The German Institution of Arbitration (DIS) advises all parties wishing to make reference to the Supplementary Rules for Expedited Proceedings when concluding the arbitration agreement to use the following arbitration clause:

All disputes arising in connection with the contract [*description of the contract*] or its validity shall be finally settled according to the Arbitration Rules and the Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration e.V. (DIS) without recourse to the ordinary courts of law.

It is recommended to supplement the arbitration clause by the following provisions:

- The place of arbitration is ... ;
- The substantive law of ... is applicable to the dispute;
- The language of the arbitral proceedings is....

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## Supplementary Rules for Expedited Proceedings

### Section 1. SCOPE OF APPLICATION, DURATION OF PROCEEDINGS

1.1 The Supplementary Rules set forth herein shall only apply if the parties have referred to them in their arbitration agreement or if the parties have agreed on their application prior to filing a statement of claim. Unless otherwise agreed by the parties, the DIS Arbitration Rules as well as the Supplementary Rules in effect on the date of commencement of the arbitral proceedings apply to the dispute.

1.2 The duration of arbitral proceedings conducted under these Supplementary Rules should be no longer than six months (in the case of a sole arbitrator) or nine months (in the case of a three member tribunal) after the filing of the statement of claim pursuant to Sec. 1 sub. 3.

1.3 Pursuant to these Supplementary Rules a statement of claim shall be filed with the DIS Main Secretariat in Cologne. If the statement of claim is filed with another DIS Secretariat, the timeframe for the expedited proceedings referred to in Sec. 1 sub. 2 shall commence upon receipt of the statement of claim by the DIS Main Secretariat.

1.4 The arbitral tribunal shall at all times exercise its discretion to determine the procedure (Sec. 24 sub. 1, 2nd sentence DIS Arbitration Rules) in the light of the parties' interest in expediting the proceedings, as reflected by the parties' agreement to apply these Supplementary Rules. This applies in particular to possible extensions of time limits provided for in these Supplementary Rules.

## Section 2. COSTS UPON COMMENCEMENT OF PROCEEDINGS

In deviation from Sec. 7 sub. 1 DIS Arbitration Rules as read with No. 17 of the Appendix to Sec. 40 sub. 5 DIS Arbitration Rules, the advance to be paid by the claimant upon filing the statement of claim shall cover the full amount of the arbitrators' fees.

## Section 3. NUMBER OF ARBITRATORS, NOMINATION OF ARBITRATORS

3.1 In deviation from Sec. 3 DIS Arbitration Rules, the dispute shall be decided by a sole arbitrator, unless the parties have agreed prior to the filing of the statement of claim that the dispute shall be decided by three arbitrators.

3.2 If the parties have agreed on the individual who is to act as sole arbitrator prior to the filing of the statement of claim, the claimant shall nominate the arbitrator in its statement of claim. In the absence of such agreement, the Appointing Committee of DIS shall appoint the sole arbitrator without undue delay upon request by one of the parties. Such request may be made together with the statement of claim. Until such request is received by the DIS Main Secretariat, a joint nomination of the sole arbitrator by the parties shall be permissible.

3.3 If the parties have agreed pursuant to Sec. 3 sub. 1 to have the dispute decided by three arbitrators, Sec. 6 sub. 2 (5) DIS Arbitration Rules apply in respect of the arbitrator nominated by the claimant. In deviation from Sec. 12 sub. 1 DIS Arbitration Rules, the respondent shall nominate an arbitrator within 14 days of the receipt of the statement of claim by the respondent. If the respondent fails to nominate an arbitrator within this time limit, the claimant may request nomination by the Appointing Committee of the DIS. The chairman of the arbitral tribunal shall be appointed pursuant to Sec. 12 sub. 2 DIS Arbitration Rules, subject to a shortening of the time limit mentioned therein to 14 days.

3.4 If a party-nominated arbitrator or the chairman cannot be confirmed within 7 days of receipt of the request to submit the declaration pursuant to Sec. 16 subs. 1 DIS Arbitration Rules, the Appointing Committee of the DIS shall nominate a substitute arbitrator.

#### Section 4. STATEMENT OF CLAIM, STATEMENT OF DEFENCE AND ORAL HEARING

4.1 Until the arbitral tribunal is constituted, all written communications of the parties shall be transmitted to the DIS Main Secretariat; thereafter they shall be transmitted to the arbitral tribunal. Copies of written submissions shall at all times also be sent to the other party.

4.2 In deviation from Sec. 9 DIS Arbitration Rules, the statement of defence shall be filed by the respondent within four weeks of receipt of the statement of claim pursuant to Sec. 8 DIS Arbitration Rules. Unless the arbitral tribunal determines otherwise all further written submissions by the parties are to be filed within four weeks of receipt of the other party's submission.

4.3 The oral hearing shall be held at the latest four weeks after receipt of the final written submission. The arbitral award shall be rendered at the latest four weeks after the closing of the oral hearing.

4.4 In proceedings under these Supplementary Rules, counterclaims and set-offs shall only be admissible with the consent of all parties and the arbitral tribunal.

#### Section 5. TIME SCHEDULE, PROCEDURE

5.1 At the outset of the proceedings, the arbitral tribunal shall in agreement with the parties establish a time schedule to ensure that the arbitral proceedings can be concluded within the time frame specified in Sec. 1 sub. 2.

5.2 Unless the arbitral tribunal determines otherwise,

- the exchange of written submissions shall be limited to the statement of claim within the meaning of Sec. 6 DIS Arbitration Rules and the statement of defence within the meaning of Sec. 9 DIS Arbitration Rules as well as one further written submission by each party;
- only one oral hearing, including any taking of evidence, shall be held;
- no further written submissions shall be exchanged after the closing of the oral hearing.

5.3 The arbitral tribunal should at the earliest possible stage of the proceedings identify to the parties and as a rule after each round of written submissions, the issues it may regard as relevant and material for the outcome of the case.

#### Section 6. MODIFICATIONS, NONCOMPLIANCE WITH THE TIME FRAME

6.1 The provisions and time-limits contained in these Supplementary Rules may be modified by agreement between the parties. After the constitution of the arbitral tribunal,

any modification shall require the consent of the arbitral tribunal. In the absence of consent of the parties, the arbitral tribunal may only extend a time-limit contained in these Supplementary Rules for good cause. The extension shall be effected by an order in writing, which shall state the reasons for the extension and which shall be transmitted to the parties and DIS Main Secretariat.

6.2 If the arbitral proceeding cannot be concluded within the time frame set forth in Sec. 1 sub. 2, the arbitral tribunal shall inform the DIS Main Secretariat and the parties of the reasons in writing. The competence of the arbitral tribunal shall remain unaffected if the time frame set forth in Sec. 1 sub. 2 is exceeded.

#### Section 7. ARBITRAL AWARD

Unless the parties have agreed otherwise, the arbitral tribunal may abstain from stating the facts of the case in the arbitral award.

## Guide to Authors

The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at [editorjoia@kluwerlaw.com](mailto:editorjoia@kluwerlaw.com)
2. Special attention should be given to quotations, footnotes and references which should be accurate, complete and in accordance with the Journal style sheet, which is available online at [www.kluwerlawonline.com/JournalofInternationalArbitration](http://www.kluwerlawonline.com/JournalofInternationalArbitration).
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. Please ensure a brief biographical note giving details of the professional/academic status of the author(s) is provided.
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# The American Influence on International Arbitration

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# The American Influence on International Arbitration

ROGER P. ALFORD\*

It is a curious fact that the Americanization of international arbitration is a topic that is often felt but rarely discussed.<sup>1</sup> If we in the arbitration community do discuss it, we typically do so casually over drinks, rarely in a formal setting such as a law school symposium. Certainly, it is indisputable that the international arbitration world is an identifiable epistemic community that transcends national borders, and whose members are shaped by their own experience. Increasingly, that experience reflects an American influence, be it heritage, training, affiliation, or client base. This being the case, why not admit it openly and reflect upon the import of this trend?

One can only guess as to why this topic has merited so little attention, particularly in light of the redundant and superfluous discussions that are typical fare at many an arbitration conference. Given the overwhelming American influence in the world today, perhaps the silence reflects a desire among American arbitrators to avoid a public display of hubris. Perhaps it reflects among non-American arbitrators a desire to avoid a public display of resentment. Or perhaps it reflects simple apathy, as the arbitration community is not given to self-reflection, preferring instead to focus on the substance of our livelihood rather than the sociology of our collective lives. Perhaps it reflects a timidity within this tight-knit community, as we wish to avoid public discussion of subjects that divide us and focus instead upon legal developments that unite us. Why embark on treacherous waters to face the fractures within our college when we could remain anchored in the safe harbor of yet another discussion of *Chromalloy*<sup>2</sup> and *Hilmarton*?<sup>3</sup>

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<sup>1</sup> The only significant treatment of the issue is by Lucy Reed and Jonathan Sutcliffe. See Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, 16 MEALEY'S INT'L ARB. REP. 36, 36 (2001); see also Nicolas C. Ulmer, *A Comment on "The 'Americanization' of International Arbitration?"*, 16 MEALEY'S INT'L ARB. REP. 24, 24-25 (2001).

<sup>2</sup> *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.C. 1996).

Frankly, I share such resistance. The sociology of international arbitration is not a priority of the first order in my intellectual pursuits. Moreover, much of my legal career has been spent living and working in Europe, where I learned to greatly appreciate the vitality and virtues of dispute resolution as practiced on that continent. Were it not for this symposium and the effective persuasion of Professor Mary Ellen O'Connell to secure my participation, my ruminations on this topic would be few and fettered. Nonetheless, as always, she is persuasive, and I therefore happily will explore this virgin territory.

In preparing my comments, I must say that my initial reaction to the theme is one of skepticism. Skepticism in part based on the implicit assumption inherent in the theme that only recently has international arbitration felt the weight of U.S. influence. To say that international arbitration is becoming "Americanized" is to suggest that it was not "American" in the past.

But skepticism also in the sense that it suggests that international arbitration is becoming "Americanized," as if there is only one influence on international arbitration. Anyone with any significant exposure to international arbitration knows that there are many rivers that flow into this delta, not just the Hudson, but also the Thames, the Seine, the Rhine, the Amazon, the Yangtze, and the Nile. One could just as easily have a symposium on how international arbitration is truly becoming more Asian, more Latin, more multi-cultural than ever before.

Having said that, it is indisputable that the American influence is growing in international arbitration. The principal instrument for that influence is the meteoric rise of the American law firm in the global market place. The style, technique, and training of lawyers based in these firms dramatically influences the manner in which international arbitration is conducted. It is the soft-power of these firms that is one of the defining features of international arbitration as we know it today.

## I. THE FLOW AND EBB OF AMERICAN INFLUENCE

Let me first address the assumption that international arbitration is only now becoming Americanized. Some may assume that past decades have not witnessed the American influence of international arbitration to the same degree that we have seen in recent years. To be sure, there have been periods when the American influence on international arbitration has ebbed, rather

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<sup>3</sup> *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation OTV*, 20 Y.B. Com. Arb. 663 (U.K. v. Fr. 1995) (Int'l Council for Com. Arb.).

than flowed. The singular event of the past fifty years in international commercial arbitration undoubtedly was the signing of the New York Convention in 1958.<sup>4</sup> The United States was largely absent at creation. The United States “did not attempt to exert a strong influence on the content of the convention, confining itself to exposition of its views on matters of basic principle.”<sup>5</sup> Perusing the *travaux préparatoires* of the New York Convention underscores this conclusion.<sup>6</sup> The United States never

bothered to comment on the work of the Ad Hoc Committee and initially resolved not to take part in the Conference. Although the United States ultimately sent a delegation to the Conference . . . it took no part in any of the working sessions . . . [and] declined even to cast a vote on the question of whether the Conference should adopt the final text of the Convention as a whole.<sup>7</sup>

Even when the United States did finally accede to the Convention, it did so a dozen years later, by which time forty-four other countries were already signatories.<sup>8</sup> Thus, the United States has had little influence in the drafting

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<sup>4</sup> See, e.g., Alan Redfern, *Having Confidence in International Arbitration*, 57 DISP. RESOL. J. 60, 60–61 (2003) (New York Convention “has been described as the single most important pillar on which the edifice of international arbitration rests” and “perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.”) (internal quotes omitted).

<sup>5</sup> 1960 A.B.A. SEC. INT’L & COMP. L. PROC. 210, *quoted in* IAN MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 160–61 (1992).

<sup>6</sup> See Charles H. Brower II, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 VA. J. INT’L L. 971, 1005, 1012–21 (1995) (footnotes omitted).

<sup>7</sup> *Id.* at 1020 (footnotes omitted).

<sup>8</sup> For a list of countries that are parties to the New York Convention, with dates of accession, see United Nations Commission on International Trade Law (UNCITRAL), *Status of Conventions and Model Laws*, available at <http://www.uncitral.org/english/status/status-e.htm> (last visited Sept. 20, 2003). For a discussion of the reason the United States was reluctant to play an active role in the Convention or accede shortly thereafter, see Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT’L L. REV. 17, 29–30 (2002). Karamanian noted that the U.S. delegation was concerned that:

[f]or the United States to benefit, the Convention would need to override state anti-arbitration laws, which would require changes in state and possibly federal court procedural rules. The delegation was also concerned that the United States lacked a “sufficient domestic legal basis” for accepting the Convention and that the Convention embodied undesirable principles of arbitration law.

and early developments of the New York Convention. It is unfortunate that this monumental achievement perhaps reflects the low-water mark of American influence on the arbitration world.

But if one takes a longer look, the American shadow looms large. It is widely recognized that the modern era of international arbitration finds its genesis in the Jay Treaty of 1794, which established commissions to resolve disputes between the United States and Great Britain through the arbitration of claims by British creditors against U.S. nationals.<sup>9</sup> With a potential war with Britain looming over the U.S. failure to compensate British creditors, George Washington commissioned Chief Justice John Jay to negotiate a compromise. The treaty obligated the United States to pay full compensation and to adjudicate these claims before a panel of five commissioners, two appointed by each country and the fifth by unanimous consent.<sup>10</sup> When news of the terms of the treaty broke, there were literally mobs in the streets. Chief Justice John Jay was declared a traitor and burned in effigy. George Washington's reputation was assailed as never before, with Thomas Jefferson describing the treaty as a "monument of venality."<sup>11</sup>

If the Jay Treaty was much maligned then, it is much beloved today. The arbitral commissions established under the Jay Treaty were the beginning of the modern era of international arbitration.<sup>12</sup> Many of the features utilized in that treaty will sound familiar today. They include: (1) the ineffectiveness of domestic courts precipitated recourse to international arbitration;<sup>13</sup> (2) the

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<sup>9</sup> Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., arts. V, VIII, 8 Stat. 116, 119-20, 122 [hereinafter Jay Treaty].

<sup>10</sup> *Id.*

<sup>11</sup> DAVID MCCULLOUGH, JOHN ADAMS 457 (2001). Elsewhere Jefferson described the treaty as "nothing more than a treaty of alliance between England and the Anglomen of this country against the legislature and people of the United States." JOSEPH ELLIS, THE AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 158-59 (1996). More than any other event the signing of the Jay Treaty led Thomas Jefferson out of retirement to declare his candidacy as president. He saw the Jay Treaty, with federal assumption of pre-revolutionary private debt and pro-English version of American neutrality, as a repudiation of the Declaration of Independence, the Franco-American alliance, and all the political principles on which Jefferson had staked his public career. *See id.* at 159.

<sup>12</sup> *See* Barton Legum, *Investment Disputed and NAFTA Chapter Eleven*, 95 AM. SOC'Y INT'L L. PROC. 196, 204 (2001); *see also* Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 68 (1997) ("The Jay Treaty of 1794 marked the beginning of modern international arbitrations, which have continued to the present."); Barton Legum, *Emerging Fora for International Litigation (Part 1): The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531, 534-35 (2002).

<sup>13</sup> Jay Treaty, *supra* note 9, art. VI, at 119:

utilization of party-appointed arbitrators and a chair selected by those arbitrators;<sup>14</sup> (3) arbitrator declarations affirming their impartiality and independence;<sup>15</sup> (4) the payment of arbitrators to be shared equally by both sides;<sup>16</sup> (5) the manner of replacement of arbitrators;<sup>17</sup> (6) discovery techniques including oral testimony, written depositions, and document

Whereas it is alleged . . . that by the operation of various lawful impediments since the peace, not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive full and adequate compensation for the losses and damages which they have thereby sustained.

<sup>14</sup> *Id.* at 119–20:

For the purpose of ascertaining the amount of any such losses and damages, five Commissioners shall be appointed, and authorized to meet and act in manner following, viz.: Two of them shall be appointed by his Majesty, two of them by the President of the United States by and with the advice and consent of the Senate thereof, and the fifth by the unanimous voice of the other four; and if they should not agree in such choice, then the Commissioners named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by lot, in the presence of the four original Commissioners.

<sup>15</sup> *Id.* at 120:

When the five Commissioners thus appointed shall first meet, they shall, before they proceed to act, respectively take the following oath, or affirmation, in the presence of each other; which oath, or affirmation, being so taken and duly attested, shall be entered on the record of their proceedings, viz.: I, A. B. one of the Commissioners appointed in pursuance of the sixth article of the Treaty of Amity, Commerce, and Navigation, between his Britannic Majesty and the United States of America, do solemnly swear (or affirm) that I will honestly, diligently, impartially, and carefully examine, and to the best of my judgment, according to justice and equity, decide all such complaints, as under the said article shall be preferred to the said Commissioners: and that I will forbear to act as a Commissioner, in any case in which I may be personally interested.

<sup>16</sup> Jay Treaty, *supra* note 9, art. VIII, at 122:

It is further agreed, that the Commissioners mentioned in this and in the two preceding articles shall be respectively paid in such manner as shall be agreed between the two parties, such agreement being to be settled at the time of the exchange of the ratifications of this treaty. And all other expenses attending the said Commissions shall be defrayed jointly by the two parties, the same being previously ascertained and allowed by the majority of the Commissioners.

<sup>17</sup> *Id.* (“And in the case of death, sickness or necessary absence, the place of every such Commissioner respectively shall be supplied in the same manner as such Commissioner was first appointed, and the new Commissioners shall take the same oath or affirmation and do the same duties.”).

production;<sup>18</sup> (7) determinations to be made not simply as law mandates, but as equity and justice require;<sup>19</sup> (8) the finality of awards;<sup>20</sup> and (9) the commitment by the non-prevailing party to honor the award.<sup>21</sup>

Subsequent mixed claims commissions served to crystallize international arbitration in the 19th and early 20th centuries. The *Alabama* cases concerned allegations that England had violated its neutrality between the United States Government and the Confederate Government during the American Civil War by destroying U.S. commercial vessels. These cases represent among the most important and earliest arbitral tribunals to apply international law.<sup>22</sup> As one commentator has put it,

For about two centuries [during the 17th and 18th centuries], international adjudication in the real sense fell in abeyance . . . . This situation, which

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<sup>18</sup> Jay Treaty, *supra* note 9, art. VI, at 120:

And the said Commissioners shall have power to examine all such persons as shall come before them, on oath or affirmation, touching the premises; and also to receive in evidence, according as they may think most consistent with equity and justice, all written depositions, or books, or papers, or copies, or extracts thereof; every such deposition, book, or paper, or copy, or extract, being duly authenticated, either according to the legal forms now respectively existing in the two countries, or in such other manner as the said Commissioners shall see cause to require or allow.

<sup>19</sup> *Id.*:

The said Commissioners in examining the complaints and applications so preferred to them, are empowered and required, in pursuance of the true intent and meaning of this article, to take into their consideration all claims, whether of principal or interest, or balances of principal and interest, and to determine the same respectively, according to the merits of the several cases, due regard being had to all the circumstances thereof, and as equity and justice shall appear to them to require.

<sup>20</sup> *Id.* (“The award of the said Commissioners, or of any three of them as aforesaid, shall in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant.”).

<sup>21</sup> *Id.* (“[A]nd the United States undertake to cause the sum so awarded to be paid in specie to such creditor or claimant without deduction; and at such time or times, and at such place or places, as shall be awarded by the said Commissioners . . .”).

<sup>22</sup> See JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 197–200* (1929). The arbitral panel was one of the earliest to apply international law to determine whether indirect damages resulting from international law violations of neutrality were compensable. The United States argued that in addition to direct loss from destruction of U.S. vessels, Britain should also compensate the United States for (1) expenses incurred in pursuing British cruise vessels; (2) loss in transfer of American commercial marine; (3) enhanced payments of insurance; (4) prolongation of the war; and (5) suppression of rebellion. *See id.* at 199; *see also* 6 JOHN BASSET MOORE, *A DIGEST OF INTERNATIONAL LAW* § 1050, at 999 (1906).

some authors refer to as “the catastrophe” in relating the history of arbitration, continued until the advent of a young republic, the United States of America, bringing with it new ideas about settling disputes: first, in the Jay Treaty of 1794, following the War of Independence, which introduced binding decisions by joint mixed commissions; then again in the Alabama arbitration of 1872 after the American Civil War, which can be considered the real beginning of modern international arbitration, in the technical sense.<sup>23</sup>

The United States also had a decisive role in the establishment of the first standing arbitral body, the Permanent Court of Arbitration (PCA). At the Hague Peace Conference of 1899, the superpowers of the day were at loggerheads over the establishment of such a tribunal. Germany was strongly opposed to arbitration, believing that “arbitration through interested judges . . . [is] nothing but intervention” and “that courts of arbitration would result in bringing up the interests of different countries, forming groups for war, and taking advantage of the weaker group.”<sup>24</sup> Intervention from the United States delegation was critical to securing Germany’s support, leading to the establishment of the PCA.<sup>25</sup> Moreover, in its early years no nation referred any cases to the PCA for determination, and many believed it would be a failure. The United States was the first to refer a case to the PCA concerning expropriation by Mexico of Catholic funds used to fund the building of missions in Upper and Lower California.<sup>26</sup> Subsequent disputes were submitted to the PCA at the behest of the United States.<sup>27</sup>

Theodore Roosevelt’s Secretary of State, Elihu Root, received the Nobel Peace Prize in 1912 in recognition of, among other things, his efforts to establish international arbitration as an accepted practice among states. In his Nobel Lecture, Root underlined “the value of having this [arbitration] system a part of the common stock of knowledge of civilized men, so that, when an international controversy arises, the first reaction is not to consider war but to

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<sup>23</sup> Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. & POL. 919, 921–22 (1999).

<sup>24</sup> RALSTON, *supra* note 22, at 255.

<sup>25</sup> *Id.* at 255–56.

<sup>26</sup> *Id.* at 263–64.

<sup>27</sup> For example, in 1903, President Theodore Roosevelt was invited to arbitrate a number of claims brought by European countries against Venezuela regarding nonpayment of debt. President Roosevelt suggested arbitration in The Hague under the auspices of the PCA. See MOORE, *supra* note 22, § 967, at 590–91; see also EDMUND MORRIS, THEODORE REX 191–92, 207–08 (2001).



consider peaceful litigation.”<sup>28</sup> He then urged the “next advance . . . along this line is to pass on from an arbitral tribunal . . . to a permanent court composed of judges who devote their entire time to the performance of judicial duties.”<sup>29</sup>

A few short years later the United States was instrumental in creating just such a permanent court. Of course, Woodrow Wilson was the principal architect of the League of Nations, which included the Permanent Court of International Justice (PCIJ). Although the United States did not become a member of the League for reasons that are well known, the United States was critical in the creation of the PCIJ—even when it was clear the United States would not join the League.

The early influence of the United States was not limited to institution building. In the early 20th century, the United States was at the forefront in establishing substantive principles that insured the efficacy of international arbitration. For example, in the middle part of the 20th century attempts were made to undermine the substantive rights of foreign investors through doctrines such as the Calvo Clause, national treatment, and “appropriate compensation” (*i.e.*, less than full).<sup>30</sup> In response, the United States developed doctrines such as the international minimum standard and the Hull formula, which guaranteed prompt, adequate, and effective compensation for deprivation of property rights.<sup>31</sup> These substantive developments were critical to the protection of foreign investment and the success of international arbitration.

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<sup>28</sup> ELIHU ROOT, *Nobel Lecture: Towards Making Peace Permanent*, in ADDRESS ON INTERNATIONAL SUBJECTS 153–74 (Robert Bacon & James B. Scott eds., 1916), available at <http://www.nobel.se/peace/laureates/1912/root-lecture.html> (last visited Sept. 20, 2003).

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., Kenneth J. Vandeveld, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT’L L. 373, 379–99 (1998); Christopher K. Dalrymple, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INT’L L.J. 161, 163–68 (1996); Tali Levy, *NAFTA’s Provision for Compensation in the Event of Expropriation: A Reassessment of the “Prompt, Adequate and Effective” Standard*, 31 STAN. J. INT’L L. 423, 424–39 (1995).

<sup>31</sup> See 3 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655–61 (1940). In the famous exchange between Secretary of State Hull and the Minister of Foreign Relations of Mexico in 1938 the United States insisted that property of its nationals was protected by an international standard under which Mexico was required to pay “adequate, effective and prompt” compensation. The Mexican Minister insisted that international law required only that aliens be granted national treatment and that domestic, not international, law governed the time and manner of payment. The United States prevailed. *Id.* at 660–65.

Thus, if one steps back and takes a longer look, one can certainly assert with confidence that the United States was not only present at the creation, but was a midwife in the birth of the modern era of international arbitration.

## II. INTERNATIONAL ARBITRATION AS “*PRAXIS AMERICANA*”?

The other assumption implicit in the title to this conference is that international arbitration is becoming “Americanized” to the exclusion of other influences. While the United States certainly has influenced international arbitration, it would be wholly inaccurate and presumptuous to argue that international arbitration represents the triumph of *Praxis Americana*. International arbitration is not unipolar. The multipolar arrangement of international arbitration reflects the fundamental agreement among the developed and developing world on the need and utility of arbitration to resolve international commercial disputes. “The developed and the developing arbitration world now speaks in the same voice.”<sup>32</sup>

Arbitration is exploding in Asia.<sup>33</sup> As the Indian President, Shri K.R. Narayanan put it recently, quoting Gandhi, “[p]eople will take time before they accommodate themselves to arbitration, [for] its very simplicity and inexpensiveness will repel many people even as palates jaded by spicy foods are repelled by simple combinations.”<sup>34</sup> If that is so, then we might say that the sophisticated palates of Asians no longer are repelled by the simple fare of arbitration. Statistics from one prominent Asian practitioner reveals that “the growth rates in some Asian jurisdictions over the past decade doubled,” and “in the case of some locations which had single-digit case numbers at the beginning of the decade, the quantity of arbitration cases increased by several multiples.”<sup>35</sup> One scholar has argued that “there no longer is any doubt that Asia—and particularly China—has emerged as the world’s leading site for

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<sup>32</sup> A.C. Muthiah, *Welcoming Address, in ICCA CONGRESS SERIES NO. 10, INTERNATIONAL ARBITRATION AND THE NATIONAL COURTS: THE NEVER ENDING STORY 1* (Albert Jan van den Berg ed., 2001).

<sup>33</sup> For recent statistics, see Veronica Taylor and Michael Pryles, *The Cultures of Dispute Resolution in Asia, in DISPUTE RESOLUTION IN ASIA 20–24* (Michael Pryles ed., 2nd ed. 2002).

<sup>34</sup> Shri K.R. Narayanan, *Inaugural Address, in ICCA CONGRESS SERIES NO. 10, INTERNATIONAL ARBITRATION AND THE NATIONAL COURTS: THE NEVER ENDING STORY 7, 8–9* (Albert Jan van den Berg ed., 2001).

<sup>35</sup> See Sally A. Harpole, *Factors Affecting the Growth (or Lack Thereof) of Arbitration in the Asia Region 1* (2002) (unpublished manuscript, on file with author); see also George W. Coombe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective From North America*, 5 ANN. SURV. INT’L & COMP. L. 13, 20 (1999).

the conduct of international commercial arbitrations, at least in terms of the volume of new cases filed each year.”<sup>36</sup> In support, the author reports that from 1995 to 2000 inclusive, China’s leading international arbitration commission, China International Economic and Trade Arbitration Commission (CIETAC), received 4,200 new international commercial arbitrations and the Hong Kong International Arbitration Centre (HKIAC) received 1394, totaling over 5,500 new arbitrations.<sup>37</sup>

In Latin America there are also tectonic changes taking place.<sup>38</sup> As Horacio Grigera Naón of White & Case has stated, “Latin American countries have radically changed their attitude towards arbitration, which had been traditionally hostile to this form of dispute resolution.”<sup>39</sup> As part of government policies promoting private business and integration of national markets, Latin American countries have adopted an entirely new approach to commercial arbitration, with new arbitration laws, accession to key arbitration agreements, and improved local court support for the arbitration process.<sup>40</sup> Wide ratification of the major arbitration treaties, the adoption of numerous new bilateral and multilateral investment treaties, and new arbitration laws in Brazil, Colombia, Mexico, Peru, and Venezuela, among others, give “eloquent indications of this new trend” strongly favoring arbitration in Latin America.<sup>41</sup> This new attitude is showing marked results in the number of arbitrations involving Latin America. For example, the participation of Latin American parties in the International Chamber of Commerce (ICC) arbitrations has grown dramatically and today averages approximately ten percent of parties to new cases filed each year.<sup>42</sup>

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<sup>36</sup> Philip J. McConnaughay, *Introduction* to INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA, at xxix (Philip J. McConnaughay & Thomas B. Ginsburg eds., 2002). In support, the author reports that from 1995 to 2000 inclusive, China’s leading international arbitration commission, CIETAC, received 4,200 new international commercial arbitrations and the Hong Kong International Arbitration Centre (HKIAC) received 1,394, or 5,594 total. *Id.*

<sup>37</sup> *Id.* at xxix–xxx.

<sup>38</sup> For a helpful bibliography on arbitration in Latin America, see John P. Bowman & Jack J. Coe, Jr., *Selected Bibliography on Arbitration and Latin America*, June 2003, published in Fourteenth Annual Workshop of the Institute for Transnational Arbitration, *Arbitration and the Courts: A Case Study from Latin America*, June 19, 2003.

<sup>39</sup> HORACIO GRIGERA NAÓN, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN: INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA 5 (1997).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *Spotlight on Dispute Resolution in Latin America*, WHITE & CASE INT’L DISP. RESOL. NEWSL. (White & Case LLP), Mar. 2002, at 2–3.

In Central and Eastern Europe, the favorable investment climate of the past two decades has created an environment in which arbitration is trusted as never before and regularly utilized in international transactions.<sup>43</sup> The United States has negotiated bilateral investment treaties with Poland, the Czech and Slovak Republics, Russia, and Bulgaria that include mechanisms for investor-to-State arbitration enforceable under either the International Centre for Settlement of Investment Disputes (ICSID) or New York Conventions.<sup>44</sup> Recent statistics indicate that arbitration in Central and Eastern Europe is growing at a rapid pace.<sup>45</sup> A recent survey by the ICC indicates that Eastern Europe is “lead[ing] the charge in arbitration,” with the number of Central and Eastern European parties involved in arbitration growing by 68% in 2001.<sup>46</sup>

Moreover, when one speaks of the great international arbitration institutions the list includes not only the ICC, the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA), but also CIETAC, the Stockholm Chamber of Commerce, the Singapore International Arbitration Centre, the Australian Conciliation and Arbitration Commission, and the Cairo Regional Centre for International Commercial Arbitration, to name but a few. Major arbitral institutions are now holding conferences throughout the world discussing in great detail the global proliferation of international commercial arbitration.<sup>47</sup> As Lucy Reed and Jonathan Sutcliffe put it, “international arbitration practice is in fact

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<sup>43</sup> See, e.g., Kenneth Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT’L L. 621, 637–38 (1993).

<sup>44</sup> *Id.* at 630–31, 634–35.

<sup>45</sup> In the Czech Republic, for example, recent statistics indicate a significant increase in international commercial arbitration. See Roman Brncal, *Overview of Arbitration Cases by the Arbitration Court Attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic* (2003) (unpublished manuscript, on file with author).

<sup>46</sup> Brendan Malkin, *Eastern Europe Leads the Charge in Arbitration*, LAWYERNEWS, at <http://www.thelawyer.com/cgi-bin/item.cgi?id=105377> (last visited Sept. 20, 2003).

<sup>47</sup> See, e.g., ICCA CONGRESS SERIES NO. 10, INTERNATIONAL ARBITRATION AND THE NATIONAL COURTS: THE NEVER ENDING STORY (Albert Jan van den Berg ed., 2001); Fourteenth Annual Workshop of the Institute for Transnational Arbitration: Arbitration and the Courts: A Case Study from Latin America (June 19, 2003); Enforcement of Arbitration Agreements in Latin America: papers presented at the 1998 Vancouver IBA Conference, International Bar Association, Vancouver, Canada, (Bernardo M. Cremades ed., 1998).

becoming 'homogenized'—incorporating the best aspects of several traditions . . . .'<sup>48</sup>

### III. LAW FIRMS AND THE SOFT-POWER ARBITRATION GAME

So if we dispense with these two incorrect assumptions—the mistaken assumption that the United States has only recently become influential, and the second equally misguided assumption that today the United States is overwhelmingly influential to the exclusion of other influences—then we can turn to what I think is an extremely useful inquiry. That inquiry is whether we are reaching a moment in which U.S. influence is at its high tide, extending to backwaters and eddies never reached before.

To this question, I think the answer is almost certainly yes. The first and most significant factor in Americanization of international arbitration is *demographic*: the rise of the Anglo-American law firm.<sup>49</sup> Just as the United States has been and will be the dominant force in economic globalization, our law firms will be the dominant force in international arbitration. The reason for this seismic demographic shift is the overwhelming success of the Anglo-American law firm in what scholars describe as the “soft-power game.”

Soft power is cultural and economic power, and very different from its military kin . . . . The United States . . . is definitely in a class of its own in the soft-power game . . . . This type of power—a culture that radiates outward and a market that draws inward—rests on pull not push; on acceptance not on conquest . . . . [T]his kind of power cannot be aggregated, nor can it be balanced . . . . All the[] movie studios [of Europe, Japan, China, and Russia] together could not break the hold of Hollywood. Nor could a consortium of their universities dethrone Harvard et al., which dominate academia while luring the best and the brightest from abroad.<sup>50</sup>

So too we might add that the Anglo-American law firms are in a class by themselves in the soft-power game. The muscle of all of the other law firms of the world put together cannot match the attractive allure of these firms. It is their soft power—a power that rests on the magnetic attraction these firms

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<sup>48</sup> Reed & Sutcliffe, *supra* note 1, at 36.

<sup>49</sup> I use the phrase “Anglo-American law firm” rather than American law firm because it more accurately reflects the reality that the common law, vertically integrated, globalized, general service law firms are virtually identical in style, scope, structure and influence.

<sup>50</sup> Josef Joffe, *How America Does It*, 76 FOREIGN AFFAIRS Sept./Oct. 1997, at 13, 24.

hold on legal service providers and consumers—that will ensure that they will be the defining feature in the future of international arbitration.

Indeed, the common lamentation of local lawyers in almost every major legal market in the world is the “Anglo-American invasion” in their legal markets, stirring the once placid waters of their country’s practices. From the very heart of international arbitration in Paris, France we hear a *cri de coeur* of French law firms struggling mightily to compete in the soft-power arbitration game. According to a Chambers Global publication on the “World’s Leading Lawyers,” the trend in the French legal market has been the concurrent decline of the traditional Franco-French firm, with its emphasis on individual superstars, and the rise of the Anglo-American firm, with its emphasis on tight organizational structure and teamwork.<sup>51</sup> Their survey identifies seven of the top eight leading arbitration practices in France to be in Anglo-American law firms.<sup>52</sup> Even the lone French firm, Salans, is an anomaly. Its founders include the American name partner, Carl Salans, and it merged with a British firm in 1998 and an American firm in 1999.<sup>53</sup>

Similarly, a recent survey by *International Commercial Litigation* identified the top arbitration law firms in the world based on number of cases, total value of cases, average claim size, industries covered, and hearings heard.<sup>54</sup> Of the nineteen law firms surveyed, Anglo-American law firms dominated. On average, seven of the top ten law firms in each category were Anglo-American law firms. For example, when evaluated based on the number of cases in a law firm’s portfolio, eight of the top ten firms were Anglo-American.<sup>55</sup> When ranked based on the number of hearings, seven of the top ten law firms were Anglo-American.<sup>56</sup> In short, by whatever methodology one ranks law firms practicing international arbitration—volume, size, industry diversity, number of hearings—this survey suggests that Anglo-American law firms are king of the mountain.

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<sup>51</sup> CHAMBERS GLOBAL: THE WORLD’S LEADING LAWYERS 2001–2002, at 261–63 (James Fairweather ed., 2001).

<sup>52</sup> Of the top eight, four are American, (1) Shearman & Sterling, (2) White & Case LLP, (3) Coudert Frères, and (4) Jones, Day, Reavis, & Pogue; three are British, (1) Freshfields Bruckhaus Deringer, (2) Herbert Smith, and (3) Norton Rose; and one is French, Salans. *Id.*

<sup>53</sup> See *History of the Firm*, Salans Firm Overview, at [http://www.salans.com/firm/firm\\_overview\\_frmset.html](http://www.salans.com/firm/firm_overview_frmset.html) (last visited Sept. 20, 2003).

<sup>54</sup> David Samuels, *The New Periodic Tables*, in INTERNATIONAL COMMERCIAL LITIGATION 16–20 (1999).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

These results mirror a more recent survey in *The American Lawyer*, which identified the top forty arbitrations in Europe.<sup>57</sup> Although each dispute featured a European forum or at least one European party, in the overwhelming majority of cases it was Anglo-American law firms that the parties chose to represent them.

Young, aspiring lawyers across the globe recognize this trend and hope to ride the wave with American LL.M. degrees and C.V.'s touting American law firm experience. As a result, the second great American influence today is *legal training*. The brightest foreign talent recognizes that Anglo-American law firms are one of the best avenues to begin their budding careers. These young international lawyers flock to American law schools to secure LL.M. degrees to increase their marketability. At these law schools non-Americans secure a firm grounding in American law and legal culture, and their careers are shaped accordingly. For example, at my alma mater, New York University School of Law, students from fifty-five countries have studied and obtained degrees, and foreigners typically make-up a significant majority of the class. In the 2001-2002 academic year, 68% of the full-time graduate students were from foreign countries and 150 foreign law schools were represented among the class.<sup>58</sup> Pursuit of the American LL.M. leads directly to pursuit of large law firm employment. Each January, NYU, together with thirty other law schools, holds an International Student Interview Program for foreign-trained lawyers pursuing graduate degrees in the United States. Last year several hundred foreign law students interviewed with over 125 U.S. and foreign employers.<sup>59</sup> For many aspiring arbitrators, the path to lucrative employment requires a pilgrimage to American law schools. Indeed, the law school where I teach, Pepperdine University in Malibu, California, is so confident that there is significant demand for such training that it has established an LL.M. program exclusively devoted to dispute resolution.

The influence of Anglo-American law firms in the great centers of international arbitration—London, New York, Paris—has brought with it uniquely common law cultural and professional influences. The third, and perhaps the most notable, American influence in the practice of international arbitration relates to *style*. As Alan Redfern and Martin Hunter put it,

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<sup>57</sup> Michael D. Goldhaber, *Big Arbitrations*, THE AMERICAN LAWYER MEDIA SUPPLEMENT: FOCUS EUROPE, Summer 2003, at 22.

<sup>58</sup> See NYU Office of Admissions, at <http://www.law.nyu.edu/depts/admissions/info/graduate/foreign.html> (last visited Sept. 20, 2003).

<sup>59</sup> See NYU Office of Career Counseling and Placement, at <http://www.law.nyu.edu/depts/careerservices/recruiting/index.html> (last visited Sept. 20, 2003); Telephone Interview with NYU Office of Career Counseling and Placement (March 18, 2003).

whether arbitration procedures follow the common law adversarial model or civil inquisitorial model will depend “not so much on the place where the arbitration is conducted, but more on the background and experience of the individual members of the arbitral tribunal and the parties’ advisers.”<sup>60</sup> The growing influence of American law firms suggests the increased use of a common law adversarial style of international arbitration.

In the early part of the 20th century, the so-called “Reformation period” of American arbitration,<sup>61</sup> advocates urged more robust use of arbitration in the United States to avoid “needless contention that [is] incidental to the atmosphere of trials in court.”<sup>62</sup> But arbitration today is no longer free from such needless contention. In particular, concerns have been expressed that arbitration is “Americanized” when counsel engage in “brass knuckle” tactics that are so alarmingly familiar in American courts.<sup>63</sup> It is quite common now for sophisticated American litigators to assume that international arbitration is simply “offshore litigation,”<sup>64</sup> and that they can “do” international arbitration by applying the skills learned in the courtroom.<sup>65</sup> Whether the skills are transferable or successful in international arbitration is not the point. With the overwhelming influence of American law firms on the global scene, the fact that these tactics are tried is altering the atmosphere of international commercial arbitration. It is more likely that the American style is not a scorched earth mentality—not because American practitioners are not willing to utilize this approach, but because they will rarely perceive it as effective or necessary. It is again more likely that the American style represents a tactical battle that will utilize *all* arrows that a seasoned American litigator has in his or her quiver, with some arrows sharper than others.

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<sup>60</sup> ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 282 (1999).

<sup>61</sup> MACNEIL, *supra* note 5, at 34–58.

<sup>62</sup> Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 *YALE L.J.* 595, 614 n.44 (1928).

<sup>63</sup> Ulmer, *supra* note 1, at 24–25. “Americanization” is often a:

code word for an unbridled and ungentlemanly aggressivity and excess in arbitration. It can involve a strategy of “total warfare”, the excesses of US-style discovery, and distended briefs and document submission . . . I have sometimes seen this type of “Americanization” accusation to have merit . . . [b]ut this is the exception, . . . and “total war”, in and of itself, is an unintelligent arbitration strategy.

<sup>64</sup> REDFERN & HUNTER, *supra* note 60, at 283.

<sup>65</sup> Reed & Sutcliffe, *supra* note 1, at 36.



A fourth significant American influence concerns *discovery*. Many American lawyers fail to fully appreciate the uniqueness of American discovery techniques. Discovery in international arbitration has adapted to incorporate many of tools familiar in American litigation. As counsel, American lawyers are encouraging the use of American approaches to discovery—depositions, interrogatories, cross-examination—with increased frequency. As arbitrators, American arbitrators are more comfortable with such techniques and willing to acquiesce to such requests. In addition, as civil law lawyers gain experience in Anglo-American discovery techniques, they too will utilize and advocate these approaches if it suits their clients' needs.<sup>66</sup> Finally, as institutional leaders, Americans are influencing the approach taken in adopting and revising arbitration rules, such as the International Bar Association Rules of Evidence. The most hotly debated issue in drafting these rules pertained to the discovery of documents in the possession of the opposing party.<sup>67</sup> The common law lawyers won this debate, with Article 3 requiring a party to produce, pursuant to an arbitral order, all requested documents in its possession.<sup>68</sup>

A fifth American influence is *choice of law*. American law firms are at the forefront in drafting complex international contracts, and anecdotal information indicates that New York law is fast approaching English law as the preferred choice of law for international transactions. This includes not only major infrastructure transactions, joint ventures, and the like, but New York is also making inroads even in areas such as maritime law, in which English law has always dominated. This is not particularly surprising. Parties normally choose the law of one of the contracting parties, or a respected, neutral third country. New York law (or some other U.S. state law) often will be chosen because it is the contract law of one of the contracting parties or their counsel. Often, it will be the contracting party with the greatest leverage to impose their applicable law. And if New York law is not the law of one of the contracting parties, it is viewed, along with English and Swiss law, as one of the most respected, neutral third country laws. Moreover, U.S. courts will

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<sup>66</sup> Ulmer, *supra* note 1, at 24–25.

<sup>67</sup> IBA WORKING PARTY, COMMENTARY ON THE NEW IBA RULES OF EVIDENCE 5 (1999), available at [http://www.ibanet.org/pdf/comment\\_rules.pdf](http://www.ibanet.org/pdf/comment_rules.pdf) (last visited Sept. 20, 2003).

<sup>68</sup> Article 3(4) of the IBA Rules of Evidence provides that “[w]ithin the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the Arbitral Tribunal and to the other Parties all the documents requested in its possession, custody or control as to which no objection is made.” See INTERNATIONAL BAR ASSOCIATION RULES OF EVIDENCE, art. 3(4) (1999), available at <http://www.ibanet.org/pdf/rules-of-evid-2.pdf> (last visited Sept. 20, 2003).

almost invariably enforce such choice of law clauses. In keeping with the strong federal policy favoring arbitration, U.S. courts will grant almost unfettered discretion to the parties to choose whatever law they desire, recognizing that such choice of law clauses are an “almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”<sup>69</sup>

A sixth American influence relates to *venue*. By venue, I mean not only the *situs* of arbitration, but also the *situs* for enforcement. The overwhelming pro-arbitration policy reflected in Supreme Court decisions such as *Prima Paint*, *Scherk*, *Southland*, and *Mitsubishi*, to name but a few, has created a hospitable judicial environment in which arbitration is allowed to thrive, so much so that the United States is viewed as an extremely favorable *situs* to conduct arbitration proceedings and to enforce awards. Although many will appreciate the pro-arbitration policy reflected in U.S. jurisprudence, it bears repeating just how liberal that policy is. In *Prima Paint*, the Court avoided lengthy pre-arbitration litigation regarding the enforceability of an arbitration agreement by establishing the “separability doctrine” to address allegations of fraud in the inducement.<sup>70</sup> On arbitrability, *Mitsubishi* holds that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”<sup>71</sup> In *Scherk* the Supreme Court recognized the potential “damage [to] the fabric of international commerce and trade” if this country parochially refuses to enforce international arbitration agreements.<sup>72</sup> And in *Southland*, the Supreme Court responded to the old common law hostility toward arbitration and the failure of state arbitration statutes to mandate enforcement of arbitration agreement by finding that the FAA is applicable in

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<sup>69</sup> *Scherk v. Alberto-Culver, Co.*, 417 U.S. 506, 516 (1974); *see also Northrop Corp. v. Triad Int'l Mktg S.A.*, 811 F.2d 1265, 1270 (9th Cir. 1987) (holding that choice of law clauses should be enforced absent strong reasons to set them aside); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1293, 1295 (11th Cir. 1998) (finding that “international agreements—even those that render United States securities law inapplicable—are *sui generis*”). To invalidate choice provisions in Lloyd's contract would be to conclude that the reach of the United States securities laws is unbounded; “because we are unwilling to so conclude, we hold that the anti-waiver provisions of the United States securities laws do not categorically render unenforceable the Lloyd's choice clauses.” *Id.* WILLIAM F. FOX, JR., *INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING, AND RESOLVING DISPUTES* 151–53 (3d ed. 1998).

<sup>70</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

<sup>71</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

<sup>72</sup> *Scherk*, 417 U.S. at 517.

state courts.<sup>73</sup> As the Supreme Court put it, in a few short decades we have gone from a “suspicion of arbitration as a method of weakening the protections afforded in the substantive law” to a “strong endorsement of the federal statutes favoring this method of resolving disputes.”<sup>74</sup>

The United States is, however, a preferred venue not only because of a favorable judicial climate, but also because of opportunity. The overwhelming economic might of the United States will often create an opportunity for in rem attachment of assets to enforce foreign arbitral awards. To the extent that the United States is one of the premier financial markets in the world, one of the premier inbound markets in the world, *and* one of the premier outbound suppliers of goods and services abroad, it follows that all manner of companies have assets in this country that may be attached for purposes of enforcing arbitration awards.

A seventh American influence concerns *published precedent*. The confidential nature of most international commercial arbitration enhances the attractiveness of this mechanism of dispute resolution, but it also greatly diminishes the pool of available materials one can use as persuasive authority. The most important body of international arbitration jurisprudence emanates from an institution that has a distinctly American influence: the Iran-United States Claims Tribunal. The significance of these decisions as persuasive authority is second to none. A second body of published precedent, NAFTA Chapter 11 awards, is quickly becoming an important source of international arbitration jurisprudence. It too has the American imprint. At a recent conference in New Zealand one of the most eminent European arbitrators privately expressed sheer delight to me that he could *finally* discuss his work as an arbitrator because the NAFTA award he rendered, like all NAFTA awards, is in the public domain. Decades of work on other arbitration matters, he said, are in a black box, unexamined and inscrutable.

An eighth influence is *language*. English has become the *lingua franca* of international arbitration. One prominent arbitrator, Jan Paulsson, recently noted that that “[t]en years ago, half my cases were in French and half in English. Now, it’s ninety percent English.”<sup>75</sup> Anglo-American law firms and the English language are a pair, each symbionts of the other. The growth of Anglo-American law firms fosters the dominance of English in arbitration, and the dominance of the English language encourages ever more clients to

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<sup>73</sup> Southland Corp. v. Keating, 465 U.S. 1, 10–17 (1984).

<sup>74</sup> Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 481 (1989).

<sup>75</sup> Michael Goldhaber, *The Court that Came in from the Cold*, THE AMERICAN LAWYER, May 2001, at 98, 101.

seek Anglo-American counsel. For example, in the multi-billion euro dispute between Deutsche Telekom and France Telecom we witnessed a continental family feud that was resolved in European fora with the score kept in euros and arbitrators from Denmark, Belgium, France, Italy, and Sweden applying the laws of Germany, France, Italy, Belgium, Switzerland, and the European Community.<sup>76</sup> The lead lawyers were Americans Gary Born of Wilmer, Cutler & Pickering and Eric Schwartz of Freshfields Bruckhaus & Deringer. According to Gary Born, “[w]hat I brought to the case was expertise in the truly international process that has grown up to deal with that kind of mess, and the ability to argue persuasively in English.”<sup>77</sup>

A final American influence is more subtle and relates to *institutional personnel*. Americans are over-represented at the major arbitration institutions. For example, at the International Chamber of Commerce in Paris, three of the past four Secretaries-General have been Americans. The fourth, Horacio Grigera Naón, joined the American law firm of White & Case following his tenure at the ICC. Americans are often disproportionately represented at other key arbitration institutions, such as the Permanent Court of Arbitration, the Claims Resolution Tribunal, the World Trade Organization, the Iran-United States Claims Tribunal, the International Centre for Settlement of Investment Disputes, and the United Nations Compensation Commission, to name but a few. On more than one occasion I have heard hiring personnel at certain key arbitration institutions lament their inability to hire qualified American attorneys because Americans were already over-represented at their institution. Moreover, many of the personnel at these institutions, be they American or otherwise, come from or depart to American law firms, further enhancing the influence of these firms.

#### IV. CONCLUSION

So is international arbitration becoming “Americanized”? Although many will say no, I think the demographics suggest the answer is yes. As I am writing from Malibu, perhaps you will allow an analogy from Hollywood. As you perhaps will recall, cinema was born in Paris on December 28, 1895 when the Lumieres brothers presented their first commercial motion picture. Much of the early history of film has its roots in Europe rather than the United States. The greatest films were German, the best editing techniques were Russian, and much of the best equipment was developed in France. But it was the establishment in the 1920s of major

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Hollywood motion picture studios—Warner Bros, MGM, RKO, Paramount, and Fox—with their vertical integration and factory system of production that led to the golden age of Hollywood. These studios created an economic juggernaut that assimilated the best and the brightest artists and directors from Europe: Ernst Lubitsch, Pola Negri, Victor Seastrom, and Greta Garbo. Today we all know that the United States is the dominant force in film. This is not to say that there are not great films from India, or great actors from Australia, or great film festivals in France. But the film *industry*, for several decades now, has become Americanized.

Today we are experiencing the dawn of the golden age of the Anglo-American law firm. While the elder statesmen of international arbitration are largely European, the Anglo-American juggernaut we know as the modern international law firm is the defining feature affecting the industry today. With their tight organizational structure, integrated services, global network of offices, and team mentality, these firms dominate international legal practice, including international arbitration. Not surprisingly, much of the greatest young arbitration talent from across the globe aspires—or at least is sorely tempted—to affiliate with these firms. And it is this aspiration, and its realization, that will result in the Anglo-American law firm being the dominant force in international arbitration in the coming decades. And with it, we will see the Americanization of international arbitration reach its high-water mark.