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[ARTICLES]

[PREFACE]

YAR AND THE PURSUIT OF EXCELLENCE

Now that the season of the arbitration moots is upon us, many of us are compelled to revisit our own beginnings as international arbitration lawyers. As we coach a team or sit as mock arbitrator and offer our feedback on student performances, we may end up asking ourselves whether we were ever capable, at that early juncture, of the linguistic and analytic feats that we urge the new arbitration generation to perform. However, as comparisons are odious –and maybe more to the point are rather impossible as between generations– the jury will forever remain out on that particular question, and perhaps fortunately so.

But the mooting activities and annual rite of passage they represent for many young lawyers do provide much opportunity for reflection for the international arbitration bar as a whole: reflection on how lawyers in our field of specialty are or should be trained, on how they may learn to acquire the habits that spur excellence and on what expectations we may reasonably continue to put upon ourselves in our professional lives in the never-ending search to maintain or even supersede our earliest goals for achieving excellence.

And, in the midst of all of this academic activity that seeks to foment excellence, we should never forget to reflect on the ultimate question. That question is the extent to which any such activity in the pursuit of excellence translates directly into acquired skills and knowledge that furnish added value for our clients. It seems crucial for us to be convinced that it does; otherwise, what would be the point of acquiring those skills and knowledge? To think they could be self-sustaining would be naïve. The "liberal professional" is, as much as anything else, a service provider.

If, as lawyers, we teach, we are at the service of our students (and perhaps, to a greater or lesser extent, of the academy). If we work for the government, we are at the service of society. If in government service we work on regulated matters or for the courts, we may even be at the service of the police power. But if we work in private practice, we are first and foremost at the service of our clients. And if we work as arbitrators, we are at the service of the parties that appoint us who are indeed our clients, even as we act as their judge. Consequently, our academic or intellectual pursuits in the field of dispute resolution must never lose sight of the end user to whom we propose to offer our acquired skills and knowledge, in sum our expertise.

This combination of the pursuit of academic and intellectual distinction all the while in the service of a results-based, paying clientele is not unique to the law. Architecture comes quickly to mind, and so does medicine. Higher education, journalism, marketing and even the plastic arts all are professional activities that are forced to navigate the turbulent waters between the Scylla of the academy and the Charybdis of the purse.

Nevertheless, in the field of international arbitration, and regardless of jurisdiction (even if, in particular jurisdictions the challenges might be particularly acute at present), we are keenly aware of the call to "efficiency" or, put bluntly, the client's mandate to cut the costs of arbitral proceedings. In this context "costs", and in particular attorney's or arbitrator's fees, means time. Clients want us to devote less of our time, but naturally to deliver optimal results.

Accordingly, we might ask ourselves to what avail we pursue activity that is not clearly profitable either to service directly the client's needs or to bring more income to our firm or solo practice. While we coach a moot team or draft an article for YAR the client's brief is not getting written ... or is it?

In fact, experience suggests that the more we force ourselves to multi-task, the more efficient we become. And, the profession undeniably requires –regardless of the exigencies of our applicable bar or bars– that we actively continue to pursue our legal education throughout our professional career. With the benefit of hindsight, we come to realize that the law school years are really just the beginning, the baby steps in fact.

It may be that what drew us to the legal profession and particularly to international arbitration in the first place is the special set of challenges that requires our intellectual prowess and our pragmatic bent to work in tandem and simultaneously to deliver the desired results. It has even been suggested that, among specialty practices, international arbitration is among those that suffers the lowest ratio of burn-out. Why should this be? This, the ninth edition of YAR, offers some clues.

Now in its third year of publication, YAR represents everything that both attracts young lawyers to the field of international arbitration in the first place and afterwards maintains the interest of others, the "less young" among us, unflagging.

The completeness of this volume –embracing all stages of the arbitral process, from the agreement to arbitrate to post-award actions for set aside– corresponds to the wide range of issues, both procedural and substantive in nature, that we are fortunate enough to encounter in practice. Its geographical range illustrates the international and indeed transnational aspect of our work which is probably the principle non-academic element that attracted most of us to this field, whether it all started with a multi-cultural upbringing, an aptitude for languages, having fallen in love with someone who happened to hail from abroad, a combination of any or all of the foregoing or just a simple predilection. The variety of topics represents the ever-shifting subject matter that clients continuously bring to our door, forcing versatility upon us and ensuring we will never be bored.

This edition's rich and varied offering includes the following:

Starting with the very beginning of the arbitral process, Mr. Aleksander Fillers of Stockholm University addresses issues arising out of the interpretation of international arbitration agreements.

Focusing on the post-award phase, Mr. Octávio Fragata Martins de Barros and Ms. Mariana Pedrosa Jungstedt of BM&A Advogados in Rio de Janeiro turn to the topic of frivolous challenges of arbitral awards.

General topics on arbitration are presented by Mr. Rainer Werdnik from Werdnik Kusternegg in Vienna, who analyzes the growth of arbitration, while Mr. Stavros Brekoulakis from the School of International Arbitration, Queen Mary, University of London provides an analysis of the school's renowned survey of choices and practices in international arbitration.

Specialty topics include a look at siblings and conflict in international arbitration by Ms. Filipa Cansado Carvalho of PLMJ in Lisbon as well as, also from Portugal, Ms. Maria A. Fernandes and Messrs. Porfírio Moreira, Pedro M. Lopes and Pedro Cardigos' case study on insolvency and international arbitration.

Rounding out the offering is an overview by Mr. Richard Breen from William Fry, Dublin, of recent judicial decisions in Ireland affecting arbitration.

On behalf of YAR, the authors are to be sincerely thanked for their contributions. Not only do they put themselves at the service of YAR's readers by providing them with new sources of continuing legal education; they also exemplify the pursuit of excellence that is a hallmark of this very special field of practice.

Virginia Allan

TO STAY OR NOT TO STAY? A STEP, ESTOPPEL AND A STEP TOO FAR – AN OVERVIEW OF RECENT JUDICIAL DECISIONS IN IRELAND

By Richard Breen and Gerard James

In recent years, significant measures have been taken by both the Irish legislature and judiciary to promote Ireland as an attractive location for the conduct of international arbitration. As a member state of the European Union with an English speaking populace and a common law jurisdiction, Ireland enjoys certain inherent advantages in terms of an ability to attract international arbitration.

Pivotal to the promotion of Ireland as a hub of international arbitration was the enactment by the Oireachtas (the Irish houses of parliament) of the Arbitration Act 2010 (the "2010 Act"). The 2010 Act adopted the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") in its entirety into Irish law.

Prior to the enactment of the 2010 Act, domestic and international commercial arbitrations were governed by separate legislation. The 2010 Act has repealed the earlier legislation and rendered any distinction as between domestic and international arbitrations obsolete insofar as it applies the Model Law to all arbitrations in Ireland commenced on or after 8 June 2010.

The High Court is the relevant court for applications under the 2010 Act. It should be noted that there is no right of appeal from the High Court in respect of applications under the 2010 Act (i.e those permitted by the Model Law). This limitation on court intervention means that the High Court is in essence both the court of first instance and court of final jurisdiction in relation to arbitration applications.

Notwithstanding the limitation of the courts' powers of intervention under the 2010 Act, a considerable volume of jurisprudence continues to be generated in this area. The purpose of this article is to provide an overview of three of the more significant and recent of those judicial decisions.

The importance of these decisions is linked to the growing trend for countries to adopt the Model Law in its entirety into domestic law. As a common approach to the Model Law should inevitably evolve, these judicial decisions have the potential to

impact upon the international arbitration stage.

1. A step

***At what point does a party to an arbitration clause lose its contractual right to arbitrate by participating in court proceedings*?**

A recent unanimous decision of the Supreme Court[1] has provided arbitrators, legal practitioners and observers alike with a degree of clarity on this nebulous issue.

As the relevant contract pre-dated the 2010 Act, the Supreme Court was concerned with the Arbitration Act 1980 (the "1980 Act"), which governed domestic arbitration until the 2010 Act. It is likely that cases under the 2010 Act will be treated by the High Court in a similar fashion.

Section 5 of the 1980 Act, pursuant to which the applicant sought to stay the proceedings pending arbitration, contained similar wording to Article 8 of the Model Law which obliges the court to stay proceeding "*if a party so requests not later than when submitting his first statement on the substance of the dispute … unless it finds that the agreement is null and void, inoperative or incapable of being performed".*

Background

This case arose from a contractual dispute between a construction company ("Lurgan-ville"), two other parties and the two clients, Mr and Mrs Furey (collectively the "Fureys").

A construction contract (the "Contract") was entered into in October 2002. The Fureys were ultimately dissatisfied with aspects of the construction and issued High Court proceedings against Lurgan-ville and the two other parties to the Contract.

The Contract contained an arbitration clause and Lurgan-ville asserted a right to rely on that clause so as to have the proceedings stayed pending arbitration under section 5 of the 1980 Act. This section provided that the time at which an application to stay proceedings must be made is before "*delivering any pleadings or taking any other steps in the proceedings*".

In order to determine the issue of compliance with this time limit, it was necessary for the court to review the procedural history of the case.

At the time proceedings first issued (June 2005), Memoranda of Appearance were filed on behalf of Lurgan-ville and the two other defendants. Further pleadings were exchanged between the Fureys and the two other defendants but not, crucially, Lurgan-ville.

With a view to compelling Lurgan-ville's participation in the proceedings, an application for judgment in default of defence was brought against Lurgan-ville. When the application came before the court, an order was made, with the consent of both sides, directing Lurgan-ville to deliver a defence to the substantive proceedings within a fixed period and directing that Lurgan-ville meet the costs of the application. A short time later, Lurgan-ville asserted, for the first time, a right to rely on the arbitration clause and sought a stay of the proceedings pending arbitration.

The High Court granted the stay application, a decision the Fureys then appealed to the Supreme Court. In arguing that the High Court had been incorrect in granting the stay, the Fureys based their appeal on three separate contentions:

The defendant had taken a "step" in the proceedings such as to prevent it from relying on the arbitration clause.

What was relied on as 'step' in the proceedings was the agreement reached between the solicitors for Lurgan-ville and the Fureys consenting to the court order for the delivery of the defence within the fixed period.

The decision of the Supreme Court was delivered on 21 June 2012 in a judgment by Mr Justice Clarke and it contains extensive reference to Irish and English case law.

In the opinion of Mr Justice Clarke, delivering the unanimous judgment of the Court, the facts of the case positioned it between two ends of a spectrum. At one end of the spectrum is the decision of the English Court of Appeal in *Ford's Hotel Company Ltd v Bartlett*[2] which held that an application to the court for an extension of time for delivering a defence amounts to a step in the proceedings. At the opposing end, is the English High Court decision in *Brighton Marine Palace and Pier Ltd v Woodhouse*[3] which is authority for the proposition that a request in correspondence for an extension of time for delivering a defence does not to amount to taking a step in the proceedings.

However, the most persuasive authority for the purposes of the Supreme Court decision (and incidentally the decision of the High Court at first instance) was an Irish judgment, handed down by the President of the High Court, Mr Justice Finlay in *O'Flynn v Bord Gáis Eireann*[4]*,* the facts of which were extremely similar to the present case.

Mr Justice Clarke cited with approval the statement of Mr Justice Finlay in that case that:

"the court should lean in favour of staying the proceedings and should only refuse … if satisfied that the parties seeking such an order has instituted some process or procedure in the action which involves costs no matter by whom they may be payable which are lost when the matter is referred to arbitration"

Mr Justice Clarke similarly endorsed the observation of his judicial colleague that "*the underlying policy of the 1980 Act was to keep parties to their bargain of having matters agreed to be referred to arbitration ultimately determined by an arbitrator rather than the courts".* [5]

Finally, Mr Justice Clarke observed that "*the court should*

only excuse parties from their bargain where the action taken which is said to amount to a step involves either an engagement with the merits of the case … or involves an action taken by the defendant in invoking the jurisdiction of the court which leads to costs".

Applying this to the facts of the case, Mr Justice Clarke was satisfied that Lurgan-ville had not engaged with the merits of the case i.e. the Fureys' application for judgment. Neither did the actions of Lurgan-ville, which the Fureys had sought to rely on as a step in this case, lead to the incurring of costs.

As the application was already before the court prior to the agreement to deliver the Defence (relied upon as the step in proceedings), any costs attributable to that application had already been incurred. Therefore the agreement between the parties to consent to an order to deliver the Defence did not **of itself** incur additional costs.

The Supreme Court was satisfied that no step had been taken by Lurgan-ville in the sense in which that term is used in section 5 of the 1980 Act and therefore section 5 did not provide a justification for declining to stay the proceedings pending arbitration on that basis.

The conduct of the defendant was such as to reasonably convey an intention on the part of the defendant to defend the court proceedings.

The second strand of the Fureys' related to the conduct of Lurgan-ville in advance of its reliance on the arbitration clause and specifically, whether that conduct had been of such a character as to have created an estoppel.

Mr Justice Clarke accepted the possibility that a party, otherwise entitled to rely on an arbitration clause, may, by conduct, create an estoppel which thereafter prevents that party from being able to continue to rely on an entitlement to have the matter referred to arbitration.

He also identified the possibility that, "*in theory*", there may be cases where although no step has been taken in the proceedings by a defendant, that defendant has, by conduct, become estopped from relying on an arbitration clause.

It is therefore likely that the estoppel argument may in theory, at least, be a complete defence to an application under section 5 of the 1980 Act or Article 8 of the Model Law.

As to the conduct which could estop a defendant from relying on an arbitration clause, Mr Justice Clarke stated it would be necessary to show *"a clear unequivocal promise or representation to the effect that the arbitration clause would not be relied on and that the plaintiff had acted on the basis of that representation".*

Unfortunately, for the Fureys, Mr Justice Clarke could not identify anything in the conduct of Lurgan-ville that could be characterised as amounting to a clear and unequivocal representation or promise that the arbitration clause was not to be relied upon. In fact, the arbitration clause had not arisen for comment between the parties prior to the referral of the dispute to arbitration. On this basis, the estoppel argument could not succeed.

Multiplicity of actions

The third and final strand of the appeal was that the consequence of the proceedings against Lurgan-ville being stayed pending arbitration where the proceedings against the other defendants were not so stayed would give rise to a multiplicity of separate legal processes which would, in all the circumstances, be unjust to a sufficient extent to justify the proceedings against Lurgan-ville not being stayed.

This argument, while outlined in the pre-trial written submissions to the Supreme Court, was not pursued in oral argument as the English decision upon which it relied[6] was not deemed to be good authority in this jurisdiction.

Accordingly, the Supreme Court dismissed the appeal.

With the benefit of hindsight, it would have been prudent had counsel for the Fureys sought to include wording in the consent order that Lurgan-ville irrevocably acknowledged the jurisdiction of the courts to determine the dispute.

2. Estoppel

Estoppel and the circumstances in which a party to an arbitration clause is precluded by reason of its conduct from relying on the terms of that clause was the principal issue to be determined by the High Court in the case of *Mitchell & Anor v Mulvey Developments Limited & Others*[7].

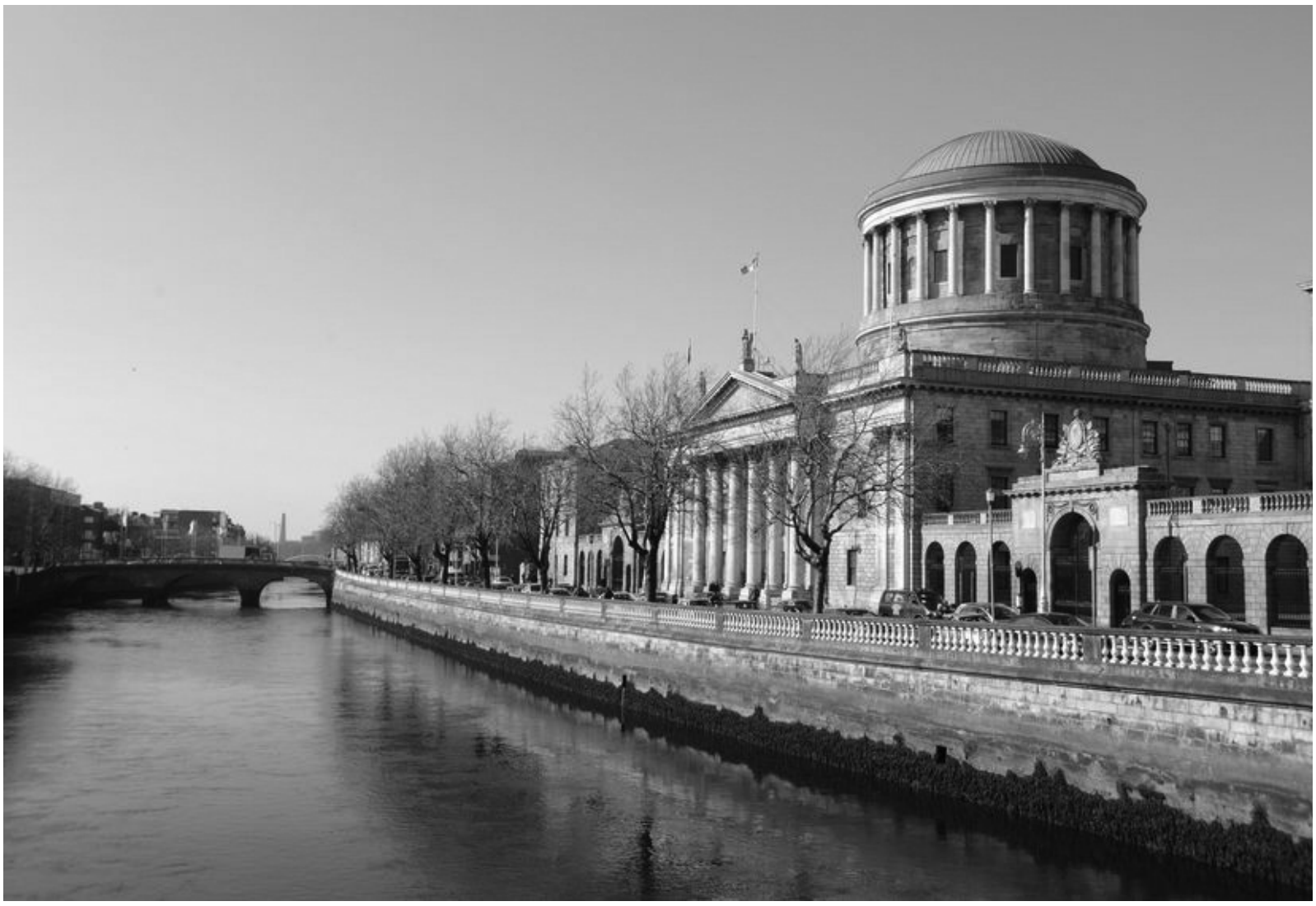
The facts of this case were similar to those in the Lurgan-ville proceedings but the outcome was markedly different.

Background

The plaintiffs in these proceedings had purchased a property in the west of Ireland, which was, they contended seriously defective. On this basis, the plaintiffs sued a number of parties, one of which was the National House Building Guarantee Co Ltd ("Homebond")[8], pursuant to a guarantee provided under the Home Bond Agreement (the "Agreement"), whereby Homebond agreed to repair defectively constructed private dwellings in the event that one of its members defaulted on its obligations to effect such a repair.

The Agreement contained an arbitration clause which Homebond subsequently relied upon to have the proceedings stayed. The plaintiffs opposed this application on the grounds that:

the arbitration clause had been rendered inoperative by virtue of the change of name and title of the relevant Minister from that of the Minister for Environment and Local Government to that of Minister for the Environment, Community and Local Government; and



HomeBond should be estopped by its own conduct from relying on the terms of the arbitration clause.

The validity of the arbitration clause was upheld by the High Court and the only issue to be determined was whether the conduct of Homebond, in advance of its stay application, was such as to estop it from exercising its right under the clause.

Proceedings first issued against Homebond in March 2010. Some thirteen months later, in April 2011, an appearance was filed on its behalf with no explanation for the delay. In June 2011, Homebond requested that the plaintiffs furnish a copy of the Statement of Claim, a pleading which had previously been furnished by the plaintiffs.

In September 2011, the plaintiffs called upon Homebond to deliver its defence to the proceedings. Solicitors for Homebond responded and expressly requested that no steps be taken "*for now in relation to bringing a motion for judgment in default of defence*" and further confirmed that Homebond "*does not intend to delay in these matters*".

By November 2011, no defence had been delivered and the plaintiffs threatened proceedings to compel Homebond to comply with the request. Finally, by letter dated 23 December 2011 (twenty three months after the writ had first been served), Homebond sought to invoke the arbitration clause for the first time.

On the facts, Mr Justice Hogan in the High Court concluded that Homebond had represented to the plaintiffs an intention to engage in the proceedings and to defend the case on its merits. The plaintiffs had relied on this representation and altered their position to their detriment. Consequently, Homebond had forfeited its right to invoke and rely upon the arbitration clause.

Given the striking factual similarities between this case and those in *Furey v Lurgan-ville Construction Ltd* Mr Justice Hogan justified his divergence from the Supreme Court decision in that case as follows:

"*it is the additional factors which were not present in Furey which I find tip the scales in the opposite direction*".

The additional factors, identified in this judgment were:

- the correspondence requesting a statement of claim;
- further requests for forbearance following the delivery of the statement of claim; and
- the fact that the delay was several months longer (albeit only by four months)

The presence of these factors caused the plaintiffs to believe, and to act accordingly to their detriment, that it was Homebond's intention to contest the matter on its merits.

Taken with the dicta of Mr Justice Clarke on the issue of estoppel, there is no doubt as to the willingness of the Irish courts to entertain estoppel based arguments.

3. A step too far

In a world of complex corporate structures and byzantine contractual frameworks, an increasingly common question challenging both arbitrators and members of the judiciary is

the extent to which a non-signatory may rely upon or be bound by an arbitration agreement.

The general rule of thumb, at least in the context of international arbitration, has been that only those party to the agreement, determined by reference to the applicable rules, may be bound by that agreement.

While this issue has received considerable judicial attention in certain jurisdictions, most notably in the UK[9], there has been little or no Irish jurisprudence on this area. The High Court in Ireland however recently considered this imbalance in the case of *P Elliot & Company Limited v FCC Elliot Construction Limited*[10].

The applicant in this case sought to stay proceedings pursuant to Article 8 of the Model Law, in which the plaintiff sought judgment in the sum of £1.2 million on foot of a consultancy agreement.

Background

Somewhat unsurprisingly, a complicated history of commercial and legal relationships existed between the entities connected to the parties involved in the stay proceedings.

FCC Construction SA ("FCC")(a Spanish company) and P. Elliot & Co. Limited ("Elliot")(an Irish company and the plaintiff in these proceedings) entered into a joint venture agreement (the "JVA") which established the framework for a joint bid for the construction of a new hospital in Enniskillen, Northern Ireland. A new entity, NIHG, owned by both FCC and Elliott was established in advance of the bid and pre-qualified in the bid process.

The JVA contained an arbitration clause referring any dispute arising under the JVA or the building construction to ICC arbitration in Geneva. The JVA was governed by the laws of Northern Ireland.

In order to avail of the more advantageous corporate tax regime in the Republic of Ireland, Elliot and FCC were advised not to enter into the primary building contract for the hospital, as had originally been envisaged by the JVA. Instead, a new special purpose vehicle, FCC Elliot Construction Limited ("FCC Elliot")(an Irish company and the defendant in these proceedings) was formed. FCC Elliot entered into the building contract with NIHG.

The governing law of the building contract entered into between FCC Elliot and NIHG was Northern Ireland and exclusive jurisdiction for disputes arising from the contract was conferred on the courts of Northern Ireland.

Shortly after the execution of the building contract, a consultancy contract, the subject of these proceedings was entered into between FCC Elliot and Elliot. Significantly, there was no arbitration clause in this agreement; instead, there was a choice of law and a jurisdiction clause nominating Irish law and Ireland, respectively.

As a final piece of the contractual jigsaw, the construction contract was sub-contracted to a partnership between two Northern Irish registered companies. The sub-contracted construction agreement contained an ICC arbitration clause, and was subject to the laws of Northern Ireland.

High Court Proceedings

The position of Elliot, as outlined in correspondence exchanged prior to the commencement of proceedings, was that the sum of £1.2 million was due to it under the consultancy contract which contained an Irish governing law clause, an Irish jurisdiction clause and no arbitration clause. FCC Elliot insisted that any dispute between the parties was connected intimately with the original JVA which did contain an arbitration clause.

Elliot applied to stay the proceedings on the following grounds:

- pursuant to Article 8 of the UNCITRAL Model Law, as incorporated into Irish law by the 2010 Act; and

- pursuant to the inherent jurisdiction of the High Court to stay proceedings.

As a reminder, Article 8 provides:

"8(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"

In support of its contention that the dispute in these proceedings fell within the scope of the arbitration clause in the JVA, the FCC Elliot cited a body of case law, supportive of a generous interpretation of arbitration clauses that embraced commercial arrangements above and beyond the precise commercial relationship where the arbitration clause was located. As Mr Justice MacEochaidh, the presiding High Court judge in this instance, stated, the cases put forward in support of FCC Elliot's argument "*favour a commonsense approach to relations between enterprises*".

FCC Elliot referred to authorities addressing sequential agreements where earlier agreements contained arbitration clauses but later agreements did not[11]. In those authorities, the courts imputed the earlier arbitration agreements into the later agreements.

FCC Elliot also argued that there was support for the proposition that in multiple contracts containing contradictory dispute resolution and/or jurisdiction clauses, the courts seek to find the "*commercial centre of the overall relationship between the parties and apply the relevant jurisdiction and/or arbitration clause*"[12].

In response, Elliot argued that FCC Elliot was not a party

to the arbitration agreement within the JVA and as such lacked the privity to seek to invoke the terms of the arbitration clause.

Elliot argued that the fact that FCC Elliot was not a party to the arbitration agreement was a "*complete answer to the application and an insurmountable barrier insofar as Article 8 of the Model Law is concerned*".

Decision of Mr Justice MacEochaidh

In circumstances whereby no previous Irish decision had sought to interpret Article 8, Mr Justice MacEochaidh took guidance from foreign decisions, and in particular, endorsed the test formulated by Mr Justice Hinkson in *Gulf Canada Resources Ltd v Arochen International Ltd*[13]*:*

"*The test formulated is that a stay of proceedings should be ordered where: it was arguable that the subject dispute falls within the terms of the arbitration agreement; and where it is arguable that a party to the legal proceedings is a party to the arbitration agreement*".

What is of interest in this case is that the judge rejected the argument put forward by Elliot that the fact that FCC Elliot was not party to the arbitration agreement was a "*complete answe*r" to the application. In doing so, Mr Justice MacEochaidh acknowledged that circumstances can exist in which a defendant seeking a stay in favour of an arbitration clause might not itself be a party to that arbitration clause.

The question to be asked, in the opinion of Mr Justice MacEochaidh, was not whether the party relying upon the arbitration clause itself agreed the clause, but rather, whether it had a "*sufficient connection, whether factually or by operation of law, with the party who agreed to the arbitration clause to invoke the clause and stay the proceedings in which it is a defendant*"

As to what will be considered to be a "*sufficient connection*", Mr Justice MacEochaidh applied the test laid down in the case of *City of London v Sancheti*[14]; that the court must look "*for more than a bare commercial* ***or legal*** *connection between two entities*".

Referring to *Sancheti,* Mr Justice MacEochaidh commented that none of the presumptions deriving from the closeness of the relationship between FCC Elliot and the parties to the original JVA could be said to be more important or effective than the actual consultancy agreement entered into by Elliot and FCC Elliot. By extension, the fact that the parties had seen fit to include an ICC arbitration clause in one agreement and then inserted contradictory clauses in other related agreements was evidence of the true intentions of the parties.

On this basis, the High Court refused the application for a stay and opted not to exercise its inherent jurisdiction.

In *obiter* comments, the trial judge provided an interesting synopsis of Article 8, stating that, at its core, the article was more concerned with ensuring that parties' actions meet their promises;

"Article 8 … directs courts to respect the arbitral process and stay court proceedings not out of deference to arbitration per se, but rather as an expression of the most basic concept in the law of contract -i.e. that parties who have mutually exchanged promises for value may, at the suit of each other, be kept to their promises. Where parties promise to arbitrate their disputes, courts should stay their proceedings in favour of arbitration if that promise is proved".

Conclusion

A common thread linking each of the judgments in this article is the importance for parties, at the contract drafting stage, to clearly address and record the agreed forum for dispute resolution, particularly where multiple contracts are concerned. With regard to the latter, if there is inconsistency, a party seeking to rely on a particular clause could find itself in a position akin to having no clause at all.

From a commercial perspective, these decisions also emphasis the need for speed on the part of a party seeking to rely on an arbitration clause. The emergence of the estoppel argument as a bar to arbitration, notwithstanding the existence of a mutually agreed arbitration clause, means legal practitioners must recognise that a delay can invalidate an arbitration clause.

A delay in seeking a stay and conflicting dispute resolution clauses can often lead to costly challenges, some multi-jurisdictional, for which clients will not thank their legal advisors and to whom they might ultimately turn to look for recompense.

By Richard Breen and Gerard James

1. Furey & Anor. v Lurganville Construction Co Ltd & Ors [2012] IESC 38, (Unreported, SC, 21 June 2012)
2. [1896] A.C.1.
3. [1893] 2 Ch. 486.
4. [1983] 1 I.L.R.M 324.
5. By extension the 2010 Act
6. Taunton-Collins v Cromie & Ors [1964] 1 WLR 633.
7. [2012] IEHC 561, (Unreported, High Court, Hogan J, 20 December 2012).
8. The leading provider of structural defect cover for new homes in this jurisdiction.
9. Continental Bank v AGELAKOS [1984] 1 WLR 558; Harbour Assurance Co. (UK) Ltd; Kansa General International Assurance Co. Ltd [1993] 1 Lloyd's Rep. 455; and City of London v Sancheti [2008] EWCA 1283.
10. [2012] IEHC 361, (Unreported, High Court, MacEochaidh J, 28 August 2012).
11. Emmot v Michael Wilson (No 2) [2009] EWHC 1 (Comm) and El Nasharty v J Sainsbury [2004] 1 Lloyd's Rep 309.
12. UPS AG v. HSH Nordbank AG [2009] EWCA Civ 589.
13. [1992] BCJ 500.
14. [2008] EWCA Civ 1283.

ANALYSIS OF THE SURVEY OF THE SCHOOL OF INTERNATIONAL ARBITRATION ON CHOICES AND PRACTICES IN INTERNATIONAL ARBITRATION

By Dr. Stavros Brekoulakis

Introduction

The 2012 International Arbitration Survey conducted by the School of International Arbitration, at Queen Mary University of London, is the second empirical research sponsored by White & Case LLP. This survey, in many ways, evolves from previous empirical surveys conducted by the School of International Arbitration in the last decade. Yet, being conscious of a slowly growing fatigue with empirical surveys, we wanted this survey to have clearly distinctive features. Indeed, this survey is unique in two ways: first, in terms of its subject matter: while previous surveys have briefly touched upon some aspects of the arbitral process, mainly issues about the arbitrators and the award, this one is the most comprehensive empirical study on the subject of arbitration process. There is a wealth of detailed information and findings covering all aspects of arbitration proceedings. Second, in terms of its demographic sample: while previous surveys focused exclusively on in-house counsel, this one has a broader sample, which includes private practitioners, arbitrators, in-house counsel and arbitral institutions. More importantly, while the size of previous surveys did not exceed 160 respondents, this survey has collected data from more than 700 respondents. Such a big and diverse sample provides more reliable data.

Aims of the survey

With countless procedural practices existing in international arbitration around the world, we sought to identify which of these practices are still divergent or emerging, and which are well established. Equally importantly, we wanted to reveal whether the current procedural practices match the preferences, needs and expectations of those involved in international arbitration. The study examines these questions, with a particular emphasis on the more contentious and recently debated issues in international arbitration today.

Eventually, we wanted this survey to have a tangible impact on different groups of people involved in the practice of international arbitration: for practitioners to have a useful handbook of the arbitration process to look when they discuss and agree on the process of arbitration; for arbitrators to have a good indication of what the parties expect from them; for arbitral institutions to develop a better understanding of what

works and what does not work in the process and take this into account when they review their rules.

Methodology and themes of the Survey

The research for this study was conducted from January to August 2012 and comprised two phases: the first quantitative and the second qualitative. In the first phase, an online questionnaire comprising 100 questions was completed by 710 respondents from March to July 2012. Respondents were primarily private practitioners (53%), arbitrators (26%), in-house counsel (10%), as well as counsel from arbitral institutions, academics and expert witnesses (together, 11%). The majority of respondents (71%) were involved in more than 5 international arbitrations in the past 5 years, and most of them (57%) worked for organisations that were involved in more than 20 arbitrations in the past 5 years. In the second phase, 104 telephone interviews were conducted from May to July 2012. Interviews were based on a set of guideline questions and lasted on average for 15 minutes. Almost all interviewees completed the questionnaire prior to the interview. The qualitative information gathered during the interviews was used to supplement the quantitative questionnaire data, to contextualise and explain the findings and to cast further light on some of the issues raised by the survey.

In terms of legal background, respondents were 48% civil law lawyers and 44% common law lawyers. In terms of geographic locations, respondents were 45% from Western Europe, 19% from North America, 13% from Asia, 11% from Eastern Europe, 8% from Latin America and 4% from Africa and Middle East These are relatively balanced breakdowns and they broadly reflect the number of arbitration practitioners from each legal background and region, fixing thus a criticism of previous surveys.

The findings of the survey are set out under sever thematic chapters, following the "life" of an arbitration:

Selection of arbitrators
Organising the proceedings
Interim measures and court assistance
Production of documents
Witnesses- both fact and expert ones
Pleadings and hearings
Arbitral award and costs

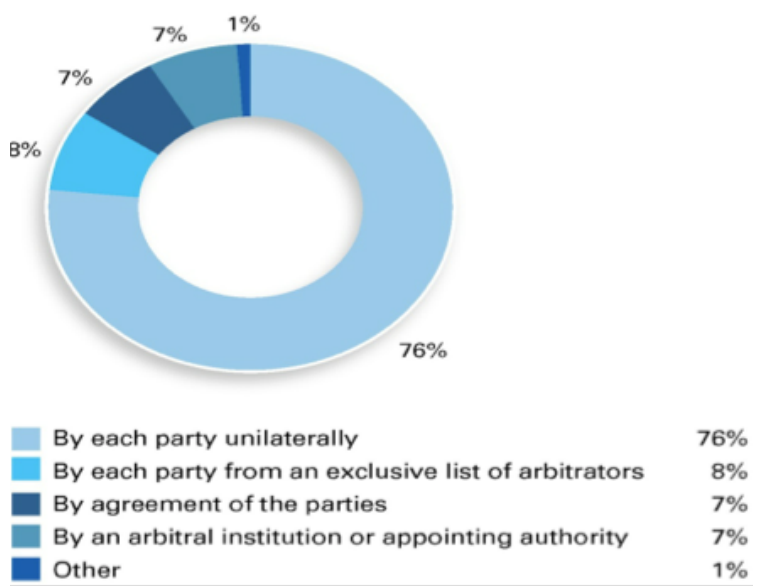
There are more than 100 findings altogether (you can download the report of the survey at www.schoolofinternationalarbitration.org); here are some of the most noteworthy ones.

1. Selection of Arbitrators

What are the preferred methods of selecting arbitrators?

We asked the participants for their preferred method for selecting the co-arbitrators in a three-member Tribunal. The survey confirms a strong preference for unilateral party appointments: 76% of the participants preferred this method (see chart below). The reasons given were that: party selection gives control over tribunal constitution and inspires confidence in process; the parties know what skills and knowledge are required; there is even distrust in some institutions.

Chart 1: By what method do you favour selection of the two co-arbitrators in a three-member arbitral tribunal?

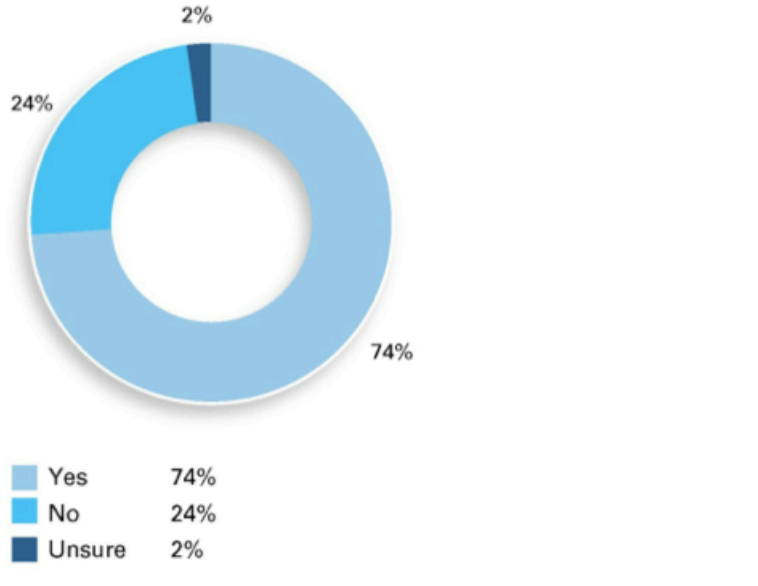


We also sought answers on the preferred method for selecting the sole arbitrator or chair. Here, the majority was still in favor of party selection, albeit significantly less (54%). On the other hand, the preference for the appointment of the chair/sole arbitrator by institution was up to 27%.

Pre-appointment interviews with potential arbitrators

There is also a long-standing debate about whether pre-appointment interviews with arbitrators are appropriate. The survey again reveals a strong endorsement of the practice: 2/3 of participants had experience with pre-appointment interviews and only 12% consider them inappropriate. The chief disagreement here seems to be not on whether interviews are appropriate *per se*, but on the topics that may properly be discussed. The 3 topics identified as most inappropriate were: the candidate's position on legal questions relevant to the case (84%); whether the candidate is a strict constructionist or instead can be influenced by the equities of the case (64%);

Chart 6: Should a party-appointed arbitrator be allowed to exchange views with his/her appointing party regarding the selection of the chair?



prior views expressed on a particular legal issue (59%). Issues that were considered most useful to ask in an interview were availability, personality, and specific knowledge or skills.

Should a party-appointed arbitrator be allowed to exchange viewed with his/her appointing party regarding the selection of the chair?

An issue that sometimes causes friction in cases is disagreement over whether a party-appointed arbitrator may have discussions about the selection of the chair with the party by which the arbitrator was appointed. A strong majority, of three quarters, finds this practice appropriate. The practice is particularly accepted among Western Europeans and North Americans, for both of which the approval rate was 80%.

2. Organising arbitral proceedings

How often are the IBA Rules adopted and are they considered to be useful?

A key aim of this theme was to find how often the parties rely on the IBA Rules on the Taking of Evidence to organise their proceedings. The survey reveals that on average the IBA rules are used in 60 % the arbitrations, mainly as guidelines (53%) and rarely as binding rules (7%). More interestingly, an overwhelming majority of 85% considers the application of IBA rules useful (only 5% responded that they do not find them useful). These findings arguably uncover a discrepancy between the actual use and the perceived usefulness of the IBA Rules. While we do not attempt to speculate as to the reasons for this discrepancy, we caution counsel and parties to bear it in mind and to push for the adoption of the IBA Rules in their arbitrations if that is indeed their preferred approach.

How often tribunal secretaries are used?

The use of tribunal secretaries, and specifically what tasks they should perform, has long been a subject of discussion among arbitration practitioners. Some are firmly against tribunal secretaries, believing that all duties should rest with the tribunal members alone, while others think that tribunal secretaries increase the efficiency of the proceedings and allow arbitrators to focus on the most important aspect of their role – determining the merits of the dispute. The survey reveals that tribunal secretaries are used in only 35% of arbitrations, although they are used more frequently in civil lawyers' arbitrations (46%) than common lawyers' arbitrations (24%). From a regional perspective, the use of tribunal secretaries is most common in arbitrations of Latin American respondents (62%), while least common in arbitrations of respondents from North America (23%) and Asia (26%).

What tasks do and should tribunal secretaries perform?

We asked arbitrators to identify the tasks typically performed by tribunal secretaries, and all other respondents to identify the tasks tribunal secretaries should carry out. There were very few differences between the two sets of findings 8. Interestingly, the survey shows that the concerns which are often raised regarding tribunal secretaries are generally unjustified: only 10% of arbitrators said that tribunal secretaries appointed in their cases prepared drafts of substantive parts of awards, and only 4% said tribunal secretaries discussed the merits of the dispute with them. These findings generally confirm the approach adopted in the ICC's recently revised 'Note on the Appointment, Duties and Remuneration of Administrative Secretaries', which states that administrative secretaries may perform organisational and administrative tasks such as transmitting documents and communications on behalf of the arbitral tribunal, organising hearings and meetings, taking notes or minutes, conducting research, and proofreading and checking citations, dates and cross-references in procedural orders and awards. However, in contrast to the Note which states that the arbitral tribunal should under no circumstances delegate 'its duty personally to review the file and/or to draft any decision', 70% of arbitrators said that tribunal secretaries, when appointed, prepared 'drafts of procedural orders and non-substantive parts of awards'. To put it another way, the views of

respondents are more liberal on this practice: a notable majority (72%) believe that tribunal secretaries should be allowed to prepare such non-substantive drafts.

How common are fast-track arbitrations?

Fast-track or expedited arbitration is regularly cited as a prime method of cost control, but the survey reveals that fast-track arbitration **is not commonly used in practice**. **54% had no experience** with fast-track arbitration, while **41 %** were **involved in a limited number (1-5) of fast-track arbitrations.** However, when asked about their experiences and views of fast-track arbitration, the parties were largely satisfied and **only 9% was negative about its experience of expedited arbitrations.** Indeed, the majority of the respondents said that fast track arbitration worked in practice, and that in general the shorter period time-frames were complied with (93%).

In contrast to respondents' modest experience with fast-track arbitrations, the survey shows that almost two-thirds of respondents are willing to consider

fast-track clauses for future contracts: 60% of respondents said that they would favour fast-track clauses for certain contracts (depending on the contract) and another 5% said they generally favour fast-track clauses for future contracts, while only 21% do not favour fast-track clauses for any contract.

3. Interim Measures and Court Assistance

How common are requests for interim measure?

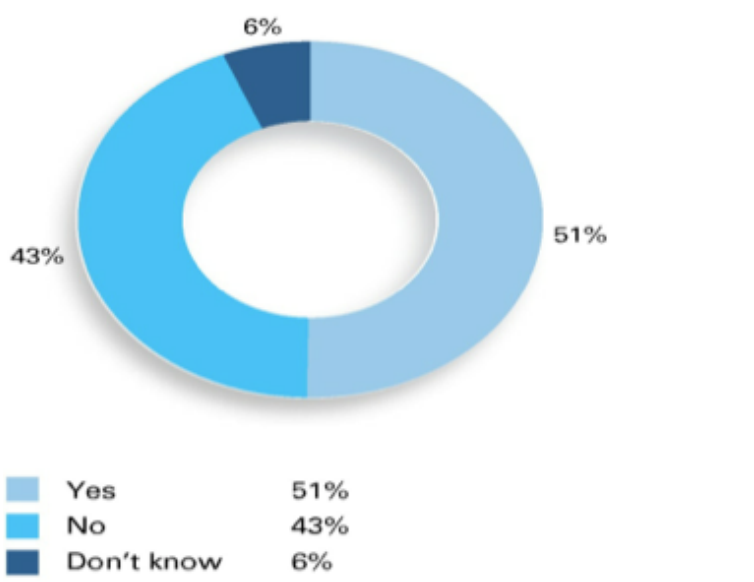
While the use and effectiveness of interim measures in international arbitration is often discussed in theory, the survey reveals that such measures are in fact relatively uncommon: 77% of respondents said they had experience with such requests to arbitral tribunals in only one-quarter or less of their arbitrations. Even rarer are requests for interim measures in aid of arbitration to courts: 89% of respondents had experience with them in only one-quarter or less of their arbitrations.

Moreover, when interim measures are requested by tribunals, arbitrators seem generally hesitant to grant them: on average, only 35% of all interim measures applications addressed to the arbitral tribunal are granted. However, when interim measures are granted by tribunals, parties are in their majority (62%) voluntarily comply with them, and actual court enforcement of interim relief is very rare.

Should arbitrators have the power to order interim measures ex parte?

One of the more contentious 'hot topics' of international arbitration is whether arbitrators should have the power to order interim measures ex parte (i.e., without notice to the party against whom the measure is directed). The survey reveals a slight preference in favour of arbitrators having such a power: while just over half of respondents believe that arbitrators should have such a power, 43% believe they should not. Interestingly, when the results are broken down by legal background, the majority of civil lawyers (56%) are in favour of tribunals having the power to order interim measures ex parte, whereas 38% are against it. In contrast, common lawyers are more divided on this issue: 46% of them are in favour of such power, whereas 48% are against it. The contrast is even starker when the results are broken down by respondents' role: 57% of private practitioners are in favour of ex parte interim measures, compared to 40% of arbitrators and only 35% of in-house counsel.

Chart 16: Should arbitrators in certain circumstances have the power to order interim measures *exparte*?



4. Document production

How common are requests for document production?

It is often said that the best evidence is documentary evidence. However, the document production process is also the most time-consuming and costly stage of the arbitration. The survey confirms that requests for document production are common in international arbitration: 62% of respondents said that more than half of their arbitrations involved requests for document disclosure, while only 22% said that less than one-quarter of their arbitrations involved such requests. Document production is often considered an area of international arbitration where the views and experiences of civil and common lawyers clash the most. The survey confirms the widely held view that requests for document disclosure occur more frequently in the common law world: 74% of common lawyers compared to only 21% of civil lawyers said that three-quarters or more of their arbitrations involved such requests.

How common is the use of the 'Redfern schedule' and how efficient is it?

The 'Redfern schedule', originally devised by English arbitrator Alan Redfern, is a table containing four columns which set out (i) a description of the documents requested; (ii) the requesting party's justification for the request; (iii) the opposing party's reasons for refusing the request; and (iv) the tribunal's decision on each request.

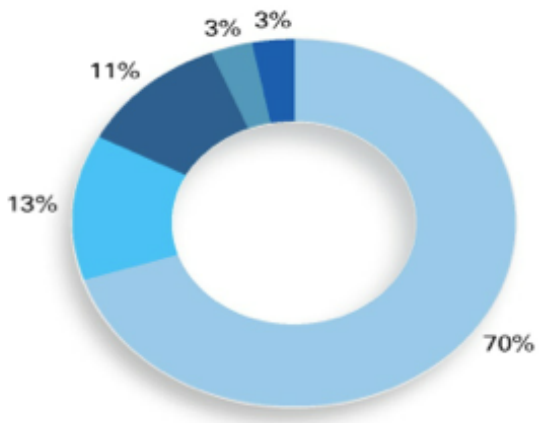
On average, 37% of arbitrations involve the use of the Redfern schedule as a method of managing the document production process. Perhaps not surprisingly given its English origins, the Redfern schedule is used slightly more frequently in common lawyers' arbitrations (43%) than civil lawyers' arbitrations (30%).

Overall, most respondents who have experience using the Redfern schedule find it to be an efficient method of managing the document production process: 46% find it the best method, while only 4% find it inefficient (34% think this depends on the case; 16% have no view).

What are the appropriate standards for the production of documents?

Notwithstanding the differing traditional approaches to document production in civil and common law systems, the survey reveals that 70% of respondents believe that Article 3 of the IBA Rules on the Taking of Evidence are the appropriate standard for a tribunal to order the production of documents in international arbitration, namely that the document should be both *relevant to the case*, and *material to its outcome*. Only 13% prefer a higher threshold whereby only specifically identified documents should be produced, while only 11% opted for a lower threshold whereby all relevant documents to the dispute are disclosed.

Chart 19: What standard should generally apply for disclosing documents in international arbitration?



Article 3(b) of the IBA Rules (i.e. "relevant to the case and material to its outcome")	70%
Only documents that are specifically identified (i.e., not categories of documents)	13%
All documents relevant to the issue in dispute	11%
No disclosure	3%
Other	3%

How often do documents obtained through document production materially affect the outcome of the case?

A majority of respondents (59%) believe that documents obtained through document production materially affected the outcome in at least one-quarter of their arbitrations, and 29% of these respondents believe this happened in at least half of their arbitrations. These findings show that documents obtained through document production are crucial to a statistically significant percentage of arbitrations. The survey thus confirms that, despite being the most costly element of an international arbitration, document production can be a worthwhile step in the arbitral process given its potential to affect the outcome of the case.

The belief that documents obtained through document production materially affected the outcome of the case is significantly higher among common lawyers than civil lawyers: 40% of common lawyers, as opposed to only 17% of civil lawyers, believe this occurred in at least half of their arbitrations. This divergence may result from differing perceptions on the usefulness of document production, and/or from the fact that common lawyers engage more often in document production in international arbitration than civil lawyers.

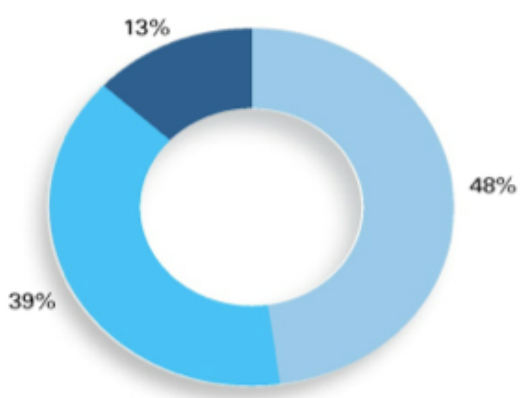
5. Fact and expert witnesses:

How is fact witness evidence usually presented?

The usefulness of fact witness statements is often questioned, so we wanted to find out how often counsel use witness statements and whether they find them effective. A whopping 87% said that fact witness evidence is given in the form of a witness statement. Even more, in 39% of the cases the witness statement is not followed by direct examination at the hearing or is followed by very limited one In contrast, fact witness evidence is offered solely by oral testimony in only 13% of arbitrations. The presentation of fact witness evidence by oral testimony only is more common in civil lawyers' arbitrations (21%) than in common lawyers' arbitrations (6%).

When asked about their preferences, 59% (20% more than the current practice) said that they consider a witness statement an effective substitute for oral direct examination, and they would be happy to go away from it. Most interviewees, however, would still like to keep a limited direct examination (e.g., 5-10 minutes) to allow the witness to settle in and to discuss any issues that arose after the witness statement was submitted. Those interviewees who disliked the idea of substituting direct examination with written fact witness statements explained that this is because such statements are mostly written by lawyers and can often be repetitive of the pleadings. They also pointed out that arbitrators should have the opportunity to assess a witness's credibility before he or she gets 'crushed' by an experienced cross-examiner.

Chart 22: Over the past 5 years, in what % of your arbitrations was fact witness evidence offered by:



Exchange of written witness statements together with direct examination at the hearing	48%
Exchange of written witness statements together with limited or no direct examination at the hearing	39%
Oral testimony only	13%

Is cross-examination an effective form of testing witness evidence?

Cross-examination is sometimes criticized as an evil

transplanted from common law that is a waste of time. We asked the participants about the effectiveness of cross-examination and we found out that the vast majority (90%) believes that cross-examination is either always or usually an effective form of testing fact and expert witness evidence.

How common is witness conferencing?

Witness conferencing is a technique in which fact or expert witnesses presented by two or more parties are questioned together on a particular issue by the arbitral tribunal and sometimes by counsel. The process is said to reduce the time needed to take evidence in complex arbitrations involving many fact or expert witnesses.

The survey confirms that expert witness conferencing is more common than fact witness conferencing, although witness conferencing in general remains relatively uncommon. Only 39% of respondents have experienced fact witness conferencing, whereas 60% of respondents have experienced expert witness conferencing. In both cases, most respondents experienced witness conferencing in only a small number of cases: 33% of respondents experienced fact witness conferencing in only 1-5 cases, and 49% experienced expert witness conferencing in only 1-5 cases.

Participants' **preferences** follow a similar trend, as 62% think expert witness conferencing should be done more often, whereas only 37% said the same about fact witness conferencing. Many in the interviews said that fact witness conferences is often unhelpful, as the witnesses are most likely personally involved in the matter of the dispute and they may become too personal or defensive during this process, whereas for expert witnesses it is more useful technique, as experts are willing to moderate their views in the presence of another peer.

How common are expert witnesses and who should appoint them?

Expert witnesses are appointed in two thirds of arbitrations. They are appointed more regularly in common lawyers' arbitrations (77%) than civil lawyers' arbitrations (57%). 46% of respondents said financial/accounting experts are used most frequently, followed by technical (35%) and industry specific experts (17%), while legal experts are used least frequently (13%). Expert witnesses are appointed by the parties in 90% of arbitrations and by the tribunal in 10% of arbitrations. These results are surprising in view of the continued debate on which method is more effective.

Respondents' preferences are more balanced, as only 43% find experts more effective when they are appointed by the parties, compared to 31% who find Tribunal-appointed experts more effective.

6. Pleadings and hearings

How are substantive written submissions usually submitted? How many written submissions are usually exchanged?

As regards the order of exchange of substantive written submissions: here the survey reveals that sequential exchange occurs much more regularly (at a rate of 82%) than simultaneous exchange (18%). This is also the clearly preferred practice (79%). As interviewees explained here sequential submission allows the parties to engage in a constructive dialogue, whereas simultaneous exchange was described as "two ships passing in the night." Some interviewees said that simultaneous submissions were saving time and costs.

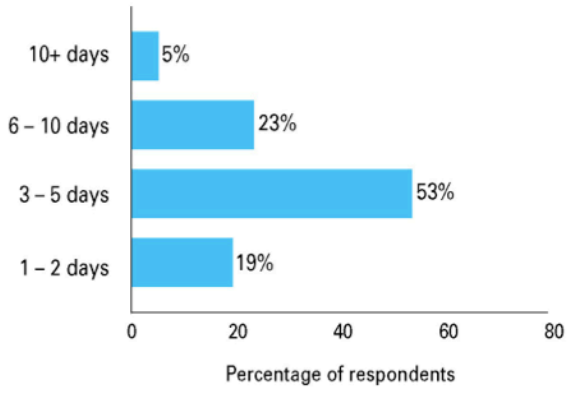
As regards the number of written submission, most parties (63%) exchange four written submissions, namely statement of claim, statement of defence, reply to defence, and rejoinder; 23% exchange three written submissions, and 12% exchange two. Again, practice here accurately reflects preferences, although four exchanges of submissions are preferred by civil lawyers (65%) more than common lawyers (45%).

What is the average duration of the merits hearings?

As regards the duration of hearings, the majority of the respondents (53%) said that the average duration of the final merits hearings was between 3-5 days. 19% of the respondents said that the average duration of the merits hearing was between 1-2 days. Finally, 23% of the respondents said that the average duration of the merits hearing was 6-10 days.

But it seems that civil lawyers are having shorter hearings. From the group of civil lawyers respondents, 31% responded that the average duration of their hearings was 1-2 days. Whereas from the group of common lawyers respondents, only 9 % of common lawyers said the same.

Chart 37: What has been the average duration of the final merits hearings in your arbitrations over the past 5 years?



Conversely, from the group of common lawyers the 34% said that the average duration of their hearings was 6-10 days, whereas from the group of civil lawyers only 12% said that the average duration of their final merits hearing was 6-10 days.

How are time limits imposed at hearings and what is the preferred method?

Hearings can be time-consuming and expensive. One way to reduce the time and costs of proceedings is to impose time limits on oral submissions and examination of witnesses at hearings. The survey reveals that these methods are employed in two-thirds of arbitration hearings: 36% by using the 'chess clock' method (i.e., parties have an overall allocation of time at the hearing which they may use as they please), and 31% by allocating time limits for specific stages of the hearing. The use of the chess clock method is more customary for common lawyers (44%) than civil lawyers (27%), while allocating time limits for specific stages in hearings is more customary for civil

lawyers (38%) than common lawyers (22%).

It interesting to note, that the majority of the respondents actually want arbitrators to impose time limits on the hearing (oral submission and examination of witnesses): 57% (although there is a slight preference for allocation of time limits for different stages of the hearing than chess clock method), and only 6% said that they opposed time-limits.

7. The arbitral award and costs

What is an appropriate length of time for rendering an award?

Another common criticism of arbitration is that tribunals take too long to render awards. According to respondents, tribunals took unjustifiably long to render awards in 28% of arbitrations. Unsurprisingly, arbitrators believe this happened in only 12% of their arbitrations, whereas private practitioners and in-house counsel think this happened in 32% and 33% of their arbitrations, respectively.

Naturally, there are different expectations for sole arbitrators and three-member tribunals with respect to the appropriate length of time for rendering an award. For sole arbitrators, two-thirds (67%) of respondents believe that the award should be rendered within 3 months after the close of proceedings

For three-member tribunals, over three-quarters of respondents (78%) believe that the award should be rendered either within 3 months (37%) or in 3 to 6 months (41%). Interestingly, when the three-member tribunal results are broken down by respondent type, 47% of arbitrators think that the appropriate time for rendering an award is within 3 months, whereas 45% of private practitioners and 50% of in-house counsel think the appropriate time is longer – 3 to 6 months.

How are costs usually allocated?

Arbitrators can allocate costs in a number of different ways. The survey shows that tribunals allocate costs according to the result in a significant majority of arbitrations (80%), on the basis of either 'costs follow the event' (i.e., the unsuccessful party pays all) (50%) or 'apportionment of costs by the tribunal' (30%). In only 20% of arbitrations do tribunals not allocate costs according to the result, instead leaving parties 'to bear their own costs and half the arbitration costs'. But according to participants' preferences, even this 20% is too high, as only 5% favored this method. Thus, the survey provides very strong support for cost allocation according to the result.

Another significant finding is that a whopping 96% of participants believes that improper conduct by a party or its counsel should be taken into account when allocating costs. This sends a strong message to arbitrators that they are expected to penalize improper conduct by parties and their counsel when allocating costs.

Conclusion

Despite the dominance of international arbitration as the dispute resolution method for international business, little empirical evidence exists about what goes on in this inherently private process. For the very first time, the closed doors of international arbitration – a private dispute resolution mechanism – have been opened up for the world to see. We now know which practices in the arbitral process are most common around the world, which are preferred, and by identifying the gaps between them we can help shape the direction of international arbitration.

By Dr. Stavros Brekoulakis

JUGGLING INSOLVENCY AND INTERNATIONAL ARBITRATION - A CASE STUDY -

By Maria A. Fernandes, Porfírio Moreira, Pedro M. Lopes and Pedro Cardigos,
Cardigos e Associados, Sociedade de Advogados R.L

1. Introduction

On 16 October 2012, the Swiss Supreme Court delivered a judgement[1] upholding an interim decision issued by an arbitration court seated in Switzerland on the interplay between insolvency and the jurisdiction of an international arbitration court. Pursuant to the Swiss Supreme Court decision, the jurisdiction of the arbitration court was not affected by the insolvency of one of the parties thereto.[2] For the reasons detailed below we are convinced that the Swiss Supreme Court got it wrong.

2. Some notes on private international law and capacity

Article 186 (1) of Section 12 of the Swiss Federal Act on International Private Law of 18 December 1987 (hereinafter referred to as the "SPILA") encapsulates the *kompetenz-kompetenz* doctrine, setting forth that the arbitration court shall decide on its own jurisdiction.

A necessary prerequisite for the jurisdiction of an arbitration court is that the parties are effectively bound by the relevant arbitration clause. The validity of such an arbitration agreement, and thus the jurisdiction of the arbitration court, is contingent upon the legal capacity of the parties – capacity to have rights (*Rechtsfähigkeit*) and capacity to participate in the arbitration proceedings, *i.e.*, capacity to exercise rights and to be a party to the proceedings (*Parteifähigkeit*).[3] So it follows that the capacity of the parties is a precondition to the jurisdiction of an arbitration court:[4] in the event that one party ceases to be bound by the arbitration clause due to the lack of legal capacity, the arbitration court is deprived of the jurisdiction previously conferred by such clause.

In order to assess the capacity of the parties to participate in the proceedings, the arbitration court shall previously deal with a matter of private international law: which (national) law shall be used as the yardstick for capacity? As far as legal persons are concerned, this question is answered under Articles 154 and 155 of the SPILA, clearly establishing the law of the place of incorporation of the company as the applicable law.

In our case, the insolvent party to the arbitration proceedings was a Portuguese company. So it follows that – and La Palisse would not say it any better – the capacity thereof should be tackled from the angle of Portuguese law.

If the arbitration court was integrated in the jurisdiction of an EU Member State, the same conclusion would be drawn from the rules on conflict of laws within the scope of insolvencies encompassed in the EU Council Regulation (EC) no. 1346/2000, of 29 May, pursuant to which *"the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:* […] *(f) the effects of the insolvency proceedings on proceedings*

brought by individual creditors, with the exception of lawsuits pending".[5]

This understanding of the SPILA as regards arbitration proceedings was confirmed by the Swiss Supreme Court in its decision of 2009 *Vivendi vs. Elektrim (*hereinafter referred to as "*Vivendi* Decision").[6] In this case, the Swiss Supreme Court held that the question of capacity was to be determined pursuant to the law of incorporation of the insolvent party – *Elektrim* – to the proceedings, *i.e.*, Polish law. Because Polish insolvency law deprived an insolvent party of its legal capacity to participate in arbitration proceedings,[7] the proceedings were dismissed. It is worth noting that the solution of the Swiss Supreme Court went further than the outcome that would be achieved if the EU regulation was deemed applicable, as pending disputes are expressly excluded from its scope. (In)Capacity is therefore a matter of Portuguese law.

3. The capacity of the insolvent estate under Portuguese law

Under Portuguese law, the general rule on the capacity of companies is encapsulated in Article 6 of the Portuguese Companies Code[8] (hereinafter referred to as the "PCC"). According to this rule, the capacity of a company comprises all rights and obligations necessary or appropriate for the pursuit of its ends, except for those which are prohibited by law or inseparable from a physical person.

The Portuguese Civil Procedural Code[9] (hereinafter referred to as the "PCPC") establishes that the capability to be party to judicial proceedings is a matter of "*judiciary capacity*" which in turn is comprised within the broader concept of "*legal capacity*".[10] Hence, the *quantum* of judiciary capacity of an insolvent entity is directly and proportionally linked to the *quantum* of its legal capacity[11] as both concepts are quantitative,[12] measured by the extent to which an entity is able to exercise its various rights.[13]

Despite retaining legal personality[14] and being subject to the rules governing companies in general – to be duly adapted in accordance with Article 146 (2) of the PCC - the entire legal structure of an insolvent company in liquidation is altered as of the declaration of insolvency, from its legal capacity to act to its accounting.

The PCC determines the dissolution of the company as an automatic effect of the insolvency decision[15] and liquidation is then initiated.[16] As of this moment, the company's purpose shifts from making profits through its business activities to the satisfaction of the claims of its creditors through the administration and liquidation of its assets. Conversely, its legal capacity is now confined to the purposes of the liquidation process.[17]

The limitation of the legal capacity of the insolvent company impairs its judiciary capacity, such capacity also being limited to the purposes of the liquidation process. Particularly relevant for the subject matter hereof it is the fact that the insolvent estate is prevented from **further participating in arbitration proceedings**.

4. Article 87 of the Portuguese Insolvency Code

4.1. The reasoning of the Swiss Supreme Court

In its decision dated 16 October 2012, the Swiss Supreme Court rejected to construe Article 87 of the Portuguese Insolvency Code[18] (hereinafter referred to as the "PIC") as preventing an insolvent estate to participate in new arbitration proceedings and therefore confirmed its legal capacity to do so.

The Swiss Supreme Court established in its decision that the fact that neither Article 87 of the PIC, nor the relevant provisions of the Polish insolvency law (Article 142) expressly referred to "*legal capacity*" did not allow to infer that both provisions were to be interpreted in the same way.

According to the Swiss Supreme Court, Article 87 of the PIC only refers to the validity of the arbitration agreement, an issue that is exclusively governed by the Swiss *lex arbitri*, pursuant to which the insolvency of a party does not have any impact on the validity of the arbitration agreement.[19]

Surprisingly, the Swiss Supreme Court also concluded that even if Article 87 of the PIC prevented the insolvent estate from participating in insolvency proceedings, such a restriction would solely apply to new arbitration proceedings seated in Portugal, and not in arbitrations seated in Switzerland as in this jurisdiction the legal personality is the only prerequisite to participate in insolvency proceedings.

4.2. Some necessary remarks on Article 87

Article 87 (1) of the PIC reads as follows*:"[w]ithout prejudice to provisions contained in applicable international treaties, the efficacy of arbitral agreements relating to disputes that may potentially affect the value of the insolvency estate and to which the insolvent is a party shall be suspended"*.

From the outset, it is worth noting that as far as we know there is no international treaty provision signed by the Republic of Portugal affecting the aforementioned Article 87 (1).

This provision establishes that upon the declaration of insolvency, the insolvent is no longer bound by any arbitration clause to which it is a party and, as a matter of Portuguese law, lacks the capacity to participate in any arbitral proceedings based on such arbitration clause.

By virtue of Article 87 (1) of the PIC, all arbitration agreements entered into by the insolvent party that may potentially affect the value of the insolvency estate are stayed.[20] Consequently, the insolvency receiver may not participate in arbitrations as representative of the insolvent estate, even with the authorization of the general body of creditors.[21]

The use by the legislator of the term "*stay*" is explained by the fact that insolvency proceedings under the PIC encompass the possibility of the full recovery of the insolvent entity – by means of the approval of an insolvency plan as opposed to the liquidation. In such scenario, the arbitration agreement shall be reinstated with full effect. In view of this, in what regards

insolvency laws, the legislator usually opts for the use of the concept of "*inefficacy*" as opposed to "*nullity*" or "*termination*".

In short, when the liquidation of the insolvent entity is decided, Article 87 (1) must be construed as a straightforward matter of validity *ratione personae* of the arbitration agreement, *i.e.*, the insolvent estate is expressly stripped by law of the legal capacity to participate in arbitration proceedings which have not yet started at the date of the declaration of insolvency.[22]

Article 87 is part of Chapter II of the PIC, under the heading "*Procedural Effects*". This systematic insertion does not amount to say that Article 87 is a mere procedural rule, deprived of substantive effect.

In fact, such restriction on the judiciary capacity is an expression of the *par conditio creditorum* principle imposed by Portuguese law aiming at creating a level playing field for all creditors. In the absence of this restriction, the creditor counterparty to the arbitration agreement would achieve through an alternative means to the insolvency proceedings, a faster and satisfactory decision on its interests to the detriment and without the participation of all other creditors or the judge presiding to the insolvency procedure.[23]

This is to say that Article 87 of the PIC substantively safeguards the principle of the primacy of creditors' protection. Therefore, under a procedural veil, this provision pursues a material goal which would be undermined if absent.

Furthermore, the aims underlying the insolvency proceedings under Portuguese law have an undisputed public policy dimension. In fact, the Portuguese legislator intended to protect the rights of the insolvent estate's creditors and sustain the equality among creditors by implementing comprehensive and universal proceedings of insolvency.

All insolvency creditors must participate in the same universal insolvency proceedings so that the equality of creditors as well as a legitimate decision on the recovery or liquidation of the insolvent entity be considered.

This understanding is confirmed by Article 128 (3) of the PIC setting forth that *"[t]he verification [of credits] consists of confirming all the claims against the insolvent estate, irrespective of their nature or origin, and not even a creditor whose credit has been recognized by a definitive decision is exempted from claiming it in the insolvency procedure, if it wishes to obtain payment".*

It is indeed virtually impossible to reconcile the contractual and *inter partes* nature of the arbitration agreement with the public interest of summoning all creditors in single insolvency proceedings. Insolvency proceedings have a collective nature, aiming at striking a balance and settling competing interests, whereas arbitration is a private dispute resolution mechanism involving only the parties to an arbitration agreement.[24]

In addition, the pursuance of the public interest goals of the insolvency proceedings implies that the relevant interests shall be subtracted from the private autonomy of the parties. The subtraction of the matter of the claim from the private autonomy of the parties is frequently seen as the main criterion for concluding on the lack of arbitrability of a given matter. Hence, if the object of the claim is outside of the scope of private autonomy, the matter will no longer be subject to arbitration, *i.e.*, will not be arbitrable.

It should be pointed out that the PIC contains substantive provisions of contractual law applicable to the agreements pending when insolvency is declared and to which the insolvent estate is a party. These provisions - that have a mandatory nature and thus may override some of the terms and conditions set forth by the parties – aim at protecting the equality between creditors, by restricting contractual privileges of a given creditor that in view of the insolvency situation are deemed unfair *vis-à-vis* the other creditors. Through arbitration proceedings, the concerned creditor would circumvent these mandatory provisions.

Lastly, according to Article 20 (1) of the Portuguese Constitution[25], justice shall not be denied to anyone due to lack of financial means. By its very nature, an insolvent entity is deprived of the financial capacity required to stand on an equal footing before an arbitration court and thus such proceedings run against this fundamental principle of Portuguese law, and, we venture to say, of EU law.

4.3. An ill-founded reasoning

The Swiss Supreme Court misunderstood the concept of capacity (legal and judiciary) under Portuguese law. This is even clearer when this Court considered the concept of legal personality as the relevant criterion to determine the jurisdiction of an arbitration court, concluding that if the insolvent estate has legal personality, then it also has legal capacity to participate in arbitration proceedings seated in Switzerland according to Section 12 of the SPILA.

Pursuant to the Swiss Supreme Court's ruling, this applies irrespective of any foreign provisions that may restrict the judiciary capacity of a party or render the arbitration agreement ineffective. Therefore, the Swiss Supreme Court refused to apply the Portuguese law as far as the capacity of the party to the arbitration is concerned[26] and decided to define the concept of "*subjective arbitrability*" under the Swiss *lex arbitri* in what regards insolvent entities.

In addition, the Supreme Court pointed to further provisions of the PIC according to which an insolvent entity retains legal personality, highlighting in particular Article 87 (2) of the PIC, which sets forth that an insolvent company is capable of participating in arbitral proceedings initiated before the declaration of insolvency.

Therefore, the Supreme Court concluded, wrongly in our view, that even if it were possible to construe a type of "*non-arbitrability*" from Article 87 (1) PIC, this would have no influence on the capacity of an insolvent entity to be a party to arbitration proceedings according to the Swiss *lex arbitri*, as long as that entity retained legal personality.

5. To be or not to be enforceable: the New York Convention

An award rendered in arbitration proceedings, grounded on an arbitration agreement stayed by virtue of Article 87 of the PIC, will be refused recognition and enforceability by the Portuguese jurisdiction.

This is the conclusion resulting from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958, adopted by Portugal by means of Decree-Law no. 52/94 of 8 July 1994[27] (hereinafter the "Convention").

In fact, pursuant to Article V (1) of the Convention, "*[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity (…)*".

As for the scope and meaning of *incapacity*, "*[a]rticle V (1) (a) authorizes non-enforcement if "[t]he parties to the agreement … were, under the law applicable to them, under some incapacity (…). Although this exception, on its face, seems to refer to the parties' capacity at the time the arbitration agreement was made, rather than to their capacity at the time of the arbitration proceedings, the background of the provision suggests that the drafters were concerned with ensuring that both parties be properly represented during the arbitration proceeding; therefore, the provision refers to the parties' capacity at the time of arbitration*".[28] There is, to say the least, little justification for limiting the concept of incapacity in Article V (1) (a) to the time of entering into the arbitration agreement, leaving outside its scope the situations where legal capacity is lost either before or during arbitral proceedings. [29]

In addition, Article 5 (2) of the Convention sets forth that the "*[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: a) The subject mater of the difference is not capable of settlement by arbitration under the law of that country; or b) The recognition or enforcement of the award would be contrary to the public policy of that country*".

Given that the arbitration agreement is stayed upon the declaration of insolvency and, therefore, the corresponding subject matter is not capable of settlement by arbitration, the award could also be refused recognition and enforceability by the Portuguese jurisdiction based upon such proviso.

Moreover, recognition and enforcement of such an award would always run against to the Portuguese public order principles, as it would be contrary to fundamental underlying principles of the Portuguese jurisdiction.[30]

In the *Vivendi* Decision, the Swiss Supreme Court held that the relevant Polish insolvency law provisions regarding the capacity of the parties to participate in an a arbitration were directly applicable and, as such, decisive to determine the legal capacity of the parties – and therefore concluded that said provisions belonged to the category of mandatory rules (*"loi d'application immediate")* and were as such a matter of public policy.

Surprisingly, the Swiss Supreme Court overruled materially such decision in this case, considering that the arbitration court's jurisdiction was unaffected by a similar provision under the law of incorporation, i.e., Portuguese law.

6. Conclusions

The award rendered by the Swiss Supreme Court in

October 2012, upholding the jurisdiction of an arbitration court seated in Switzerland, is difficult to understand in light of the *rationale* followed in *Vivendi*.

Despite following the same basic line of reasoning of *Vivendi*, the Swiss Supreme Court opted this time for a different approach while assessing the issue of legal capacity under Portuguese.

As opposed to the outcome of *Vivendi*, the Swiss Supreme Court decided that foreign insolvency laws cannot, as a rule, affect or jeopardise an entity's capacity to be party to an arbitration governed by the laws of Switzerland: as long as that entity retains legal personality and has at least some "*residual*" legal capacity according to the law of the place of incorporation, it shall be capable of being a party to an arbitration subject to the laws of Switzerland.

A possible explanation for such a "u-turn ruling" is that the Swiss Supreme Court starting point was a will to restrict the scope of *Vivendi* and therefore its reasoning was bended accordingly. It seems that the Swiss Supreme Court intended to reverse Vivendi without actually saying it, a reason why it was emphasised by the court that the *Vivendi* decision was rendered within a very specific context of Polish law and doctrine, and therefore such award was not to be generalized or extended to other jurisdictions.

It is submitted that it is this decision that lacks sound legal foundations. It blatantly ignores fundamental principles of both Portuguese and EU law (EU Council Regulation (EC) no. 1346/2000, of 29 May 2000).

If overriding provisions, part of what we could call the EU public order, are not taken into account, how can one expect that such decisions be recognized and enforced in the relevant foreign jurisdictions? This is of particular importance when, as it was the case, apart from the *lex contractus* and the place of the arbitration, there is no other connection factor with Switzerland: what will then be the point of such an award? That is a question that only a self-serving Swiss Supreme Court can answer.

Maria A. Fernandes, Porfírio Moreira, Pedro M. Lopes
and Pedro Cardigos, Cardigos e Associados,
Sociedade de Advogados R.L

1. Swiss Supreme Court 4A_50/2012 of 16 October 2012, ICC case no. 17321/FM.
2. The party had been declared insolvent and the creditors decided to wind-up the company.
3. See POUDRET & BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 269; and BERGER & KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed., 2010, para. 323-326, 331.
4. "The question of jurisdiction of the arbitral tribunal also comprises the question of the subjective scope of the arbitration agreement. Whether all parties to the proceedings are bound to it, is a question of their capacity to be a party to the arbitration proceedings and, thus, a prerequisite for a decision on the merits or the admissibility [of the claims]". In Swiss Supreme Court DFT 4P.137/2002 of 4 July 2003, cons. 3.2.
5. Article 4 of the EU Council Regulation (EC) no. 1346/2000, of 29 May 2000. In this Regulation there is no reference to the concept of capacity. In fact, as it is common practice, the EU legislator opted for a pragmatic approach in order to remove the hurdles for a uniform interpretation and application of the law deriving from technical and conceptual differences existing between the different national jurisdictions.
6. Swiss Supreme Court 4A_428/2008 of 31 March 2009.
7. Pursuant to Article 142 of the Polish insolvency law, "[a]ny arbitration clause concluded by the bankrupt shall lose its legal effect as of the date bankruptcy is declared, and any pending arbitration proceedings shall be discontinued".
8. Approved by Decree-Law no. 262/86, of 2 September 1986, as amended.
9. Approved by Decree-Law no. 44 129, of 28 December 1961, as amended.
10. Article 5 and Article 9 of the PCPC.
11. See REMÉDIO MARQUES, A Acção Declarativa à luz do Código Revisto, 2.nd ed., 2009, p. 353.
12. On the contrary, the concept of legal personality is a qualitative one: either a party has legal personality or it has not.
13. For instance, Articles 81 and 87 of the Portuguese Insolvency Code restrict the capacity of the insolvent estate to perform certain rights.
14. The legal personality of the insolvent company only ceases to exist upon the closure of the liquidation proceedings.
15. Pursuant to Article 141 (1) of the PCC the declaration of insolvency leads automatically to its dissolution.
16. Unless an insolvency plan is approved under which the company's business may be re-launched.
17. Cf. JOÃO MORAIS LEITÃO & DÁRIO MOURA VICENTE, International Handbook on Commercial Arbitration, Portugal, Suppl. 45, 2006, p. 10-11. According to MENEZES CORDEIRO, "[t]he personality of the legal entity being wound up evolves to the equivalent of what we have called the "rudimentary person". This means that winding up eventually leads to the disappearance of the collective entity". In Tratado de Direito Civil, IV, 3rd ed., 2011, p. 607-608.
18. Approved by Decree-Law no. 53/2004, of 18 March 2004, as amended.
19. Despite the absence of any specific statutory provision in Section 12 of the SPILA, the Supreme Court resorted to a general procedural principle, according to which the capacity of an entity to be a party in proceedings assumes that the entity has legal capacity, that is, the capacity to hold rights and obligations.
20. Conceptually almost all disputes under an arbitration agreement will impact on the value of the insolvent estate. Even if only for the costs of the proceedings, there will be a direct impact on the value of the insolvency estate. In the present case, the effect on the value of the insolvent estate is blatant as the claimant in the proceedings requested the determination of a breach that would – if accepted by the arbitration court - result in a contractual liability amount which would support an otherwise unfounded credit claimed against the insolvent estate.
21. Articles 72 to 80 of the PIC.
22. See SAMPAIO CARAMELO, A Disponibilidade do direito como critério de arbitrabilidade do litígio, Revista da Ordem dos Advogados, Vol. III, 2006, p. 1263-1264. On the impairment of capacity of companies undergoing liquidation proceedings, MENEZES CORDEIRO, op. cit., p. 607-608.
23. See CATARINA SERRA, O Novo Regime Português da Insolvência – Uma Introdução, 3rd ed., 2008, p. 64.
24. Cf. PAUL OMAR, International Insolvency Law: Themes and Perspectives, 2008, p. 33.
25. Approved by a Decree of 10 April 1976, as amended.
26. In this regard, the Arbitration Court had decided in the interim decision that no proof was submitted supporting the existence of a restriction under Portuguese law on the judiciary capacity of the insolvent estate, as far as arbitration proceedings were concerned.
27. Entered into force on 16 January 1995.
28. See CONTINI, International Commercial Arbitration, 8 AM. J. Comp. L. 283, 1959, p. 300-301. According to JAY LAWRENCE WESTBROOK "The context in which the incapacity defence is found admittedly suggests that it may refer to the parties' capacity when the arbitration agreement arose, since article V(I) (a) deals with the validity of the agreement underlying the award and the incapacity clause refers back to article II which applies to recognition of the agreement prior to an award. The earlier drafts containing the incapacity defence had not set it forth in the same provision containing the agreement invalidity defence, but instead had expressly linked incapacity to lack of proper representation. U.N. Doc. E/2704 and Con. 1 (1955), ICA-Convention, supra note 72, at Al.1, Annex .7 (1955 Ad Hoc Committee draft); U.N. Doc. E/CONF. 26/L.17 (1958), ICA-Convention, supra note 72, at B.1.12 (Netherlands Amendments May 26, 1958). Of course, the change in the location of the provision could be argued to demonstrate that the conference intended to make it refer to capacity at the time the agreement arose. However, the Netherlands delegate who offered the incapacity language which was adopted specifically referred to incapacity in relation to the award, not to the agreement, suggesting that the focus remained upon incapacity during arbitration. U.N. Doc. E/CONF. 26/SR.24 (1958)". In International Arbitration and Multinational Insolvency, Rev. 635, 2011.
29. See GARY B. BORN, International Commercial Arbitration, 2009, p. 754.
30. See 4.2., supra.

ALL IN THE FAMILY: SIBLINGS = CONFLICT IN INTERNATIONAL ARBITRATION?

By Filipa Cansado Carvalho

In ICSID case ARB/11/29,[1] the respondent challenged the arbitrator appointed by the claimants on a not-your-everyday ground for refusal, namely that said arbitrator was the brother of the arbitrator named by one of the claimants in another dispute against the same respondent and in which the same facts were being discussed.

The particulars of this case – especially in a context of shortage of publicly available information (in global terms) regarding decisions on conflicts of interest in arbitration – make it worthy of attention.[2]

The relevant facts are quite simple: in May 2011, following the termination, by presidential decree, of the concession agreement for the port of Conakry, the concessionaire initiated, pursuant to the arbitration clause in the concession agreement, arbitration against the Republic of Guinea under the rules of the OHADA Common Court of Justice and Arbitration (the "OHADA arbitration") and nominated as arbitrator Juan António Cremades.

In addition to the OHADA arbitration, in which the concessionaire sought compensation pursuant to the contractual provisions, the concessionaire and other companies of the same group brought ICSID proceedings against the Republic of Guinea later that year on the basis of both the convention on the settlement of investment disputes between states and nationals of other states (the "Washington Convention") and the Republic of Guinea's investment legislation (the "ICSID arbitration"). In these proceedings the claimants appointed Bernardo Cremades as arbitrator.

Prior to the first session of the ICSID tribunal, the Republic of Guinea announced its intention to make an application for the disqualification of Bernardo Cremades pursuant to article 57 of the Washington Convention[3] and rule 9 of the Rules of Procedure for ICSID Arbitration Proceedings. Upon conclusion of the exchange of submissions on the matter and the presentation of comments by the arbitrator in question, the proposed disqualification of Bernardo Cremades was voted on by the other members of the tribunal. Since they were equally divided, the issue was referred to the chairman of the Administrative Council (the "chairman") for decision.

In summary, in its application, the State argued that

the nomination/appointment, by the claimant party, of two brothers in parallel proceedings could only be a deliberate strategy to illegitimately create an advantage to the detriment of the respondent.

In Guinea's submission, the claimants had created an objective situation which was, in and of itself, sufficient to generate legitimate and reasonable doubt as to the independence and impartiality of Bernardo Cremades for the following reasons:

(i) Violation of the principle of party equality: there was a link between the arbitrators nominated/appointed by the claimant party in the two sets of proceedings, whereas no such link existed between the arbitrators nominated/appointed by the respondent;

(ii) Risk of communication of confidential information[4] and opinion between the two arbitrators/brothers: a third party could reasonably fear that Bernardo Cremades would have access to more information than the other members of the ICSID tribunal. This would in turn violate due process to the extent that arbitrators must decide the case based solely on the elements presented and argued before them;

(iii) Risk that Bernardo Cremades could be positively influenced by the decisions taken by the OHADA tribunal because his brother sat on said tribunal: Guinea deemed this analogous to the situation considered in paragraph 3.3.4 of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines" or "Guidelines"), with the main difference that the link between the two arbitrators was, rather than professional, a family one;

(iv) Failure to disclose: the fact that Bernardo Cremades had not disclosed that his brother was acting as arbitrator nominated by concessionaire in the OHADA arbitration reinforced the legitimacy of the doubts regarding his independence and impartiality. The public nature of the family tie between the two arbitrators was said to be irrelevant in view of article 4.1 of IBA Rules of Ethics for International Arbitrators.

The claimants denied the accusation that the nomination/appointment of the two brothers had been determined by a deliberate intention to thus obtain decisions going in the same direction in both arbitrations. They noted that Guinea's position implied that both arbitrators would be willing to breach their ethical duties including their duty of confidentiality, something which was difficult to reconcile with the fact that Republic of Guinea did not call into question (in fact, quite the opposite) the professional qualities or probity of either arbitrator.

They rejected the suggestion that the situation was analogous to paragraph 3.3.4 of the Guidelines stating that it is natural and legitimate that lawyers in the same firm share information and that this can happen even inadvertently since they often have access to the files and information of the whole firm. Conversely, none of this happens in the case of two brothers that do not work together and who are required to keep professional secrecy between them.[5]

As to the coincidence of the facts under discussion in the two cases, the claimants noted that if, as decided in Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19[6] ("Electrabel"), the same person could sit in two different arbitrations in which the same facts or similar facts and the same legal issues were being discussed, the two brothers could, all the more, sit in the two parallel proceedings.

Since there was no conflict of interest and no case law or doctrine identifying such a situation as problematic – the claimants concluded – there was no reason for disclosure, moreover because the relationship between the two arbitrators is public.

The last submission on the subject was filed on May, 11th and on June, 28th the chairman issued his decision. In it the chairman noted that the disqualification procedure exists to ensure that disputes are decided by people that possess the characteristics described in article 14 of the Washington Convention and not to address other issues that do not directly concern those characteristics such as the strategy of the other party. Thus, whether or not Bernardo Cremades should be disqualified by the simple fact that his brother was nominated in the OHADA arbitration had to be decided based upon objective elements of evidence.

The proposal to disqualify Bernardo Cremades was then dismissed for the following reasons:

(i) Regarding the alleged violation of equality of the parties, the chairman decided that the Republic of Guinea had not shown how this could affect the independence of Bernardo Cremades;

(ii) The chairman additionally dismissed as speculation the suggestion that two experienced and renowned international arbitrators that do not have patrimonial and professional common interest would be willing to violate their ethical and deontological duties with the purpose of assisting the claimants in obtaining favourable decisions;

(iii) On the danger of Bernardo Cremades being influenced by the decisions of the other panel, the chairman noted that it was not at all clear or certain that this arbitrator could be influenced by said decisions any more than the remaining members of the ICSID panel or any more than any arbitral tribunal called to rule on issues that had already been decided by another tribunal;

(iv) While the Republic of Guinea had argued that there was no jurisprudence regarding this specific issue,[7] the chairman upheld the argument used by the claimants that – a fortiori and by analogy with the decision in Electrabel – there should be no disqualification;

(v) On the absence of disclosure, the chairman – underlining the non-mandatory nature of the IBA Guidelines[8] – mentioned that the lack of disclosure is not equivalent to a lack of independence and that only the facts and circumstances that have not been disclosed can call into question the arbitrator's independence. He added that it was not clear that Bernardo Cremades was aware of the nomination of his brother in the OHADA arbitration. He also considered that even though the public nature of certain information – such as the

relationship between the two brothers within the arbitration world – is insufficient to justify not disclosing facts that should otherwise be disclosed, the said public nature can be taken into account when deciding if the lack of disclosure constitutes a manifest lack of the qualities required by article 14 (1).

This decision confirms the truism that decisions on challenges against arbitrators are very fact-specific. Its wording suggests that, in terms of arguments, the identity and characteristics of the arbitrators in question were more decisive than the decision in Electrabel.[9]

Since it is well-known that there is a higher threshold for disqualification of arbitrators in ICSID arbitration (and this is patent from the decision, which contains numerous references to the fact that Guinea's proposal was based upon supposition and unproven allegations), one may wonder whether, had this been an international commercial arbitration, the result would have been the same.

We cannot, of course, decisively answer this question, also because the decision on whether or not to uphold a challenge depends on more than the actual facts invoked, and includes, for instance, practical considerations such as the timing of the challenge (for instance, all things being equal, the decision may be different depending uniquely on whether the challenge was made before or after the confirmation of the arbitrator by the institution).

With this proviso it seems, however, that absent any palpable indication that the arbitrators in question would be inclined to violate their duties, institutions[10] allowing the same arbitrator to sit in two parallel proceedings in similar conditions would, a fortiori, have also rejected the challenge.

Even for institutions that would not allow this, it is not clear that the result would have been different. Effectively, there are relevant differences between the two situations: whereas the same arbitrator has automatic and unlimited access to the information of either case without any violation of his/her duties and cannot split his/her mind in two to ignore in one arbitration the facts and arguments of the other, in the case under analysis the access to said information would require a conscious violation of the said duties.

The Republic of Guinea argued that this type of situation was precisely what paragraph 3.3.4 of the IBA Guidelines was intended to avoid and that the only reason why the brotherly relationship was not considered in it was because of its rarity, an argument that seems flawed.

As a matter of fact and as a complement to the above arguments, there is no reason to suppose that two siblings, that do not work together, that do not have common professional or financial interest and that are recurring and recognised participants in the international arbitration system would be more willing to violate ethical and deontological rules or more prone to be influenced in one way or the other by the decisions of the panel in which the other seats than, for instance, two friends.[11]

Furthermore, under point 3.3 of the IBA Guidelines (on "Relationship between an arbitrator and another arbitrator or counsel") close family relationships and close personal friendship were considered, as were parallel proceedings in broad terms. Despite this, close personal friendships were only addressed by reference to relationships between arbitrator and counsel of one party and not between two arbitrators (be it in the same or different disputes). Since this situation will presumably be more frequent than the appointment of siblings, its omission cannot be taken to mean that the reason it was not included anywhere in the Guidelines was because of its rarity and that, had it been thought of, it would be identified as a problematic or potentially problematic situation.

Also, the Republic of Guinea sought to apply paragraph 3.3.4[12] by analogy to automatically disqualify Bernardo Cremades without further consideration, a consequence that the Guidelines do not impose for the situation expressly mentioned in that article. Furthermore, as explained in General Standard 6 referring to "*Relationships*", although "[i]*n the opinion of the Working Group, the arbitrator must in principle be considered as identical to*

his or her law firm", "the activities of the arbitrator's firm should not automatically constitute a conflict of interest."

As to the lack of disclosure, there is no hard and fast rule that failure to disclose automatically generates justifiable doubts as to the arbitrator's impartiality and independence. On the contrary, point 5 of Part II of the IBA Guidelines reads "*In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so*."

Also, article 4.1 of IBA Rules of Ethics for International Arbitrators[13] states that a failure to disclose may – rather than will – of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification. It is difficult to argue that this will be the case when (i) the specific situation at stake is not referred to in any rule, guideline, case-law, etc. and (ii) it is unclear whether the arbitrator was even aware of the facts in question. In fact, in the current state of the art it seems difficult to sustain that the reasonable enquiries to investigate that are the other side of the duty to disclose would include investigating whether a sibling had been appointed in a related affair.

As to the Republic of Guinea's allegations on the supposed violation of the equality principle, they seem somewhat formalistic: not all differences between the parties are tantamount to a (relevant) violation of this principle.

In conclusion, while independence and impartially are nowadays generally recognised as a cornerstone of arbitral proceedings (and not only in international arbitration), in practice doubt continues to exist in regard to conflicts of interest. The reasons behind the publication of the IBA Guidelines[14] are as relevant today as they were in 2004. While certain types of conflicts are recurrent and have been extensively debated, there is virtually no guidance when it comes to close personal relationships (including family and friends) outside the cases expressly addressed in the IBA Guidelines. This grey area will assume a darker tone when combined with problematic issues in arbitration as is the case of parallel proceedings.

It is easy to understand why these issues are not specifically addressed in the IBA Guidelines. They were prepared based upon the known and available information and judgment of the members of the Working Group and others involved in international commercial arbitration and this type of situation was not very common. In addition, they do not purport to be comprehensive.

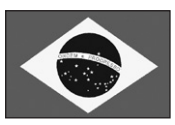
This being said, to the extent that it would be possible to establish some further guidelines in respect of this type of situation,[15] this might prove beneficial in the future. While it is fair to assume that conflicts involving two arbitrator siblings will remain rare, anedoctal evidence suggests that other types of close personal relationships between participants in the arbitration arena are increasing. While they will most probably never become pervasive, they may give rise to different decisions[16] which may in the long run cause disturbance to the entire system.

Filipa Cansado Carvalho

1. I am a member of the legal team of one of the parties in this case. All the factual information from the cases mentioned in this article is publicly available on line. The decision commented on here is res judicata and is available in the French original at https://icsid.worldbank.org.
2. This article does not purport to make a thorough analysis of all the arguments used by both parties and will merely focus on the most significant or interesting ones.
3. This article reads in the relevant part: "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." Article 14 (1) in turn reads: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."
4. Such as information regarding the discussions within each panel regarding the case.
5. Guinea had commented en passant that, in fact, the two arbitrators had worked together in the past. In his observations reiterating his independence, Bernardo Cremades stressed that he had not had a professional or financial relationship with his brother for the past 13 years.
6. While the decision on disqualification is not public, reference can be made in this regard to published comments of claimant's counsel: "the claimant sought to challenge the appointment by the respondent of Professor Brigitte Stern on the basis that she had also been appointed as an arbitrator by Hungary in another Energy Charter Treaty claim, AES Summit Generation v Republic of Hungary. Electrabel's complaint was that: both arbitrations arose out of similar factual circumstances relating to the generation of electricity in Hungary and out of similar long-term Power Purchase Agreements; both arbitrations concerned the same governmental decree which had the effect of reducing tariffs significantly; both arbitrations related to the Energy Charter Treaty; both arbitrations were registered on the same day consequent to which the proceedings would likely run more or less in parallel; and Professor Stern would very likely be privy to evidence and arguments in the AES arbitration which would not have been seen by counsel to the claimant or the other two arbitrators in the Electrabel arbitration. The two remaining arbitrators, Professor Kaufmann-Kohler and Mr V.V. Veeder QC (chairman), rejected the challenge." Audley Sheppard, Arbitrator Independence in ICSID Arbitration, International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer, 2009, page 154.
7. Guinea grounded its position on (i) the nature of the link between the two arbitrators and (ii) on the identity of facts discussed in the two arbitrations, which in its submission meant that the dispute in question before both tribunals was the same. On this point specifically, the chairman stated that in any event the legal grounds for the claims in the two arbitrations were different.
8. This is clear from the wording of the Guidelines themselves. In their submissions the parties never discussed the nature of the IBA Guidelines, although the respondent referred to them as the "IBA Rules" and the claimants referred to them as the "IBA Guidelines".
9. This decision was not a guarantee that the disqualification of Bernardo Cremades would be rejected, inter alia, because the chairman was not bound by said decision.
10. What is said here regarding institutions applies mutatis mutandis to courts that are called to analyse this question.
11. While this distinction does not exist in the IBA Guidelines, which consider these two types of personal relationship jointly, the situation might be different for other types of close family relationship, i.e. if instead of siblings we were for instance talking about spouses or life partners.
12. This paragraph is included in the Orange List, which non-exhaustively enumerates specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence.
13. And not of the IBA guidelines, as mentioned by lapse in the chairman's decision.
14. While this is not the only available instrument on the subject of conflict of interest practice, arbitration literature and case law reveals that the IBA Guidelines are consistently referred to for guidance on the subject of conflicts of interest in international arbitration.
15. Going beyond acknowledging independence and impartiality as an overriding requirement of arbitration as a legitimate alternative mechanism of solving disputes and the general principles of Part I of the Guidelines and including some of these situations in the existing red – non-waivable and waivable –, orange and green lists as appropriate.
16. Thus, in separate ICC arbitrations in which I was recently involved two seemingly similar situations were addressed in a distinct manner by two equally distinguished and knowledgeable international arbitrators: in one case, the arbitrator nominated by the claimants disclosed that the wife of respondents' counsel was a partner in his office; conversely, in the other the President failed to disclose that the wife of the respondents' counsel worked in his office.

FRIVOLOUS ANNULMENT ACTIONS: A QUICK GLIMPSE FROM BRAZIL

By Octávio Fragata Martins de Barros and Mariana Pedrosa Jungstedt[1]



An important characteristic of arbitration and perhaps one of the main benefits that distinguishes it from litigation before the ordinary courts is that the arbitral award, even though it produces similar effects to a judgment rendered by a court of law, is not subject to appeal on the merits.[2] In most arbitration statutes worldwide there is no appeal, at any instance, against the merit of the award. Likewise, in arbitration the many opportunities to pursue interlocutory appeals (at least under Brazilian procedural law) do not exist, and the fact that arbitral tribunals have issued diverging or dissenting opinions does not give grounds for the review of the arbitral award.[3] Finally, one should mention that when the parties choose to submit their dispute to arbitration, they also commit themselves to accept the award rendered by the arbitrator(s), even when the tribunal's understanding of the law may be considered to be wrong.

These are some of the reasons why the legislator sought to protect arbitral jurisdiction by giving these impartial and independent third parties the power to rule on their own jurisdiction. Thus, any question concerning the lack of arbitrability of the dispute or any type of challenge against the arbitrators must be submitted to, and decided by, the arbitrators themselves or, ultimately, by the governing arbitral institution, all depending, naturally, on the applicable arbitration rules, if any.

The safeguards surrounding arbitral jurisdiction, which apply both to the arbitrators' authority to be the first to decide on jurisdiction and to the merits of their award, and exempt the arbitral award from the endless appeals provided for in the Brazilian Code of Civil Procedure, are not absolute. In fact, most legislations worldwide, assuming that even arbitrators can be mistaken, provide that in very limited circumstances (see, for example, article 32, Law 9307/1996), an arbitral award can be challenged through annulment proceedings. In these few cases, the questions usually relate to matters that affect the

entire legitimacy of the arbitral process, such as issues of the validity of the arbitral agreement, the (lack of) capacity of the arbitrator when rendering the award, or the arbitrator's breach of due process, particularly the right to a full defence and the principle of equal treatment of the parties.

Although it was the legislator purpose to restrict as much as possible challenges to arbitral jurisdiction and arbitral awards, Brazilian courts have seen an increasing number of actions for declarations of nullity that seek to evade the legislator's intention and that may be described, for all intents and purposes, as frivolous annulment actions.

Although it is difficult to give a precise definition of a frivolous annulment action, one element that must be examined is whether the action constitutes a clear abuse of the right to bring annulment proceedings., i.e. an abuse of the annulment process.

If the ultimate goal of the law is to maintain a balance between opposing social elements, broadening the use of annulment proceedings in matters clearly not envisaged will therefore disrupt this "social harmony" and should be discouraged. The abuse of this right can be described as an exercise that works contrary to the economic and social purpose of a given entity. In the arbitral process, for example, these different social elements go from the need to give certainty to the market that their right to arbitrate will be secured notwithstanding any direct (via arguments against the arbitration agreement) or indirect (via repeat challenges to arbitrators) attack on the arbitral jurisdiction to the need to assure that core values such as due process and the right to be heard be respected.

Different legislations have been enacted to prevent the abuse of right. Article 17 of the Brazilian Code of Civil Procedure allows judges to penalize parties that are litigating in bad faith with the simple objective of postponing a decision. In the United States section 28 of the United States Code, paragraph 1927, states that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct".

It was based on this section that American Courts have recently granted three decisions that may assist those seeking to identify those annulment proceedings that may be considered "unreasonable" and "vexatious". These decisions will cast some light on the increasing "exasperation" of the ordinary courts when it comes to annulment proceedings that in the end subvert their intended purpose.

In the most recent decision, *DigiTelCom Ltd v. Tele2 Sverige AB*[4], the United States District Court for the Southern District of New York imposed a sanction on the attorneys of the unsuccessful party that is equivalent to a penalty for litigating in bad faith under Brazilian Law. The arbitration in question began in 2009, when DigiTelCom Ltd filed a request for arbitration before the ICDR against Tele2 Sverige AB, claiming breach of a contract that provided for expanding mobile telephone services in Russia. The claim was rejected in an award rendered by the Arbitral Tribunal in September 2011, which also decided that the claimant was liable to pay the respondent for its attorneys' fees, in an amount of approximately of USD 2 million.

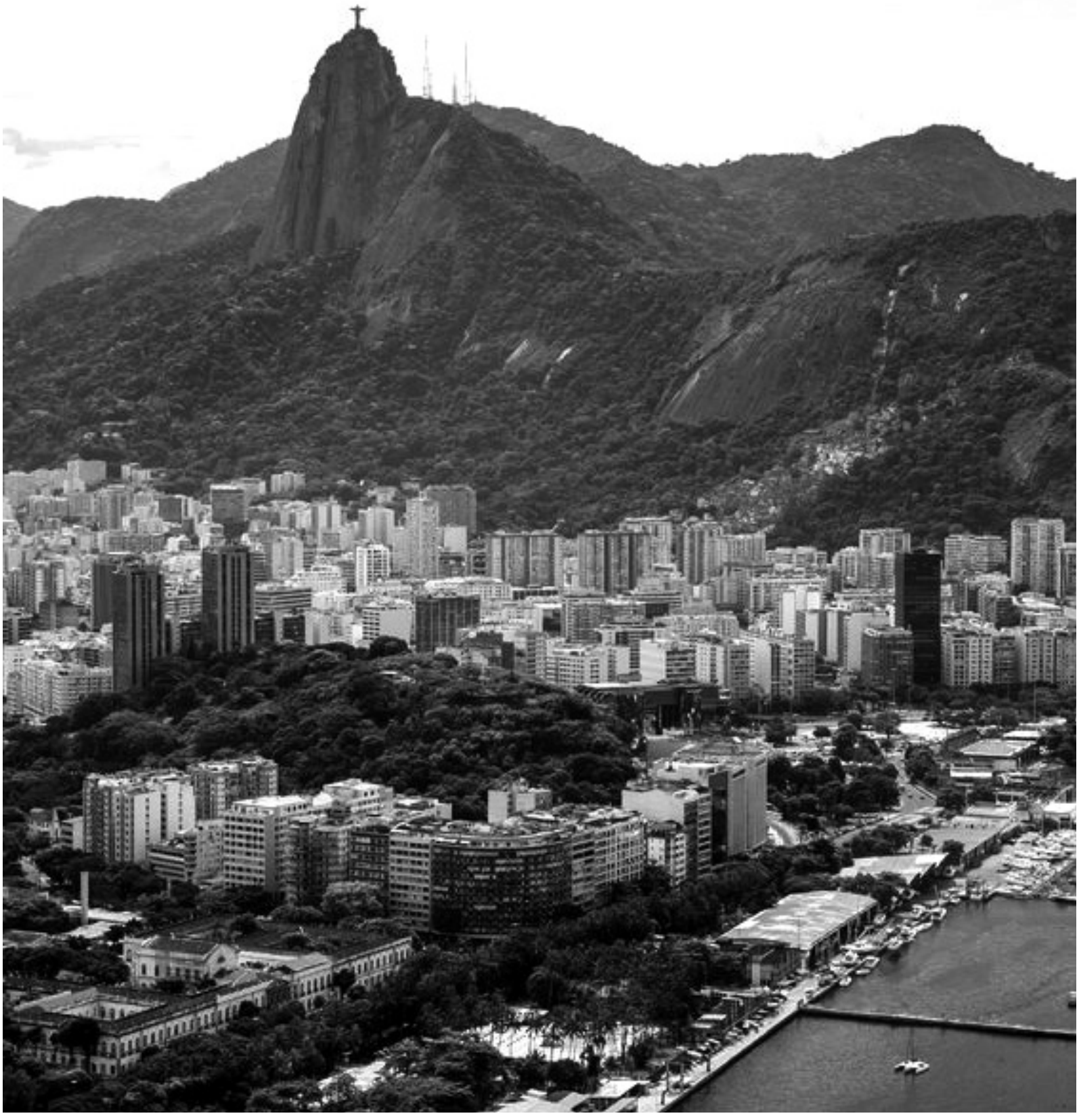
In its action to vacate the arbitral award, DigiTelCom alleged that the Arbitral Tribunal had incorrectly performed its functions by misinterpreting the contract, by disregarding the law that governed the contract in ordering one of the parties to pay the other party's attorneys' fees, and by rendering an award that disregarded most of the facts, thus putting the arbitrators' impartiality into question. The District Court found that the action to vacate the award was intended exclusively to delay the enforcement of the arbitral award, and was based on purely speculative grounds. According to the court, the imposition of a sanction on DigiTelCom was justified because "litigants must be discouraged from defeating the purpose of arbitration by bringing such petitions based on nothing than dissatisfaction with the tribunal's conclusions".

In a similar case, *DMA International Inc. v. Qwest*[5], the United States Court of Appeals for the 10th Circuit imposed a sanction on DMA International Inc. ("DMA"), which sought to vacate an arbitral award on the grounds that the award was manifestly contrary to law and to public order, and that the sole arbitrator lacked impartiality, exceeding his powers. The matter in dispute in the arbitration was the amount owed to DMA for database research services contracted by Qwest, and the arbitrator decided in favour of Qwest.

The United States Court of Appeals for the 10th Circuit rejected all DMA's arguments, and held DMA's attorneys liable to reimburse the attorneys' fees incurred by Qwest. The court held that the proceeding to vacate the award was groundless, and intended exclusively to postpone the effects of the arbitral award, thus breaking one of the "promises" of arbitration – procedural celerity and cost optimization.

The last of the cases is *B.L. Harbert Int'l LLC v. Hercules Steel Co*.[6] Unlike the others, the United States Court of Appeals for the 11th Circuit decided not to impose sanctions, although it did state that frivolous actions to set aside arbitral awards give the court room to order payment of sanctions. The court's decision was based on the duty of the ordinary courts to ensure that arbitration is an end in itself and not merely a preparatory stage to litigation before the courts: "[i]f we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less.".

Although we have not yet come across any Brazilian case law finding that an annulment proceeding is frivolous, or imposing a penalty for litigating in bad faith in such an hypothesis, the policies surrounding the Brazilian Arbitration Law interpreted jointly with article 17, VII, of the Brazilian Code of Civil Procedure are equivalent to those principles



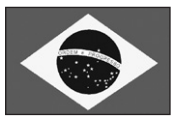
applied in the American cases described above. And although the subjectivism of the law gives margin for parties to adopt this kind of behaviour or procedure, it becomes even more important to assess, with care, the real chances of success. The Brazilian Judiciary has been showing a clear understanding of the law and principles of due process that preside over the institute and, certainly, it will not take long for Brazilian judges, like their U.S. counterparts, to make use of punitive measures as an useful and effective tool to deter ill-intended parties, thus preserving the health and future of arbitration.

Octávio Fragata Martins de Barros
and Mariana Pedrosa Jungstedt

1. Associates with Barbosa, Müssnich & Aragão Advogados.
2. Brazilian procedural law provides ample opportunities for appeals. The merits of a decision can be challenged by means of an appeal (apelação, provided for in article 513 of the Code of Civil Procedure – CCP). It is also possible to appeal from interlocutory decisions (agravo – art. 522 CCP), and to petition for clarification (embargos de declaração – art. 535 CCP) of decisions that are unclear, obscure or contradictory. A "special" appeal to the Superior Court of Justice (Superior Tribunal de Justiça) lies when a decision is contrary to federal legislation, and an "extraordinary" appeal can be made to the Supreme Federal Court (Supremo Tribunal Federal) when the judgment is contrary to the Federal Constitution (art. 541 et seq. CCP).
3. An application for review (embargos infringentes – art. 530 CCP) can be filed when a non-unanimous decision by the court of appeal overturns a ruling on the merits of the case.
4. DigiTelCom, Ltd. v. Tele2 Sverige AB, No. 12 CV 3082(RJS), 2012WL3065345 (S.D.N.Y. July 25, 2012).
5. DMA International, Inc. v. Qwest Communications International, Inc.,585 F.3d 1341, 1345 (10th Cir. 2009).
6. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006).

REVIEW OF ARBITRATION IN BRAZILIAN OIL INDUSTRY

By Eduardo Helfer Farias, Gilvan Luiz Hansen and Sérgio Gustavo de Mattos Pauseiro



Introduction

The purpose of this work is to approach the subject of arbitration and the Oil International Industry in Brazilian law by comparing it to the Norwegian Law system.

Following we will assess the downstream operation of Petrobras in the investment made in the Petrochemical Complex of Rio de Janeiro – COMPERJ.

1. Arbitration in oil international law

With respect to the importance of arbitration in international contracts it is worth mentioning that the statement from Jean Robert and Bertrand Moreau saying that: "currently, it is not possible to conceive a meaningful international contract without the arbitration convention."[1]

The use of arbitration in contracts for the sake of oil exploration and production is widely acclaimed.[2] According to Jacob Dolinger, it has been verified in oil contracts the case of "nationalization", as the oil producing countries members of OPEC started to implement measures to exclude all foreign jurisdictions to resolve conflicts resulting from such contracts.[3] In order to sustain his understanding, the author mentions the award approved at the 16th Conference of OPEC, held in Vienna on June 1968, which was later confirmed by the nine countries members of the organization:

"Except as otherwise provided in the legal system of the signatory country, all differences occurring between government and operators shall be exclusively submitted to the jurisdiction of the competent national courts or to the regional specialized Courts."

Thomas Walde notes in his book on "International Energy Arbitration", the reluctance of traditional oil industry companies to submit to the procedures of State Justice, especially the companies frequently involved in joint ventures.[4]

Therefore, in order to avoid, or at least to mitigate the

effects of the state sovereignty, the international agreements in the Oil Industry have presented two distinct characteristics: the first is the obligation to resolve the conflicts by means of arbitration in international courts, and the second provides that the agreement shall be ruled according to the law in force at the time of its execution.[5]

A large number of precedents in international arbitration preserve foreign companies in the activity of mineral deposits exploration:

1) ***Topco v. Calasiatic***, involving the nationalization of concessions to foreign companies by Libya. The arbitrator decided that, in Resolution 1.803, the UN General Assembly had represented the International law commonly used in expropriations. The arbitrator decided that the affected foreign companies were entitled to full compensation (*restitutio ad integrum*).[6]

2) ***Liamco v. Libya***, another arbitrator denied the intended indemnification, on the ground that it was incompatible to national sovereignty, thus awarding a minimum compensation.[7]

3) ***American International Group Inc. v. Iran***, involving the nationalization by Iran of the plaintiffs' interests, in an insurance company. The court rejected the dispute of the plaintiffs, which had claimed that the nationalization was illegal by reason of lack of quick, suitable, and effective compensation, however, the court decided that the plaintiffs were entitled to compensation and that the most appropriate criteria for the amount had to take into account not only the net price, but also the elements such as future profits the company would have if had continued its businesses.[8]

2. Review of arbitration in oil national industry

Two major events were critical for the current stage of Brazilian Oil Industry: (i) the enactment of the Constitutional Amendment n. 9, of November 9, 1995 ("EC no. 9"), and (ii) the subsequent edition of Law 9.478, of August 6, 1997 (Oil Act).

The EC no. 9[9] has eased the state monopoly over oil, by allowing that the Brazilian Federal Government engages "with state or private companies" to perform it, thus enabling the participation of major world-class players to work alongside the Brazilian national company Petróleo Brasileiro S.A. – PETROBRAS.[10]

Following, the Law 9478/97 ruled this new reality in contracts among federal public administration and private companies in oil exploration, with special attention to item X of article 43, which had authorized the use of international arbitration as a way of conflicts solution:

"...the concession contract must faithfully reflect the conditions of the bidding invitation and the winning proposal and shall contain as its essential clauses the rules of conflict resolution related to the contract and its execution, including the mediation and the international arbitration."

This law had a revolutionary impact, if we take into consideration the moment it was enacted. The Law no. 9307/96 (Brazilian Arbitration Act – LBA) had been enacted just a year ago, Brazil had not embraced the New York Convention of 1958 on the Recognition and the Enforcement of Foreign Arbitration Awards, and the national jurisprudents were still suspicious about the regulation. Over time, the use of arbitration became conciliatory and regular within such contracts.

However, with the discovery of the Pre-Salt Layer, the Brazilian Government radically changed its position on the use of arbitration in oil contracts and also on its own oil contracts. Since it was considered a "national strategic area", the Pre-Salt was a target for specific legislation of Laws 12.276/10 and 12.351/10.

Law 12.276/10, approved on June 30, 2010, authorized the Federal Government to assign under the aegis of onerous concession, without need for competition, the performance of activities of research and prospect of oil, natural gas and other hydrocarbon fluid in areas that were not yet granted located in the Pre-Salt.

Since the Law did not expressly provided for the use of alternative means for solution of conflicts, a legal opinion from the Office of the General Counsel to the Federal Government ("AGU") no. 12/2010,[11] which became adopted by the Federal Government prior to the enactment of Law 12.351/10.

In the referred opinion, it was the understanding of the AGU, as well as the Federal Government, that (i) the international arbitration would be "not suitable" for Law 12.276/10, provided that it was a "national security" area and (ii) the conflicts that may eventual arise only concern to Petrobras, the Federal Government and Oil National Agency ("ANP"), and therefore, must be settled by the Mediation Chamber and Arbitration of AGU ("CCAF"), especially created to resolve conflicts between members of public administration.

However, subsequent to the approval of the Legal Opinion, the Law 12.351/10 was enacted on December 22, 2010 which ruled the exploration and production of oil in the Pre-Salt, by means of a public tender regime, governed by the Oil National Agency. There is a extensive number of debates about the opinion, but for the purposes of this article we will focus on the (i) obligation of any public tender winner for the exploration of the Pre-Salt, other than Petrobras, to form a consortium with Petrobras in order to perform the exploration, and (ii) the authorization for the use of mediation and arbitration provided for in its article 29, XVIII.

Notwithstanding the Opinion does not admit Law 12.351/10, it is not possible to firmly affirm whether the Opinion will influence the law or not. The reason for that is that the line of reasoning adopted by the Federal Government to justify its adoption was that of "conflicts between members of the public administration must be resolved internally or in court".

Petrobras is a publicly traded joint stock corporation,

controlled by the Federal Government. However, for the purposes of the Opinion it was considered as part of the federal administration.[12]

Petrobras not only holds the right to research over the Pre-Salt, as mandatorily must be a part of each winner consortium for the exploration and production in Pre-Salt areas. According to article 7 of Law 12.351/10, Petrobras will also be the operator of the explored block. Therefore, it is hard to affirm whether the Federal Government and the Legal Power will not construe that article 29, XVIII mandatorily refers to arbitration before CCAF.

Nonetheless, in the Oil International Law, the development is not conceived other than through cooperation, which requires the association of companies for the performance of projects in the sector. Such association is consolidated by means of private contracts of mutual cooperation, under which the *joint ventures* (shared actions) are issued in order to: explore a deposit; perform research or develop some specific technology. Legal entities governed by Public Law may be parties of such contracts, with the provision of international arbitration for conflict solutions. The Joint Operating Contract – JOA,[13] which are common in international law, is not provided for in Brazilian law.

In practical terms, the international arbitration helps to optimize the logistics of the cooperation, whenever possible, such as a joint venture between the State and some private companies in order to implement the upstream[14] structure, constituting new joint ventures to develop the midstream[15] and downstream[16] structure, therefore providing the international arbitration in each one of such private contracts, which could attract foreign investors. In this model, the State would not be required to invest in infrastructure, which would be supported by the private capital, thus reducing the risks to the Federal Government. The profit would be higher, since the State would be entitled to participate in the profits from JOA, in each operation (downstream, midstream and upstream), in addition to the proceeds resulting from the tax burden over the diversity of products and services, without the need of initial public investment due to the attraction of private capital. The characteristics of the private contract with the State are defined by Huck based on the international doctrine (Lalive, Sacerdoti, Weil and Geir), in special the stability clause – that seeks to freeze the state right at the time of its execution.[17]

However, the position adopted by the Government in the oil area is a regression, referring to the obligations of the concession companies in the Pre-Salt layer, which do not observed item X of article 43 of Law 9.478/1997. In Brazil the exploration of hydrocarbons is ruled by the public law, by means of administrative contracts and the cooperation is made feasible by means of the consortiums law, with critical reserves to international practice, mainly in upstream operation.

On the other hand, the legislator once again misses the opportunity to settle such matters, since he fails to mention even the possibility of arbitration in Bill 09/11, to amend Law 8666/93, under discussion in the House of Representatives.

3. Solutions in the quest for international cooperation in the exploration of natural resources

Jürgen Habermas calls attention to the fact that the dynamics of international cooperation is based on the debate of the public institutions with the private institutions and on the preliminary understanding among the individuals.[18] In these

current modern times, it has been occurring the intermingling of public and private autonomy, as directed by UN, observing the expansion of human rights, avoiding armed conflicts, which is impossible without cooperation.

The relations within the international businesses[19] are included in this scenario. Norway, for example, which holds a very unique legislation, has adopted a mixed system, in which a regulation and inspection body not only interferes and fosters the formation of consortiums of companies, but as well suggests the draft of the contracts to form joint ventures by corporate groups, by means of group of joint ventures.[20]

The Norwegian system may act as a model for Brazil, by maintaining the administrative contract under the regime of public law, but also opening some space for private contracts of cooperation in the Oil Industry, including arbitration.

The dynamics of the current capitalist system corresponds to an option for values and institutions, which foster the opening of new markets of the poor countries and allow the free movement of capital centered in the transfer of technology and shared exploration of natural reserves. In this scenario the international arbitration and its precedents, play a vital role, offering legal safety and guiding the procedures of foreign investors.[21]

4. The possibility of application of international arbitration in downstream operation of COMPERJ

Rio de Janeiro Petrochemical Complex - COMPERJ is a downstream area development of Petrobras and represents a US$ 8.4 billion investment, which corresponds to the largest single project of Petrobras and one of the largest of the sector worldwide.[22]

The Law School of the Universidade Federal Fluminense – UFF (University) holds a permanent research project to monitor the social and legal impacts of the CONPERJ. With the information collected by Petrobras, statistical data from the Brazilian Association of Plastic Industry - ABIPLAST and from field research held among 24 industries of the sector in Rio de Janeiro and São Paulo it was possible to perform estimates relative to the implementation of the plastic production industries in Rio de Janeiro. The estimates referring to the Scenario indicate the potential for installation of 362 new industries of plastic material sector in the State, which shall result in 15 thousand direct jobs, investments in the amount of BRL$ 900 million and an approximate year income of BRL$ 2.4 billion. In the Best Case Scenario, the figures double to a total of 724 industries of the plastic sector installed, resulting in a total of new 31 thousand jobs and a BRL$ 1.8 billion investment, with an approximate year income of BRL$ 4.8 billion. In both cases, the estimates suggest that over 90% of the developments refer to micro and small-sized companies.[23]

It is worth stating that the controversial 12/2010 AGU Opinion only mentions the upstream operation. In theory there is no limitation to the international arbitration in *downstream operation*, if finally applied as a whole the item X of article 43 of Law 9.478/1997. On the other hand, nor Petrobras participates directly in the resale and distribution activity, maintaining only its equity stake in companies working in this segment.[24] However, there are still a lack of legal studies and specialized chambers in the energy sector in order to invest in the development of such discussion relative to this operation, which may enable the attraction of local and foreign investments for the development of infrastructure in the State East Region.

For this purpose, Gestner Gestão e Consultoria and Personal Consulting have announced a joint-venture to perform the businesses insurances located in COMPERJ. The project indicates a specific trend and demand of the foreign companies that will pursue investments in the region, which requires verification by the academy.

Conclusion

The decision by the Brazilian Government to accept the 12/2010 AGU Opinion is clearly political, illegal and deprived devoid of technical content. Firstly, because Braspetro (international branch of Petrobras), is fully experienced in international arbitration, especially with the application of international cooperation contracts (joint ventures). Secondly, because Brazil is a signatory of several treaties relative to international arbitration and holds a victorious action in international arbitration courts, mainly in WTO. Lastly, the allegation that international arbitration is not compatible with the current Public Administration is even more absurd, in view of the consortiums for shared exploration of hydrocarbons in Brazil.

In fact the Brazilian Legal Regime maintains the concession system based on administrative contracts, with the purpose of preserving the extraordinary clauses and the emperor power of the State. The adoption of international arbitration would be guided by precedents that preserve greater equity and legal safety among the contracting parties, provided that in the international scenario the arbitration clause is very common in the JOA, which are contracts ruled by private law rules, with the issuance of joint ventures for the shared exploration of natural resources.

However, the downstream operation of CONPERJ, will not be affected by the limitation imposed by 12/2010 AGU Opinion, which is limited to upstream operation. In this area, Petrobras does not act directly in the resale and distribution activity, and maintains equity stale only in companies that operate in the sector.

Therefore, the field is very profuse for foreign investments, which may count on the legal security offered by international arbitration and greater equity in the resolution of conflicts.

Eduardo Helfer Farias, Gilvan Luiz Hansen
and Sérgio Gustavo de Mattos Pauseiro.

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3. Idem.p. 136.
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6. RIBEIRO, Marilda Rosado de Sá Ribeiro. Direito do Petróleo: As Joint Ventures na indústria do petróleo. 2ª ed. Rio de Janeiro: Renovar, 2003. Capítulo III. p. 144.
7. ASANTE, Samuel K. B.. International Law and the Avoidance Containment and Resolution of Disputes, op. cit., p. 188;
8. Iran, US. Tribunal. Apud ASANTE, Samuel K. B.. International Law and Foreign Investment: a Reappraisal, op. cit.; RIBEIRO, Marilda Rosado de Sá Ribeiro. Direito do Petróleo: As Joint Ventures na indústria do petróleo. 2ª ed. Rio de Janeiro: Renovar, 2003. Capítulo III. p. 145.
9. The EC No. 9 amended the wording of Article 177 of the Federal Constitution, which became effective with the following wording: "are the monopoly of the Union: I - prospecting and exploitation of petroleum and natural gas and other fluid hydrocarbons; II - petroleum refining domestic or foreign; III - the import and export of products and basic derivatives resulting from the activities referred to in the preceding paragraphs; IV - shipping crude oil of national origin or basic oil produced in the country, as well transport through pipelines, crude oil, natural gas and their derivatives from any source; V - prospecting, mining, enrichment, reprocessing, industrialization and trade of nuclear ores and minerals and their derivatives, except of radioisotopes whose production, marketing and use may be allowed under permit regime, according to subparagraphs b and c of section of the chapeau of Article XXIII. 21 of this Constitution.
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11. 12/2010 AGU Opinion – 9.3 - "The arbitration conventions require a number of indications, such as the definition of the matters subject to arbitration, definition of applicable law, place of arbitration, rules applied to procedures, definition of number of arbitrators, the arbitration language, the provision relative to the limits of time, the currency for debt payment, as well, finally, the provision on the performance of the arbitration award. 9.4 The performance of arbitration limited to the AGU Chambers, meet all of such expectations, without prejudice to the formalization of some of such items by reason of the own nature of things, such as the language to be used in arbitration.
12. 12/2010 AGU Opinion - (...)"Not because arbitration is a private mean for conflict solutions, relative to property rights available, by means of which the parties select one or more specialists in the disputed matter, in order to settle existing disputes or that eventual replace the existing one, an assumption that seems to exclude the arbitration part for the Public Administration, defining the use of international arbitration as not suitable. The reason is that the involved parties, the State, PETROBRÁS and ANP do not subject to international arbitration."
13. Joint Operating Agreement – JOA- Cooperation Contracts with issuance of joint ventures.
14. Upstream – research, extraction and oil production activity.
15. Midstream – refine and transportation of oil and gas.
16. downstream – distribution and resale
17. HUCK, Konrad. Escritos de Derecho Constitucional. [S.l.: S.n.], 1983, p. 21-33. This point was highlighted by José Carlos de Magalhães in its article of the State in Private Arbitration, which advocates the stability clause as one of the guarantees required by the foreign investor when entering in an agreement with the State. According to him, "the legislative stability clause, although consisting of a limited practical effect, refers to the intent of the parties to avoid doubts on the application of the laws edited "a posteriori" by the state and that enable the performance of the obligations ruled in the contract." The author further provides that, along with the stability clause, the applicable law clause, and the arbitration clause work as guarantees to the foreign investor. (MAGALHAES, José Carlos de. DO Estado Na Arbitragem Privada. In: MAGALHAES, José Carlos de; BAPTISTA, Luiz Olavo. Arbitragem Comercial. Rio de Janeiro: Freitas Bastos, 1986, p. 69-70)
18. HABERMAS, Jürgen. Direito e democracia: entre facticidade e validade. Tradução de Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 1997. P. 116.
19. RIBEIRO, Marilda Rosado de Sá Ribeiro. Direito do Petróleo: As Joint Ventures na indústria do petróleo. 2ª ed. Rio de Janeiro: Renovar, 2003. p. 19.
20. Same as p. 25.
21. Same as p. 25.
22. Sistema Firjan. COMPERJ - Estudos de Potencial de Desenvolvimento Produtivo. Elaboração Técnica: Fundação Getúlio Vargas. 2008. p. 06.
23. Sistema Firjan. COMPERJ - Estudos de Potencial de Desenvolvimento Produtivo. Elaboração Técnica: Fundação Getúlio Vargas. 2008. p.8
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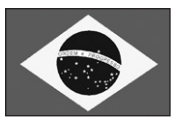
CORPORATE DISPUTES AND ARBITRATION IN BRAZIL

By Thereza Valladares Souza Frauches and Juliana Soares Porto Fonseca



General Considerations about Arbitration in Brazil

In recent years, Brazil has become an attractive market for foreign investment. As an emerging economy, Brazil represents one of the largest allocations of foreign investment in the world. Despite the great interest, foreign investors still find it difficult to deal with Brazil´s complex regulatory and legal issues, especially those which concern dispute resolution.

Many companies start businesses in Brazil by investing in a Brazilian company, forming joint-ventures with a Brazilian partner, or incorporating their own company in Brazil. All of these scenarios may lead foreign investors to corporate disputes, which might be prevented or, at least, softened by a well drafted dispute resolution provision.

In this sense, arbitration presents many advantages over judicial litigation in Brazil. Mainly, arbitration is usually faster than judicial proceedings, more informal, and the parties may appoint specialized arbitrators, with expertise to decide the matter under dispute. Moreover, arbitration enables the parties to elect the legal rules that will govern the arbitration proceeding, which may be conducted ad-hoc or under any domestic or international arbitration institution.

Also, by electing arbitration the parties may agree to keep the dispute resolution confidential, avoiding the publicity to which judicial proceedings are subject and thus protecting the information disclosed in the course of litigation. However, in some cases, parties to arbitration may be required to disclose information on the proceeding. Brazilian public companies remain obligated to disclose material information to the market, as defined by law (Federal Law 6,404/76, section 157, paragraph 4) and by the Brazilian Securities and Exchange Commission´s normative instruction # 358/2002.

Considering the scenario described above, parties to agreements involving companies incorporated in Brazil or agreements subject to Brazilian law have been choosing arbitration to solve their corporate and business disputes. The Brazilian Arbitration Act (Federal Law 9,307/96) allows the parties to choose which law will apply to the dispute and to choose an arbitration institution to conduct the proceeding. It is advisable that the parties choose a traditional and experienced arbitration institution to conduct the arbitration. The parties should learn about the institution´s rules and evaluate the costs involved.

Draft of an Arbitration Provision in Corporate Documents

It is important to note that the outcome of an arbitral proceeding may be directly influenced by the quality of the arbitration provision inserted in the agreement under dispute. Hence, it is important to point out some aspects of Brazilian arbitration law that should be considered when drafting an arbitration clause designed for corporate disputes.

A poorly drafted arbitration provision may, for instance, undermine the possibility of resolution by arbitration, driving the parties to judicial courts. Most importantly, the parties should agree on the specifics of the arbitration at the beginning of negotiations, providing a strong, broad and clear arbitration provision, in order to prevent controversies over the jurisdiction of the elected arbitration court.[1]

Therefore, it is best when the parties expressly agree on the institution that will conduct the arbitration, the number of arbitrators and how such arbitrators will be nominated, the applicable law and language, the place where the arbitration will be held, confidentiality covenants, as well as other issues relevant to that specific corporate or business relationship. It is also important to agree on which rules will apply if an issue is not governed by the arbitration institution´s regulation or by the Brazilian Arbitration Act. In case the arbitration is conducted in Brazil, it is advisable to provide for subsidiary application of the Brazilian Code of Civil Procedure (Federal Law 5,869/73), for such code has broad and descriptive rules on litigious proceedings.

Arbitration Provisions in Company´s By-Laws

The Brazilian Corporation Law (Federal Law 6,404/76), section 109, paragraph 3, expressly allows resolution by arbitration in disputes between shareholders and the company, or between controlling and minority shareholders. An arbitration provision may be inserted in the company´s by-laws, either at the time of the company´s incorporation or later on, by means of an amendment to the company´s by-laws. In both situations, there is controversy about who would be bound by such an arbitration provision.

The arbitration provision is legally binding on the parties that execute it. The question is, when the company´s by-laws imposes arbitration for dispute resolution, would the arbitration provision bind only the founding shareholders, who expressly decided to insert such provision in the company´s by-laws, or would it bind those who became shareholders afterwards, as well? Does an arbitration provision become enforceable against a shareholder simply because they purchased shares from such company?

A similar situation is that of the absent or dissenting shareholder, when the General Meeting approves an amendment to the company´s by-laws to insert an arbitration provision. Would the arbitration provision be binding to all shareholders, e.g., would it bind even the shareholders who did not attend to the meeting and the shareholders who voted against the insertion of the arbitration clause in the company´s by-laws?[2]

Two of the main arguments raised against the enforceability of arbitration provisions upon shareholders who did not expressly consented to it, are: that it restrains the shareholders´ free access to judicial courts and that, according to the Brazilian Arbitration Act, arbitration in adhesion contracts are only enforceable if the adherent party specifically grants its consent to the arbitration provision.

Brazilian courts have ruled on the issue,[3] but opinions vary, including among jurists. Therefore, it is advisable that the call notice to any meetings which will decide on an amendment to the company´s by-laws, especially to insert an arbitration provision, expressly informs the company´s shareholders that, if approved, the amendment will subject all shareholders, and all shareholders will be bound by such arbitration provision.[4] This measure will convey strength and transparency to the resolution, despite not guaranteeing that shareholders will not challenge the validity of the arbitration provision.

The enforceability of an arbitration clause inserted in the articles of association of a limited liability company is less problematic because the law grants its shareholders the right to withdraw from the company in the event of amendments to the company´s articles of association, including an amendment to insert an arbitration clause. Differently, the law does not grant such right to shareholders of a corporation. In this sense, in 2009, the State Court of Minas Gerais decided that any amendment to the articles of association of a limited liability company is binding to all shareholders, including the dissenting ones.[5]

Enforceability of Arbitration Provisions against Officers and Directors

Another concern for companies is the enforceability of an arbitration provision over disputes involving company´s officers and directors. Most of Brazilian doctrine understands that directors and officers are bound to the rules provided by the company´s by-laws, as per sections 154 and 158, II, of Federal Law 6,404/76, and therefore would be subject to an arbitration provision. However, there is no high court case law ruling on this issue.

The enforcement of arbitration provisions against officers may also be restrained by some limitations provided by labor legislation. Under Brazilian law, officers may or may not be regarded as employees, depending on the level of subordination to which they are subject. If, due to his/her position, the officer has discretion and independence to take decisions, without being strictly directed or supervised by the company´s shareholders or directors, then it is likely such officer will not be consider as an employee.

The matter whether or not an officer is considered to be an employee of the company is of great importance in determining if such officer may be subject to arbitration. According to the Brazilian Arbitration Act, individuals and legal entities capable

of entering into agreements may resort to arbitration to settle disputes concerning their alienable property rights (e.g., those rights which can be freely disposed of by their holder). In this sense, most of Brazilian labor courts regard some or all labor rights as inalienable, because they understand an employee cannot waive or dispose of such rights. Hence, some Brazilian labor courts are very resistant to accepting the resolution of individual labor disputes by arbitration.[6]

Therefore, so far Brazilian labor courts are likely to understand that labor matters may not be subject to arbitration, even if the employee expressly grants his/her consent. Thus, if an officer is considered to have an employment bond with the company, arbitration may not be applicable even if such officer expressly agrees with it.

Notwithstanding, it is important that the company´s by-laws expressly provide that disputes between the company and/or shareholders and company´s officers are subject to resolution by arbitration. Also, it is advisable that officers state, in writing, their accordance with arbitration, by means of a specific instrument or through the instrument of investiture. A formal statement would provide consistent grounds to bind the company´s officers to arbitration,[7] except if the case is brought in a labor court that understands that the merits of the dispute involve inalienable rights.

In the labor field, for instance, recent trials have shown that, as a rule, labor rights are considered to be inalienable property rights and thus may not be subject to arbitration. Hence, if an officer is regarded as a company employee, it is likely such officer will not be bound by an arbitration provision inserted in the company´s by-laws.

However, in an overview, the Brazilian Arbitration Act, which was stated as constitutional by the Brazilian Supreme Court – STF in 2001, has had solid enforcement since then. Brazilian Courts have been favorable to arbitration on resolution of corporate matters, and practice has shown that an increasing number of companies have been choosing arbitration over judicial litigation. Hence, arbitration, if it is not already, has the potential to become the preferable corporate dispute resolution mechanism in the near future.

The commercial environment in Brazil is very favorable to arbitration, always keeping in mind that a well drafted arbitration provision is vital to ensure a predictable outcome. Therefore, in order to ensure the efficiency and enforceability of an arbitration provision, the wording must be clear and the most important details must be agreed upon by the parties before any dispute actually arises. A misconceived arbitration provision may end up putting the parties through a longer and rougher proceeding, driving them away from the essential issues involved in the dispute.

Conclusion

As shown by the examples set forth in this article, Brazilian case law on arbitration is diverse, depending on the subject matter under dispute. Thus far, there are no higher court precedents ruling on whether an arbitration clause inserted in the company´s by-laws are enforceable against dissenting and absent shareholders and the company´s officers.

Thereza Valladares Souza Frauches
and Juliana Soares Porto Fonseca

1. One of Brazil´s greatest corporate disputes, dwelled by two of Brazil´s traditional families (Gradin vs. Odebrecht) and currently in progress before the Superior Court of Justice – STJ, involves the interpretation of an ambiguous arbitration provision. According to an article published by the website Consultor Jurídico, the agreement executed by the parties provides for arbitration as one of the ways, but not the only way, of dispute resolution. Instead of going straight to the merits of the case, the parties are involved in a lengthy controversy about what method of dispute resolution applies. In: http://www.conjur.com.br/2012-mai-26/isabel-gallotti-stj-julgar-disputa-societaria-bilhoes#autores >Accessed on September 24, 2012.
2. Note that the Brazilian Stock Exchange (BMF&BOVESPA) requires that companies listed in the highest corporate governance levels (Level 2 or Novo Mercado), their shareholders, directors, officers, and members of the fiscal council be subject to arbitration on the resolution of disputes, by inserting an arbitration provision in the company´s by-laws. Moreover, the BMF&BOVESPA requires that the company's controlling shareholders, directors, officers, and members of the fiscal council execute a statement whereby they expressly and formally agree to be subject to arbitration as provided in the company´s by-laws. In this way, we understand that the BMF&BOVESPA expects to set aside controversial issues regarding whether they are subject to the arbitration provision inserted in the company´s by-laws.
3. In 2010, the State Court of Minas Gerais issued a decision holding that only the shareholders who expressly agreed to the insertion of the arbitration provision in the company´s by-laws are legally bound to it (Interlocutory Appeal AI No. 1.0035.09.169452-7/001, TJMG, 10th Private Law Chamber, Reporting Judge Gutemberg da Mota e Silva, DJ 13/04/2010). The State Court stated that, since the arbitration provision restrains shareholder´s access to judicial courts, it is only enforceable if the shareholder undoubtedly waives such right. Thus, absent or dissenting shareholders are not subject to arbitration. However, the State Court understood that shareholders who entered the company when the arbitration provision was already inserted in the company´s by-laws are subject to arbitration, once such shareholders are assumed to have agreed with all terms and conditions provided by the by-laws.
4. Approaching the issue on who is legally bound by the arbitration provision, Brazilian jurist Nelson Eizirik understands that the arbitration provision is binding to all shareholders (including those who were absent or chose not to vote), except for the dissenting ones. Eizirik also recommends that the shareholders are duly informed that, if approved by the shareholder´s meeting, the arbitration provision will be binding upon all shareholders (Eizirik, Nelson. A Lei das S/A Comentada. Volume I – Arts. 1º a 120. São Paulo: Quartier Latin, 2011).
5. Civil Appeal AC No. 1.0024.08.071075-9/001, TJMG, 13th Private Law Chamber, Reporting Judge Francisco Kupidlowski, DJ 09/07/2009.
6. In 2009, the Brazilian Supreme Labor Court – TST issued a decision stating that labor rights are inalienable, thus the parties may not subject disputes over such rights to arbitration (Interlocutory Appeal on Motion to Review No. 1229/2004-014-05-40.5, TST, 1st Panel, Reporting Judge Minister Luiz Philippe Vieira de Mello Filho, DJ 27/11/2009). Afterwards, another Panel of the TST recognized the validity of an arbitration agreement executed by an employer and its former employee, after the termination of the employment bond, to solve a labor dispute arisen from their previous employment relationship. The Court understood that, after termination of the employment bond, the labor rights to which the employee is entitled becomes alienable property rights, allowing the parties to elect arbitration to solve any disputes in connection with such rights (Motion to Review No. 144300-80.2005.5.02.0040, TST, 4th Panel, Reporting Judge Minister Antônio José de Barros Levenhagen, DJ 15/12/2010). We are not aware of any decision from the TST involving acceptance of the validity of an arbitration clause inserted in a labor agreement.
7. In this regard, please see footnote number 2 above.

HOLD YOUR HORSES
ARBITRATION IS RISING

By Rainer Werdnik

1. Introduction

In the last years there has been a lot of activity in the international commercial arbitration field. Many of the arbitration rules and laws have been amended or newly adopted. Inter alia,[1] the Singapore International Arbitration Centre released the 4th edition of its arbitration rules on July 1, 2010,[2] LCIA India published its LCIA India Arbitration Rules in April 2010,[3] the new SCC Rules came into force as of January 1, 2010,[4] the IBA Rules on Taking of Evidence in International Arbitration were amended 2010,[5] the UNCITRAL Arbitration Rules were revised in 2010,[6] the Australian Centre for International Commercial Arbitration revised its Arbitration Rules in 2011,[7] the CRCICA Arbitration Rules were reviewed 2011,[8] the new ICC Rules 2012 entered into force with the beginning of the year 2012,[9] the Swiss Rules have been modified in 2012,[10] and the common law based Scots law of arbitration was adopted as the Arbitration (Scotland) Act 2010.[11] Also Australia, France, Portugal, Spain, and Ireland amended their arbitration laws.

By comparing the different amendments of the arbitration rules, the following movements in the arbitration rules have emerged: firstly, emergency arbitrator, and secondly, questioning of length of time of arbitration proceedings (accompanied by the questioning of costs of arbitration proceedings). Besides these there are further movements, e.g., multi-party arbitration, additional parties, which will not be dealt with in this article.

Parties are often in need of urgent (interim or conservatory) measures before the arbitral tribunal is constituted. Thus, in the past the parties had basically to go to national courts to get the respective measure. Although the International Chamber of Commerce[12] already provides for such procedure, the ICC Rules for the pre-arbitral referee, it now introduced the Emergency Arbitrator Rules in its ICC Rules 2012. Also other arbitration rules provide for specific provisions for emergency arbitrators which give the party the possibility to use arbitration in this respect well before going to national courts or authorities.

With regard to the length of time of arbitration proceedings (accompanied with the correlated costs of arbitration) arbitration rules now offer different alternatives and feasibilities to speed up arbitration proceedings. Above these new possibilities to accelerate the arbitration proceeding, the ICC Rules 2012 and the UNCITRAL Rules introduced a

general provision, that the arbitral tribunal shall conduct the proceeding in an effective way. Also in the context of the length of time of arbitration proceedings, the question of individual availability of arbitrators for the arbitration proceeding for which they are nominated is getting more and more important. Beside that some other measures are provided to shorten arbitration proceedings.

This article will evaluate the above mentioned aspects. Due to the complexity and amount of different rules and laws, the focus will be on the institutional arbitration rules. However, specific attention has to be paid to the arbitration rules of the ICC. As well known and confirmed by recent surveys the ICC and its rules are 'the most popular'[13] as well as the 'most preferred and widely used'[14] ones.

Further, this article will take a short look whether or not the above mentioned aspects are facing the criticism of arbitration proceedings over the past few years, whereas main criticism is the lack of efficiency (time and cost).[15] Further there is the fear of increasing 'judicialisation' in international arbitration[16] by adopting 'more and more features of a court trial'.[17] However, pursuant to an actual survey in the year 2010, arbitration is (still) attractive: Nearly 50% of the questioned US and UK companies prefer an arbitration clause for dispute resolution in cross border contracts.[18]

2. Emergency arbitrator

The provisions for emergency arbitrators shall provide the party with a way to seek an urgent interim measure before the arbitral tribunal is constituted. It shall be an alternative to applying to any other court or authority before the arbitral tribunal is constituted.[19] Especially, for issues which may be critical in the arbitration and may be (quickly) decided, the arbitral institutions provide for such solutions.[20]

2.1. ICC Pre-arbitral referee procedure

Before coming to the emergency arbitrator provisions it is worth to take a quick look at the ICC Pre-Arbitral Referee Rules. In the beginning of 1990 the ICC introduced the Pre-Arbitral Referee Rules.[21] These rules shall provide for a quick mechanism to solve problems which are urgent because such decision cannot be obtained in a specific time from another authority.[22] The referee has only the power to make specific orders for interim measures.[23] The parties nominate the referee by agreement. Pursuant to Article 6 of the ICC Pre-Arbitral Rules '[t]he parties agree to carry out the Referee's Order without delay'. Also this procedure is an alternative to going to another authority (or national court) to obtain an interim relief, but does not substitute it.[25] However, the ICC Pre-arbitral referee procedure is not used very often.[26]

2.2. Appointment of emergency arbitrator

The emergency arbitrator shall be appointed within short time.[27] Either the arbitration institution or a body of the arbitration institution appoints the emergency arbitrator.[28] Something which sounds very simple, but includes several issues.

Basically, arbitration is based on an arbitration agreement, for either present or future disputes.[29] Without an arbitration agreement, no valid arbitration can start. In the arbitration agreement the parties determine, inter alia, the procedure of the appointment of the arbitral tribunal either directly or by referring to specific rules.[30] This means that the appointment of the arbitral tribunal depends on the parties' will and their autonomy, including the choice of the individuals who will act as their arbitrators.[31]

The appointment of arbitrator(s) is one of the central, if not the decisive step which parties take in arbitration.[32] The choice of the arbitrator influences the whole arbitration proceeding and should be done with utmost care.[33] This leads to the issues in context with the appointment of emergency arbitrators. Parties, willingly to use emergency arbitrators for an urgent solution, have no impact on the appointment procedure. Moreover, they have no influence on the choice of the individual being appointed as arbitrator. This means that party autonomy is thwarted against the basic principle of arbitration.[34] Parties want to have control over the whole arbitration procedure.[35] On the other hand, pursuant to Article 4.1 ICC Pre-Arbitral Rules the parties shall agree on the appointment of the referee. Thus, the party's autonomy is preserved in the ICC Pre-Arbitral Rules.

Contrary, an argument for the advantage of arbitrators appointed not by parties but by the arbitration institution is the 'independence' with regard to the appointing party and, especially, the counsel of the respective party. In such case, the arbitrators do not depend upon any counsel for future appointments as arbitrators.[36] However, as the appointment by the arbitral institution bears great risk in losing the control of the arbitration proceeding, it is least desirable by parties.[37]

2.3. Proceedings

The arbitration rules on the proceeding which have to be applied by an emergency arbitrator vary in its degree of specification. Some give the emergency arbitrator free hand but under the condition of compliance with basic procedural rules and rights[38] or specific measure,[39] whereas others apply, taking account of the urgency, the proceeding rules of the arbitration procedure.[40]

As can be seen of these examples the emergency arbitrator has most of the time free hand with regard to the proceeding. The parties have little or no influence at all on the schedule of the proceeding. This leaves the parties totally exposed on the will, experience and knowledge of the arbitrator. Also here the parties' autonomy is thwarted.[41]

2.4. Decision of emergency arbitrator

The emergency arbitrator has to deliver its decision within a short period of time.[42] Further, the rules stipulate that the decision of the emergency arbitrator is binding for the parties.[43] In this context all arbitration rules have a different approach to

the legal nature of the decision of the emergency arbitrator. The decision of the emergency arbitrator can be in the legal nature of (i) an order,[44] (ii) an award or an order[45] or (iii) without specific qualification.[46] This definition is, however, important and decisive for the enforcement of such 'decision' as only arbitral awards are enforceable under the New York Convention.[47]

In the case *Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo*[48] the Paris Court of Appeal held that the referee in an ICC Pre-arbitral referee procedure do not act as an arbitrator and therefore cannot deliver an award.[49] This decision was based on the action to set aside the order of the pre-arbitral referee. The court held further, that the binding effect of the respective order is based only on the contractual obligation by the parties.

This case may be used to answer the question of the enforceability of emergency arbitrator decisions. If the emergency decision is rendered as an award, there should not be a question to the enforceability of the decision under the New York Convention. But if the emergency decision is an order, it is doubtful whether or not it is enforceable pursuant to the New York Convention.[50]

Following the way of argumentation of the court in *Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo*, the first question is whether or not the emergency arbitrator acted as an arbitrator.[51] The arbitration rules – obviously – use the term 'emergency arbitrator'. Thus, the procedure can be defined as arbitration proceeding. So far the emergency arbitrator can render its decision, basically, as an award. This might be proper for these rules which determine that emergency decisions can be in the form of awards.[52] Rules which clearly state that an emergency decision is an order[53] avoid the possibility of enforcement under the New York Convention. In the case where the rules do not explicitly declare what kind of legal nature the decision is,[54] it could be, at least, argued that the emergency arbitrator process is an arbitration procedure which is decided by an award.

To sum up, there are issues with respect to the enforceability of an emergency arbitrators' decision under the New York Convention, if the decision is not rendered as an award and the rules do not give a clear indication regarding the legal nature of the decision.

Contrary to the need of enforceability of the emergency decision it must be noted that by the respective decision for an interim measure a dispute could be, in fact, decided definitely and the award of the following arbitration would be therefore kind of obsolete.[55] Also the argument and rules that emergency decisions cease to be binding after an order or award of the arbitral tribunal[56] cannot protect the party harmed by the enforced emergency decision. In practice, it takes some time until the arbitral tribunal is constituted.[57] The time between rendering the emergency decision and the constitution of the arbitral tribunal, potentially long enough, leaves the opportunity to enforce the emergency decision. And after the enforcement of the emergency decision the arbitral tribunal can in fact have lost its relevance.[58]

2.5. Conclusion

As analysed above, there are some open issues and shortcomings with regard to the new rules on emergency arbitrators. Especially, compared with the experience in the ICC Pre-Arbitral Referee Procedure, it cannot be reasonably anticipated whether or not the parties will use emergency arbitrators for obtaining interim measures. As seen, the ICC Pre-Arbitral Referee Procedure, a comparable mechanism, was not accepted by the parties.[59] In addition, the emergency arbitrator rules have disadvantages in comparison with the ICC Pre-Arbitral Referee Procedure (e.g., appointment of emergency arbitrator).

3. Arbitration proceeding speeded up

In the early 1990s some ICC cases where reported which were solved within weeks on the basis of fast-track arbitration.[60] Later, the Report of the ICC Commission for Arbitration 'Techniques for Controlling Time and Costs in Arbitration'[61] mentioned that fast-track procedures are a good technique 'to enable an arbitration to proceed quickly'.[62] At this time the criticism on arbitration about its lacking efficiency had already began. On the basis of the considerations of the respective ICC report arbitration institutions began to introduce such provisions.[63] The ICC Pre-arbitral referee procedure are for example an expedited procedure, but also an expedite formation of the arbitral tribunal is such a measure.[64] Also the ICC introduced in its ICC Rules 2012 an Appendix IV for case management techniques. Further, new provisions with regard to speeding-up the arbitration procedure can be found in the recently amended arbitration rules.

3.1. Expedited arbitration

Many arbitration institutions introduced rules for fast-track procedures.[65] The incentive behind these specific rules is not only to obtain a final decision soon, but to maintain the business relationship between the parties.[66] As arbitration in general, also expedited arbitration is only applicable after the parties agreed to it. For a faster procedure just a sole arbitrator is appointed. The provisions differ in respect to who shall appoint[67] the arbitrator: either the parties jointly[68] or the arbitration institution.[69] If the parties do not jointly nominate the arbitrator[70] within a specific – often short – time period, the arbitration institution nominates the arbitrator. Fast-track procedure rules contain specific provisions with regard to the conduct of the arbitration proceeding, e.g., there are no hearings (only under specific circumstances)[71] and written submissions are limited.[72]

The ICC Rules and the LCIA Arbitration Rules, on the contrary, contain no specific fast track provisions.[73] But Article 38 of the ICC Rules 2012 gives the parties the possibility to shorten any time limits within the ICC Rules 2012.[74]

3.2. Expedited formation of the arbitral tribunal

The LCIA India Rules,[75] based on the LCIA Arbitration Rules,[76] have implemented rules for expedited formation of

the arbitral tribunal. Also the DIAC Arbitration Rules 2007 provide for such mechanism.[77] This procedure gives the parties under specific circumstances the possibility that the arbitral tribunal will be constituted faster.[78] The party seeking the faster constitution of the arbitral tribunal has to apply for the expedited formation, setting out the grounds in its written application.[79] The LCIA Court may then shorten the specific time periods for the constitution of the arbitral tribunal.[80]

In this context it should be mentioned that the SCC Rules generally shortened the period for the appointment of the sole arbitrator. The parties have now 10 instead of 30 days for a jointly appointment, otherwise the board of directors of the Stockholm Chamber of Commerce appoints the sole arbitrator.[81]

The UNCITRAL Rules also introduced a new provision by which a party may request that the Secretary-General of the Permanent Court of Arbitration designates the appointing authority to appoint the arbitrator(s).[82] A party can do so, if the parties could not agree on the choice of an appointing authority.

3.3. Availability of arbitrators

Besides independence and impartiality, arbitration rules nowadays request that nominated arbitrators confirm their availability throughout the arbitration proceeding.[83] This process began with the ICC International Court of Arbitration requesting nominated arbitrators to confirm their availability throughout the arbitration proceedings in its Arbitrator Statement of Acceptance, Availability and Independence.[84] Background of this provision is the concern (and the fact) that individuals act in too many arbitration proceedings as arbitrators and, thus, are too busy.[85] However, there is just a very small community of international arbitrators.[86] This slows down the whole arbitration proceeding, because the timeline with respect to hearings and rendering the award will be longer and longer.[87] Also the quality and efficiency of the arbitration proceedings suffer: arbitrators are not prepared for hearings or awards are not drafted by the arbitrators themselves, but by assistants or other employees of the arbitrators.[88] Everybody must be aware of the fact 'that arbitration can only be as good as its arbitrators'.[89]

Thus, explicit provisions with respect to the confirmation of availability are necessary, although each nominated arbitrator should be aware of his duties without such provisions; in particular as each arbitrator has a contract about his mandate with the parties or the arbitration institution after accepting the mandate.[90]

However, current surveys indicate that the parties are aware of the fact that the arbitral tribunal also redound to the length of the arbitration proceedings. Further, together with the arbitral tribunal the parties itself are responsible for the delay of the arbitration proceedings.[91] Also, based on surveys, parties of arbitration proceedings wish to assess the arbitrators after the final award, primarily by delivering a report to the arbitral institution (if applicable). Some could also imagine delivering a publicly available report or report directly back to the arbitrators.[92]

3.4. Case Management Techniques

The ICC Rules 2012 added in its Appendix IV some examples for case management techniques as addition to the proposals in Report of the ICC Commission for Arbitration 'Techniques for Controlling Time and Costs in Arbitration'.[93] These shall give the arbitrators as well as the parties the possibility to control the time and the costs of arbitration better. These techniques are: (i) partial awards if this leads to a more efficient resolution of the case, (ii) issue identifying for

resolution either on document basis or agreement by parties, (iii) different techniques for production of documentary evidence, (iv) limits for written submission and witness evidence, (v) using of new technology, where possible, (vi) pre-hearing conference and (vii) methods with regard to settlement of disputes.

Pursuant to the UNCITRAL Rules the arbitral tribunal has to draw up a provisional timetable.[94] For this purpose the arbitral tribunal shall consult the parties. As proposed by the UNCITRAL Notes on the Organization of Arbitral Proceedings this can be gained by written consultation or conferences, whereas the fastest ways are emails or conference calls.[95] Under specific circumstances a personal meeting will be most effective to draw up a provisional timetable.[96]

Further, also the amendments of the IBA Rules on Evidence implied new measures with regard to the conduct of an arbitral proceeding. Not very obvious, but nevertheless pursuant to the amended IBA Rules on Evidence evidentiary hearing may be held either 'in person, by teleconference, videoconference or other method'.[97] With regard to questioning witnesses the arbitral tribunal may now order witness conferencing.[98] Thereby two or more witnesses are questioned at the same time. The arbitral tribunal has the chance to compare the answers of the different witnesses immediately and directly.[99] Another amendment in the IBA Rules on Evidence accepts indirectly the separation of the proceeding in different phases or issues which is getting common in practice.[100] The arbitral tribunal can separate the submission of documents and the requests for the production of documents accordingly to the separation of the proceeding.[101]

3.5. General provision on prevention of time delay and unnecessary expense

The ICC Rules 2012[102] as well as the UNCITRAL Rules[103] now expressly state that the arbitral proceeding shall be conducted in an efficient way. Any unnecessary expense and time delay shall be avoided. However, subject of the UNCITRAL Rules is the arbitral tribunal, whereas the ICC Rules 2012 also relate to the parties. Further, the ICC Rules 2012 now give the arbitral tribunal power for an efficient case management, as the arbitral tribunal shall apply all appropriate measures for an efficient case management as long as these measures are not against the parties' will.[104] Also the IBA Rules on Evidence impose a duty on the arbitral tribunal to lead the parties with respect to taking of evidence to agree 'on an efficient, economical and fair process'.[105]

Further, the UNCITRAL Rules changed from a 'full' to a 'reasonable opportunity'[106] for the parties to present its case 'at an appropriate stage of the proceedings'[107] instead of 'any' stage. This provision, already implemented in the previous version of the ICC Rules 2012 as well as the LCIA Arbitration Rules,[108] provides the arbitral tribunal with the capability to make decisions with regard to the parties' right to present its case.[109] Thus, the arbitral tribunal must be aware that both parties have the equal opportunity to present its case.[110] So, challenges of awards due to infringement of procedural rules will be less successful as the new rules (in particular the wording) give the arbitral tribunal a broader scope of interpretation.[111]

4 Facing criticism

All the above analysed amendments and innovations will help arbitration to become more efficient with regard to reduce the length of arbitration proceedings as well as its costs. Therefore, the respective provisions for speeding-up arbitration are a good chance to bring arbitration back to its roots, where its advantage over national courts and litigation is/was its time efficiency (accompanied by lower costs). But, on the contrary, these amendments are followed by a growth of codified law which restricts the flexibility of arbitration; and a limited flexibility constrains efficiency.[112] This, in the end, also limits party authority, which is essential with respect to arbitration.

4.1. Necessary amendments?

As shown above, there have been a lot of amendments in the arbitration rules. Overall, there is one question: are these amendments necessary?

Speeding up arbitration is a matter of the will of all individuals involved in the arbitration proceeding. If all participants in an arbitration, the parties and their counsels, the arbitrators and, if applicable, the arbitration institutions, work together, the arbitration proceeding will be conducted in a fast and efficient way.[113] But would not have the rules, in the status before the amendments, been sufficient and provided everything necessary? Reference is made to the cases which were decided within weeks at the beginning of the 1990s.[114] But what led the individuals in the *Formula One* case to act in the way that they got a quick decision? Both parties, a F1 team and the Formula One Association, were under time pressure due to the start of the new racing season. Thus, using the rules effectively and in an appropriate way at this time, they carried out a fast-track arbitration *par excellence*. The parties made the choice for specific measures which led them to a fast decision and '[c]hoice is what sets arbitration apart from litigation.'[115] In fact they were acting on the arbitration rules as provided at this time.

Further, it must be acknowledged that too much codified respectively detailed rules and laws may stop or at least hinder an open mind of all participants at the beginning of each case.[116] The arbitrators, the counsels and the parties may then fall into a routine 'of simply using the same procedures from case to case'.[117] However, there exists no one-way solution for all international commercial disputes.[118] All arbitration participants, but in particular arbitrators and counsels, have to exploit case by case the different possibilities for an efficient arbitration process.

Whether or not codified and detailed rules and laws are necessary and good for international arbitration also depends on the question, if the respective rules and laws provide a basis for effective (regarding time and costs) and fair decisions.[119] The parties wish 'that the law promotes finality, speed and cost'.[120] This would mean, at first sight, that all these rules and laws are necessary. But, this approach contravenes one of the basic principles and advantages of arbitration, namely flexibility.

Therefore, general rules like the introduced provisions in the ICC Rules 2012[121] and the UNCITRAL Rules[122] are a good example to balance both approaches: On the one hand, flexibility is maintained through the general approach, and, on the other hand, there are (general) rules which promote efficient arbitration. Soft law and guidelines may also support efficient arbitration, while supporting the flexibility of arbitration. For example, the addition of the case management techniques in the ICC Rules 2012 is not such reformation because some of the respective techniques have already been used in practice in the past.[123] But the way of incorporation of these techniques is a good example for guidelines for arbitrators and parties.

Overall and as very well known, the duration of arbitration proceedings depends on the interaction between the parties and the arbitral tribunal. Parties want to have efficient arbitration proceedings.[124] But, is this true as such? The answer must be: it depends. At least for the parties it makes a difference if they are claimant or respondent in an arbitration proceeding. Certainly the claimant is pursuing an efficient arbitration proceeding as he is convinced to prevail in the arbitration and thus wants to have an enforceable award as soon as possible. Depending on the situation, but in the majority of the cases, the respondent will do everything to prevent this.[125] Therefore, this may lead to a longer and cost-intensive proceeding.[126] In this situation not both parties support an efficient arbitration proceeding.

4.2. Party autonomy

Party autonomy is a basic principle in arbitration, as it is based on a contractual agreement between the parties. Therefore, the parties decide how their dispute may be settled. Firstly, they decide to settle their disputes by arbitration and not by any other form of dispute settlement, Secondly, either they choose specific arbitration rules, amend existing arbitration rules or they draft their own rules. To be brief, parties want to shape their arbitration process how they like and believe to be best for their individual situation.[127]

Contrary to the principle of party autonomy, it can be noted from the amendments in the different arbitration rules, that more and more party autonomy is lost. This can be seen out of the fact that, e.g., the emergency arbitrator is appointed by (a body of) the arbitral institution[128] or the emergency arbitrator leads the arbitration proceedings with free hands,[129] or the arbitrator may adopt measures which are efficient.[130] Also the amendments of the UNCITRAL Rules have been described as '[i]nevitably, of course, the increase in efficiency is at the expense of party autonomy.'[131]

These facts raise the question whether or not the parties will accept the reduction of their party autonomy by still choosing the respective arbitration rules. Basically, a party would not accept such a reduction. But as long as the reduction of party autonomy is compensated by an increase of efficiency there might be arguments to accept this reduction. The main argument might be the uncertainty which parties face when they agree on arbitration. Most arbitration agreements are part of a contract[132] and parties obviously do not know in which position, claimant or respondent, they will act in a future dispute. Therefore, their incentive for the settlement of a dispute by arbitration will be the advantage of efficiency, namely a quick decision with low cost. And this perspective might lead to the acceptance of the reduction of party autonomy, as these rules provide solutions for situations where one party might delay the arbitration process. However, the parties will always have the possibility to choose the arbitration rules which are most appropriate for them, in particular how much control they want to have over the arbitration proceeding.

5. Conclusion

The institutions and individuals involved in international arbitration have listened to the criticism and are on the way to face it. That can be recognised out of the reforms of the arbitration rules (regardless of the opinion about the quality of the amendments and their criticism). Above all, the arbitration institutions have the will to provide efficient arbitration rules.

The provisions for emergency arbitrator are a good chance for arbitration to win some more customers by providing rules for urgent interim measures before the constitution of the arbitral tribunal. Indeed, there are no indications whether or not the parties will use emergency arbitrator instead of going to other authorities. In the light of the number of cases with regard to the ICC Pre-Arbitral Referee Rules one might be concerned about the success of emergency arbitrator. However, the practice will show whether or not the rules for emergency arbitrator are suitable for the purpose of the parties.

All new measures for speeding-up the arbitration process focus on efficiency. Although this means in some instances the loss of party authority and control over the arbitration proceeding, this loss shall be compensated by efficiency. If the parties favour efficiency in relation to loss of party authority, these new measures will be accepted by the parties. With regard to the criticism about lack of efficiency in arbitration proceedings parties could tend to this approach.

It is doubtful whether or not more codified and detailed rules and laws are a good way to promote efficient arbitration. Soft-law and guidelines would be a good alternative as it gives the parties and all other arbitration participants more flexibility. However, the UNCITRAL Rules and the ICC Rules 2012 give a good example with their general rules for the arbitral tribunal (and the parties) to act efficiently.

Again, it must be mentioned 'that arbitration can only be as good as its arbitrators'.[133] Thus, the limited pool of international arbitrators does not generally support the efficiency of arbitration. A broader option for parties to choose its arbitrator within a larger pool of arbitrators is desirable.[134] This would also *enhance competition* between the arbitrators to conduct in an efficient way.

To sum up, it needs the work and effort of every participant in international arbitration.[135] But with these reforms international commercial arbitration is going back to its roots and is rising again.

1. The following examples of amendments of arbitration rules and laws are non-exhaustive.
2. The Arbitration Rules of the Singapore International Arbitration Centre, SIAC Rules, 4thed. (July 1, 2010), hereinafter 'SIAC Rules'.
3. LCIA India Arbitration Rules, adopted to take effect for arbitrations commencing on or after April 17, 2010, hereinafter 'LCIA India Rules'.
4. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, hereinafter 'SCC Rules'.
5. International Bar Association, IBA Rules on Taking of Evidence in International Arbitration, adopted by a resolution of the IBA Council, May 29, 2010, hereinafter 'IBA Rules of Evidence'.
6. UNICTRAL Arbitration Rules (as revised in 2010), hereinafter 'UNCITRAL Rules'.
7. ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions, hereinafter 'ACICA Rules'.
8. Cairo Regional Centre for International Commercial Arbitration (CRCICA), CRCICA Arbitration Rules as of March 1, 2011, hereinafter 'CRCICA Rules'.
9. Rules of Arbitration of the International Chamber of Commerce, in force as from January 1, 2012, hereinafter 'ICC Rules 2012'.
10. Swiss Rules of International Arbitration (Swiss Rules), in force as of 1 June 2012.
11. Arbitration (Scotland) Act 2010.
12. Hereinafter 'ICC'.
13. Fulbright's 7th Annual Litigation Trends Survey Report (2010) 21.
14. Queen Mary, University of London & White & Case LLP, 2010 International Arbitration Survey: Choices in International Arbitration, 3.
15. Queen Mary, University of London & PricewaterhouseCoopers LLP, International Arbitration: Corporate attitudes and practices 2008, 2; A. L. Marriott, 'Pros and Cons of More Detailed Arbitration Laws and Rules', in A. J. V. D. Berg (ed., 1996), 'International Council for Commercial Arbitration, Planning Efficient Arbitration Proceedings – The Law Applicable in International Arbitration', 65 at pp. 70 et sequitur; J-C. Najar, 'Inside Out: A User's Perspective on Challenges in International Arbitration' in (2009) Arb. Int'l. 515, at pp. 517 et sequitur; T. Berger & M. Robertson, 'The new ICC Rules of Arbitration: a brief overview of the main changes, (2011) Int'l ALR 145; T. J. Stipanovich, 'Arbitration: the 'New Litigation' in (2010) U. Ill. L. Rev. 1, at p. 5; M. Davison & L. Nowak, 'International Arbitration: How can it Deliver on its Promise?' in (2009) Arbitration 163; P. Morton, 'Can a World Exist Where Expedite Arbitration Becomes the Default Procedure?' in (2010) Arb. Int'l. 103, at p. 104; D. W. Rivkin, Towards a New Pardigm in International Arbitration: The Town Elder Model Revisited' in (2008) Arb. Int'l. 375, at p. 376; T. Stipanovich, 'Arbitration and Choice: Taking Charge of the 'New Litigation'' in (2009) DePaul Bus. & Com. L. J. 402, at pp. 404 et sequitur.
16. Morton, supra n. 15, at 104; B. Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' in (2011) J. Int'l. Arb. 89, at p. 99.
17. Stipanovich, 'Arbitration: the 'New Litigation'', supra n. 15 at p. 6.
18. Fulbright's 7th Annual Litigation Trends Survey Report (2010), supra n. 13 at p. 21.
19. ICC Rules 2012, Art. 29(7); ACICA Rules, Sch. 2 Art.7.1; G. Smith, 'Commentary on the new Singapore International Arbitration Centre rules' in (2010) Arb. 727, at p. 734.
20. Blackaby et al. (5th ed., 2009), Redfern and Hunter on International Arbitration, at para.4.03.
21. International Chamber of Commerce, Rules for a Pre-Arbitral Referee Procedure (1990), hereinafter 'ICC Pre-Arbitral Rules'.
22. Introduction ICC Pre-Arbitral Rules.
23. ICC Pre-Arbitral Rules, Art. 2.
24. ICC Pre-Arbitral Rules, Art. 4.1.
25. E. Gaillard & P. Pinsolle, 'The ICC Pre-Arbitral Referee: First Practical Experience' in (2004) Arb. Int'l. 13, at p. 23.
26. E. Gaillard, 'First Court Decision on Pre-Arbitral Referee' in (June 5, 2003) New York Law Journal 1; E. Gaillard, 'ICC Pre-Arbitral Referee: A Procedure into its stride' in (October 5, 2006) New York Law Journal 3; Craig et al. (3rd ed., 2000), 'International Chamber of Commerce Arbitration', p. 706; Blackaby et al., supra n. 20 at para. 6.258, footnote 149; J. Tackaberry & A. Marriott (4th ed., 2003), 'Bernstein's Handbook of Arbitration and Dispute Resolution Practice, Volume 1', para. 9-022.
27. Within one business day, ACICA Rules, Sch. 2 Art. 2.1 and SIAC Rules, Sch. 1 Rule 2; within 24 hours, SCC Rules, Appendix II Art. 4(1); ICC Rules 2012, Appendix V Art. 2(1): 'within as short a time as possible, normally within two days'.
28. ACICA Rules, Sch. 2 Art. 2.1; SIAC Rules, Sch. 1 Rule 2; SCC Rules, Appendix II Art.4(1); ICC Rules, Appendix V Art.2(1).
29. Blackaby et al., supra n. 20 at paras. 1.38 et sequitur.
30. For the different methods see Blackaby et al., supra n. 20 at paras. 4.29 et sequitur.
31. See, e.g., D. Joseph (2005), 'Jurisdiction and Arbitration Agreements and their Enforcement', para.9.31.
32. J. Suchoža & R. Palková, 'Reflections on Arbitration Proceedings: A Chance for Dispute Resolution Missed Forever?' in A. J. B□lohlávek & N. Rozehnalová (ed., 2011), 'CYARB - Czech (& Central European) Yearbook of Arbitration - The Relationship between Constitutional Values, Human Rights, and Arbitration', 161, at paras. 9.22. et sequitur; D. E. McLaren, 'Party-Appointed vs List-Appointed Arbitrators: A Comparison' in (2003) J. Int'l Arb. 233; T. Melnyk, 'How to select a party appointed arbitrator' in (2002) NLJ 1420.
33. Suchoža & Palková, supra n. 32 at p. 161 (para. 9.23.); McLaren, supra n. 32 at p. 233.
34. The argumentation in this paragraph is based on the presentation of Michael Davison, The new ICC Rules of Arbitration, University of Edinburgh, November 14, 2011.
35. J-P. Beraudo, 'Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals' in (2005) J. Int'l Arb. 245 at p. 253; McLaren, supra n. 36 at p. 233.
36. J. E. Beerbower, 'International Arbitration: Can We Realise the Potential?' in (2011) Arb. Int'l. 75 at p. 86.
37.McLaren, supra n. 32 at p. 237.
38. ICC Rules 2012, Appendix V Art. 5(2); ACICA Rules, Sch. 2 Art. 3.3.
39. SIAC Rules, Sch. 1 Rule 5.
40. SCC Rules, Appendix II Art. 7.
41. The argumentation in this paragraph is based on the presentation of Michael Davison, The new ICC Rules of Arbitration, University of Edinburgh, November 14, 2011.
42. ICC Rules 2012, Appendix V Art. 6(4): 'The Order shall be made in writing no later than 15 days from the date on which the file was transmitted to the emergency arbitrator'; SCC Rules, Appendix II Art. 8(1): 'not later than 5 days from the date upon which the application was referred to the Emergency Arbitrator'; ACICA Rules, Sch. 2 Art. 3.1: 'not later than 5 business days from the date upon which the application was referred to the Emergency Arbitrator'.
43. ICC Rules 2012, Appendix V Art. 6(6); SIAC Rules, Sch. 1 Rule 9; SCC Rules, Appendix II Art. 9(1); ACICA Rules, Sch. 2 Art. 4.1.
44. ICC Rules 2012, Art. 29(2).
45. ACICA Rules, Sch. 2 Art. 3.3; SIAC Rules, Sch. 1 Rule 6.
46. SCC Rules, Appendix II Art. 8(1).
47. Convention on the recognition and enforcement of foreign arbitral awards, United Nations (1958), Art. 1.1 [hereinafter 'New York Convention']; Gaillard & Pinsolle, supra n. 25 at pp. 19 et sequitur.
48. Court of appeal of Paris, First Chamber, section C, 2002/05147, April 29, 2003, see the English translation in Gaillard & Pinsolle, supra n. 25 at p. 33 (APPENDIX 2).
49. Beraudo, supra n. 35 at pp. 250 et sequitur.
50. E. Freemann, 'New ICC Rules of Arbitration' in (2011) 22 10 Construction Law 32; also see in this context J-G. Betto et al., 'International arbitration: new trends' in (2006) Int'l Business Law Journal 371, at p. 376.
51. Gaillard & Pinsolle, supra n. 25 at p. 36.
52. ACICA Rules, Sch. 2 Art. 3.3; SIAC Rules, Sch. 1 Rule 6.
53. ICC Rules 2012, Art. 29(2).
54. SCC Rules, Appendix II Art. 8(1).
55. A. Bösch (1994) Provisional Remedies in International Commercial Arbitration, A Practitioner Handbook, p. 4.
56. ICC Rules 2012, Appendix V Art. 6(6); SIAC Rules, Sch. 1 Rule 7; SCC Rules, Appendix II Art. 9(4); ACICA Rules, Sch. 2 Art. 5.2 and 5.3.
57. Blackaby et al., supra n. 20 at para. 4.02.
58. Bösch, supra n. 55.
59. Gaillard, supra n. 26 (2003) at p. 1; Gaillard, supra n. 26 (2006) at p. 3; Craig et al., supra n. 26; Blackaby et al., supra n. 20 at para. 6.258, footnote 149.
60. A. Broichmann, 'Streiten auf der Überholspur, Fast-Track-Arbitration bei M&A Streitigkeiten' in D. Birk (ed., 2008) Transaktionen, Vermögen, Pro Bono, Festschrift zum zehnjährigen Bestehen von P + P Pöllath + Partners, 115, at p. 116.
61. Report from the ICC Commission on Arbitration, 'Techniques for Controlling Time and Costs in Arbitration' (ICC Publication No. 843, 2007); see also Davison & Nowak, supra n. 15 at p. 168, where they refer to an ICC case done by fast-track proceeding, published in 1992, which might be The Formula One case, ICC Case No 10211, see Blackaby et al., supra n. 20 at paras. 6.266 et sequitur.
62. Report from the ICC Commission on Arbitration, supra n. 65 at para. 6.

63. See, e.g., Institute of Arbitrators & Mediators Australia, IAMA Fast-Track Arbitration Rules (2007); German Institute of Arbitration, DIS-Supplementary Rules for Expedited Proceedings 08 (SREP); K. P. Berger, 'The Need for Speed in International Arbitration – Supplementary Rules for Expedited Proceedings of The German Institute of Arbitration (DIS)' in (2008) J. Int'l Arb. 595; S. Wilske, 'Crisis? What Crisis? The Development of International Arbitration in Tougher Times' in (2009) CAA 187, at pp. 196 et sequitur.
64. Blackaby et al., supra n. 20 at paras. 6.249 et sequitur.
65. E.g. ACICA Expedited Arbitration Rules, see for a list of arbitration rules including fast track procedures Beerbower, supra n. 36 at p. 81.
66. Stipanovich, supra n. 17 at p. 52.
67. E.g. ACICA Expedited Arbitration Rules, Art. 8.1.
68. E.g. SCC Rules for Expedited Arbitration, Art. 13(2).
69. E.g. ACICA Expedited Arbitration Rules, Art. 8.2.
70. E.g. SCC Rules for Expedited Arbitration, Art. 13(2).
71. E.g. ACICA Expedited Arbitration Rules, Art. 13(2).
72. SCC Rules for Expedited Arbitration, Art. 19(3).
73. Beerbower, supra n. 36 at p. 81.
74. ICC Rules 2012, Art. 32.
75. LCIA India Rules, Art. 9.
76. LCIA Arbitration Rules, Art. 9.
77. DIAC Arbitration Rules 2007, Art. 12.
78. Blackaby et al., supra n. 20 at para. 6.260.
79. LCIA India Rules, Art. 9.2.
80. Ibid, Art. 9.3.
81. SCC Rules, Art. 13(2).
82. UNCITRAL Rules, Art. 6(2).
83. ICC Rules 2012, Art. 11.2; SIAC Rules, Rule 10.3; LCIA India Notes for Arbitrators, paras. 12 and 13; ACICA Appointment of Arbitrators Rules 2011, sub-Rule 7.1 (c).
84. Wilske, supra n. 63 at p. 199; Berger & Robertson, supra n. 15 at p. 150; ICC Arbitrator Statement of Acceptance, Availability and Independence.
85. S. Jarvin, 'The Role of International Commercial Arbitration in the Modern World' in (2009) Arb. 65, at p. 69; Hanotiau, supra n. 16 at p. 100; Morton, supra n. 15 at p. 106; Beerbower, supra n. 36 at p. 79.
86. Jarvin, supra n. 85 at p. 69; L. Greenwood, 'The rise, fall and rise of international arbitration: a view from 2030' in (2011) Arb. 435, at pp. 437 et sequitur.
87. Jarvin, supra n. 85 at p. 69; Hanotiau, supra n. 16 at p. 100.
88. Jarvin, supra n. 85 at p. 69.
89. K-H. Böckstiegel, 'Past, Present, and Future Perspectives of Arbitration' in (2009) Arb. 181 at p. 186.
90. K. P. Berger (2006) 'Private Dispute Resolution in International Business, Negotiation, Mediation, Arbitration, Volume II: Handbook', at para. 19-8.
91. Queen Mary, University of London & White & Case LLP, supra n. 18 at p. 32.
92. Ibid, at p. 28.
93. Report from the ICC Commission on Arbitration, 'Techniques for Controlling Time and Costs in Arbitration' (ICC Publication No. 843, 2007); see also Davison & Nowak, supra n. 15 at 168, where they refer to an ICC case done by fast-track proceeding, published in 1992, which might be The Formula One case, ICC Case No 10211, see Blackaby et al., supra n. 20 at paras. 6.266 et sequitur.
94. UNCITRAL Rules, Art. 17(2).
95. UNCITRAL Notes on the Organization of Arbitral Proceedings, para. 7 et sequitur (1996).
96. D. Kozlowska, 'The Revised UNCITRAL Arbitration Rules seen through the Prism of Electronic Disclosure' in (2011) J. Int'l Arb. 51, at p. 59.
97. Definitions 'Evidentiary Hearings' IBA Rules of Evidence.
98. IBA Rules on Evidence, Art. 8(3) f.
99. Blackaby et al., supra n. 20 at paras. 6.217 et sequitur; D. Kühner, 'The Revised IBA Rules on the Taking of Evidence in International Arbitration' in (2010) J. Int'l Arb. 667, at p. 675.
100. IBA Rules on Evidence, Art. 3(14); Kühner, supra n. 103 at p. 672.
101. IBA Rules on Evidence, Art. 3(14).
102. ICC Rules 2012, Art. 22(1).
103. UNCITRAL Rules, Art. 17(1).
104. ICC Rules 2012, Art. 22(2).
105. IBA Rules on Evidence, Art. 2(1).
106. UNCITRAL Rules, Art. 17(1).
107. Ibid.
108. Kozlowska, supra n. 96 at p. 56.
109. Ibid at p. 55.
110. T. H. Webster (2010) 'Handbook of UNCITRAL Arbitration', paras. 17-45 et sequitur; W. W. Park (2006), 'Arbitration of International Business Disputes', p. 451.
111. Kozlowska, supra n. 96 at p. 55.
112. Tackaberry & Marriott, supra n. 26 at paras. 9-094 et sequitur.
113. Beerbower, supra n. 36 at p. 80.
114. The Formula One case, see Blackaby et al., supra n. 20 at paras. 6.266 et sequitur; Broichmann, supra n. 60 at 116.
115. Stipanovich, supra n. 17 at p. 51.
116. Marriott, supra n. 15 at p. 65.
117. Rivkin, supra n. 15 at p. 378.
118. Marriott, supra n. 15 at p. 72.
119. Ibid, at p. 71.
120. J. Paulsson, 'Arbitration-Friendliness: Promises of Principle and Realities of Practice' in (2007) Arb. Int'l. 477, at p. 479.
121. ICC Rules 2012, Art. 22(1).
122. UNCITRAL Rules, Art. 17(1).
123. Michael Davison at his presentation, The new ICC Rules of Arbitration, University of Edinburgh, November 14, 2011; I. Welser & G. D. Berti, 'Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices' in C. Klausegger et al. (eds., 2010) 'Austrian Yearbook on International Arbitration 2010', 79, at pp. 80 et sequitur.
124. Blackaby et al., supra n. 20 at para. 6.270.
125. See in this context G. J. Horvath, 'Guerilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics' in C. Klausegger et al. (eds., 2011), 'Austrian Yearbook on International Arbitration 2011', 297; S. Wilske, 'Arbitration Guerrilas at the Gate – Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough' in C. Klausegger et al. (eds., 2011) 'Austrian Yearbook on International Arbitration 2011', 315.
126. See in this context, PARK, supra n. 110 at p. 445.
127. Beraudo, supra n. 35 at p. 253; McLaren, supra n. 32 at p. 233.
128. ACICA Rules, Sch. 2 Art.2.1; SIAC Rules, Sch. 1 Rule 2; SCC Rules, Appendix II Art.4(1); ICC Rules 2012, Appendix V Art.2(1).
129. ICC Rules 2012, Appendix V Art. 5(2); ACICA Rules, Sch. 2 Art. 3.3.
130. ICC Rules 2012, Art. 22(2).
131. M. Roth, 'The Revision of the UNCITRAL Arbitration Rules, Arbitration rules and regimes' in M. Roth & M. Geistlinger (eds., 2010), 'Yearbook on International Arbitration, Volume I', 19, at p. 28.
132. M. W. Bühler & T. H. Webster (2nd ed., 2008), 'Handbook of ICC Arbitration', para.6-5.
133. Böckstiegel, supra note 89 at 186.
134. N. Ziadé, 'Reflections on the Role of Institutional Arbitration between the Present and the Future' in (2009) Arb. Int'l. 427, at p. 429.
135. Rivkin, supra n. 15 at p. 385.

IN THE BEGINNING THERE WAS A WORD: INTERPRETATION OF INTERNATIONAL ARBITRATION AGREEMENTS

By Aleksandrs Fillers

1. Introduction

The Bible says "in the beginning there was a word."[1] Whatever the meaning of these words may be in the context of complicated theological disputes, they seem very familiar to every lawyer. Indeed, the law of contracts is pierced by the use of language. The interpretation of arbitration agreements[2] is no exception. Thus, in the beginning of arbitration there is a word.

The words embodied in an arbitration agreement are crucial since arbitration is a dispute resolution mechanism based on the agreement of the parties.[3] By such agreement, the parties empower the arbitral tribunal to decide the disputes between them.[4] At the same time, such agreement excludes the jurisdiction of the courts otherwise competent to hear such disputes.[5] In the absence of an arbitration agreement, the disputes between the parties will normally go to court.

However, some arbitration agreements are pathological, *i.e.*, they "contain a defect or defects liable to disrupt the smooth progress of arbitration."[6] Having said this, no agreement is pathological in itself.[7] Even the clearest and the most effective arbitration agreement can become pathological if it is interpreted in a particular way. On the other hand, even the most ambiguous agreement can be interpreted in an effective way. Thus, the pathological nature of an agreement becomes evident only against the background of the applicable law that governs its interpretation. Two main trends in interpreting arbitration agreements exist – one preferring to interpret agreements in favor of effective arbitration, and the other preferring a literal interpretation of arbitration agreements.

The objective of this paper is to identify and propose generalized rules of interpretation for specific elements of arbitration agreements, based on solutions reached in doctrine and court practice. The objective will be attained by analyzing the interpretation of arbitration agreements in judgments of national courts, by attempting to make generalizations

concerning their fact-specific solutions. At the same time, the author makes this analysis within the framework of solutions proposed by legal doctrine. Thus, the work is based on a combined analysis of case-law and doctrine.

The analysis in this paper is not limited to any specific jurisdiction, but rather tries to capture global trends. At the same time, the author deliberately contrasts cases from jurisdictions considered to be "pro-arbitration" as well as those less friendly to arbitration, thus showing the contradictions among jurisdictions. This paper is not focused on the practice of arbitration tribunals, and instead prefers to rely on court practice, since courts usually have the last word on the interpretation of arbitration agreements.[8] This paper discusses only the interpretation of the commitment to arbitrate, the scope of the arbitration agreement and the seat of arbitration. These elements are more or less described as the essential elements of the arbitration agreement.[9] There are of course other important elements of arbitration agreements, *e.g.*, the choice of institutional or ad hoc rules or the choice of the language of the arbitration[10]; however, due to the limited scope of this work it is not possible to discuss the interpretation of these other elements.

This work contains three substantial sections and conclusions. Each section deals with the interpretation of one particular element of arbitration agreements. The first section deals with the interpretation of the commitment to arbitrate, the second – the interpretation of the scope of the agreement, and finally, the third – with the interpretation of the choice of the seat of arbitration. In the conclusion, the author summarizes the results of his research and analysis.

2. The interpretation of the commitment to arbitrate

Arbitration is consensual, *i.e.*, it is based on the consent of the parties to submit a dispute to arbitration instead of submitting it to the courts.[11] Therefore, the first element that the arbitration clause must contain is a commitment to arbitrate.[12] The commitment to arbitrate is also required under the New York Convention for the arbitration agreement to be enforceable.[13]

The nature of the commitment to arbitrate is so crucial for a sustainable arbitration clause that it can be distinguished from all other elements of an arbitration clause. Thus, Professor Born rightfully states that in fact, the commitment to arbitrate is the unique essential element of the arbitration clause.[14] Other elements like the designation of the seat, the arbitration institution or the scope of the arbitration agreement are of course also very important; however, silence in their respect by the parties does not necessarily render the agreement unenforceable.[15]

Ideally "[an] arbitration agreement must clearly express the parties' intention to submit their disputes to arbitration, *i.e.*, to the binding decision of one or more arbitrators appointed according to their agreement."[16] In real life, however, arbitration agreements often contain flaws.

In this section, the author will analyze the interpretation of three frequent flaws in arbitration agreements. Firstly, the author will refer to clauses containing an ambiguous commitment to arbitrate. Secondly, the author will refer to clauses containing contradictory commitments. Thirdly, the author will refer to clauses containing a non-mandatory "commitment" to arbitrate.

Under the first category fall contractual clauses that are unclear as to whether the parties have excluded the jurisdiction of the courts and have agreed to arbitrate. Courts faced with such clauses might either interpret them so as to give effect to them or pronounce them unenforceable due to a lack of consent to arbitrate.

Some authorities believe that courts should "resolve ambiguities against finding the existence of an agreement to arbitrate."[17] This reasoning can be backed by a reference to the constitutional right to access courts.[18] From a constitutional point of view, some argue that a pro-arbitration interpretation of the commitment to arbitrate involves a risk that persons that have never agreed to arbitration will be precluded from accessing courts.[19]

The reasoning can also be backed by more pragmatic arguments such as those illustrated by the reasoning of the Swiss Federal Court in the Sonatrach case. The court in that case stated that because the "restrictions as far as challenges are concerned and costs which are generally much higher [than those of litigation]" the existence of an arbitration agreement should not be lightly assumed.[20] From this perspective, arbitration involves such significant inconveniencies to persons that an agreement to arbitrate requires a higher threshold of certainty.

While these arguments might be satisfactory in relation to domestic arbitration, they are inappropriate within the international context.[21] In international cases, not only do "both parties inevitably claim access to different national courts as the putative "natural forum[s]"[22], but they will almost inevitably end up in a court that will be domestic for one party and foreign for the other. This implies that the parties will be hardly in equal positions. Moreover, the judgment given in one state could be difficult or impossible to enforce in the other jurisdiction, which could contribute to the costs of the court proceedings.[23] In such circumstances, the ability to challenge a judgment might be of no avail, because the challenge must take place in a foreign and possibly biased court. Moreover, since there is no international obligation to enforce foreign court decisions, the final judgment might still be unenforceable in the place where the assets of the losing party are located. From such a perspective, the road of international litigation can be very costly, ineffective and characterized by an inequality between the parties. Thus, it is easy to agree with Professor Born "that arbitration is the natural […] means for resolving international business disputes."[24]

Therefore, the most essential guiding principle - the guiding light - for interpreting an arbitration agreement is contained in a statement by the Paris Tribunal of First Instance:

"an ambiguous arbitration clause should be interpreted by considering that if the parties had not wished to submit their disputes to arbitration, they would simply have refrained from mentioning the possibility of doing so [...] by including an arbitration clause in their contract, they demonstrated that it would be necessary to submit any disputes arising from their

contract to [the arbitral tribunal to which they referred]."[25]

The author proposes to name this mode of reasoning as the "one mention rule".[26] That is, if an arbitration agreement is ambiguous, the existence of the very word "arbitration" or words derived from it should be sufficient to establish a presumption that there is a valid commitment to arbitrate. In other words, a very general clause in the contract stating "arbitration" should suffice to create a valid arbitration agreement. And while some courts might hesitate to enforce such an agreement, it is sufficient under Article II of New York Convention as an expression of the commitment to arbitrate.[27] Thus, a US Court has implied that the phrase "arbitration clause" in a contract is sufficient to create an arbitration agreement.[28] Similarly, a UK court found that a clause stating "suitable arbitration clause" amounted to an arbitration agreement.[29] While, of course, these clauses are hardly the best of their kind, their effective interpretation seems entirely appropriate.

Additional formalistic elements - magic words - are not necessary for the arbitration clause to be interpreted as valid. Some authorities consider that the commitment to arbitrate should be expressed in a formalistic manner. For example, Bishop states that it is necessary to provide that "any disputes shall be *finally* settled by *binding* arbitration".[30] In the opinion of Bishop, the use of words "final and binding" shows that the parties contemplated the arbitration as binding on the parties and excluded its review by courts.[31] From a practical point of view, the language might serve as an additional argument before a domestic court or arbitration tribunal to enforce an agreement. It may also be useful in cases where an arbitration agreement mentions neither the word "arbitration" nor any other word derived from the word "arbitration".[32] However, it is clear that by agreeing to arbitration, the parties agree that the award will be binding on them, since the binding nature of the award is part of the definition of arbitration, indeed it is its essential characteristic.[33] The same applies to the finality of an award.[34] Thus, adding to an arbitration agreement words that do not carry any substantial function should not affect the interpretation of an arbitration agreement containing the word "arbitration" or related words.

The second category of flaws found in arbitration agreements concerns contradictory dispute resolution clauses. In the case of these clauses, it is unclear whether the parties contemplated arbitration or some other form of dispute settlement. The author submits that these clauses should be interpreted in accordance with the same "one mention rule". Thus, the mere appearance of the word "arbitration" should create a presumption that the parties have chosen to submit their disputes to arbitration, unless the clause in a clear and definite manner provides that the parties were willing to establish a different method of dispute settlement.

As an example of the application of the "one mention rule" to this category of clauses, an English court ruled that a contract containing both an arbitration clause and a clause granting the English court exclusive jurisdiction meant that the clause established an arbitration agreement.[35] The language concerning the exclusive jurisdiction of the English courts was interpreted as granting the English court exclusive jurisdiction to support arbitration proceedings.[36]

The application of the "one mention rule" can also be illustrated by the following example of a clause stating "[a]

rbitration – all disputes will be settled amicably."[37] Such a clause raises doubts as to whether the parties intended arbitration or some other mechanism of dispute settlement characterized by its amicable nature. Again, the guiding principle for interpreting such a clause should remain the "one mention rule" – once arbitration is mentioned it is mentioned with a purpose. Since the clause in question contains the word "arbitration", a presumption in favor of arbitration should arise. The words "settled amicably" do not amount to a clear and definite intent of the parties to provide for a different method of dispute settlement. Thus, the presumption is not rebutted.

The above example provides for an additional argument. The rights to an amicable settlement exist without any specific agreement, while the right to arbitration requires a commitment to arbitrate. Thus, relying on the words "settled amicably" in order to frustrate arbitration signifies a preference for a meaningless contract construction. [38] Since parties are free to settle their disputes amicably without any special agreements, such an agreement does not create any new rights. In the case at hand, the words "settled amicably" could be considered at best a good faith obligation to settle disputes amicably that is not legally binding. Therefore, this clause should be interpreted as containing nothing less than a firm commitment to arbitrate.

The "one-mention rule" might seem to be a very pro-arbitration approach to the interpretation of arbitration agreements. However, some courts have gone even further and found that even the use of words traditionally related to arbitration are sufficient to create a binding arbitration agreement. For example, a Texas court has stated that "[n] o particular words are needed to create a valid arbitration agreement, but the contract 'must reflect the parties' intent to submit their dispute to arbitrators and to be bound by that decision."[39] In that particular case, the court interpreted a "mediation agreement" under which the parties submitted their dispute to an independent auditor who was to determine the amount owed and his decision was to be issued in writing and be final and binding.[40] The court recognized that this clause amounted to an arbitration agreement. In doing so, the court placed a strong emphasis on the use of words "final and binding decision" in the clause.

However, such a clause could be interpreted differently. On one hand, the clause may just amount to an expert determination that would create no arbitral award, but rather a contractual obligation to perform in accordance with that determination.[41] However, the words "final and binding" indeed express a firm commitment to avoid further disputes over issues once decided.[42] This effect is hard to achieve through an expert determination that does not end up with an arbitral award. Moreover the words "final and binding" are traditionally used in conjunction with arbitration commitments.[43] Finally, in an international dispute it is the default interest of both parties to have an award rather than a mere contractual obligation that will have to be enforced before a foreign court. Therefore, there are good grounds to agree with the conclusion reached by the court, even though it is hard to say that such conclusion is self-evident.

This example shows that sometimes the application of the "one mention rule" can be expanded even beyond clauses expressly mentioning "arbitration" or similar words. In some cases the use of words traditionally related to arbitration is sufficient to establish a valid arbitration agreement.

The third category of flaws concerns clauses drafted in such a way that it is not clear whether the parties have made an agreement to arbitrate or merely provided for a possibility to agree to arbitrate in the future.

The "one mention rule" should not, however, be treated as a vehicle to establish arbitration if the language of the agreement provides, in a clear and definite manner, that parties are not bound by the arbitration agreement. This applies even if the word "arbitration" is used. For example, a clause providing that "the parties may agree to arbitrate the disputes arising under the contract" hardly creates a presumption of an enforceable agreement because it expresses in a clear and definite way that the conclusion of the arbitration agreement is only an option available to the parties in the future.

However, it is hard to agree with the opinion of a US Court that found that if the arbitration agreement provides that the parties "may" submit the issue to arbitration such a clause is not mandatory until one party has commenced the arbitration proceedings.[44] This solution seems wrong for the following reasons. Firstly, the parties have provided for arbitration in their clause. Secondly, the parties have not clearly identified that such clause is not binding; since the words "may submit" (unlike the words "may agree to submit") themselves are hardly a clear and express statement. Such uncertainty should have been interpreted in favor of arbitration.

Thus, the author submits that it is reasonable to interpret a commitment to arbitrate by the application of what the author calls the "one mention rule". In other words, once the word "arbitration" or words derived from it are used in an arbitration agreement a presumption of an agreement to arbitrate applies. This presumption applies even if the clause refers to some other form of dispute settlement. The presumption, however, does not apply if the language clearly states that the parties are not willing to bind themselves with an arbitration agreement.

3. Interpretation of the scope of the arbitration agreement

Once there is a commitment to arbitrate, an arbitral tribunal has a mandate to decide the dispute. However, what are the limits of that mandate? This can be answered only by interpreting the scope of the arbitration clause, *i.e.*, over what disputes the parties have agreed that the tribunal will be competent to decide.[45] The parties to a contract containing an arbitration clause are not obliged to submit all disputes to arbitration.[46] And the tribunal will have no mandate to hear disputes outside the scope.[47] If the tribunal makes an award on issues outside the scope of the arbitration agreement it will be subject to setting aside proceedings[48], as well as denial of enforcement.[49] Thus, the decision over the scope is of crucial

importance – every dispute that a tribunal decides must be within the scope of the arbitration agreement.

Until recently courts even in the most pro-arbitration jurisdictions followed a doctrine of the narrow interpretation of the scope.[50] This doctrine was based upon the assumption that arbitration is an exceptional method of dispute settlement that deviates from the default method – litigation.[51] As exceptional rules should be interpreted in a narrow fashion, this was claimed to apply to arbitration as well.[52] Today, views concerning arbitration have changed drastically and it is more common to prefer a broad interpretation of the scope.[53] This doctrine is based on the assumption that by interpreting an arbitration agreement "liberally and broadly, [courts] uphold the parties' intent to arbitrate and give that intent the maximum legal effect."[54] Moreover, a broad interpretation of the scope is also based on the "one-stop arbitration" doctrine,[55] *i.e.,* it avoids, "a fragmentation of the matter in dispute between a court […] and arbitration."[56]

The New York Convention requires that an arbitration agreement should relate to a defined legal relation.[57] As a result, the arbitration agreement cannot be undefined. However, in practice it might be very hard to draft an arbitration agreement with a truly undefined scope.[58] Usually an arbitration clause is attached to a contract, and in the event it is silent about its own scope, it will only be interpreted as covering disputes arising from the contract it is attached to.[59] This can be easily rationalized – if the parties attach an arbitration agreement to a contract, it is only natural to believe that they have been willing to submit disputes arising from the contract to arbitration; otherwise there would be no need to attach the arbitration agreement.

However, some issues concerning the scope have been the subject of controversy. The author will address two such issues, namely whether an arbitration agreement covers tort claims; and the interpretation of specifically narrow arbitration clauses.

The often occurring problem is how to treat tort claims that are related to the contractual obligations between the parties but do not arise directly under the contract. Historically, certain courts made a nuanced distinction between general words used in an arbitration clause. For example, English courts have found that language "in connection with the contract" or "in relation to the contract" covers tort claims, while the use of language "arising under the contract" excludes such claims.[60] Similarly, the Court of Appeals in Belgium held that if a clause provides for arbitration for all disputes resulting from the contract it does not cover tort actions.[61]

These nuances of wording once so important seem to lose their importance. This change was shown in the Fiona Trust case. In that case Lord Hoffman stated:

"[R]ational businessmen, are likely to have intended any dispute arising out of relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."[62]

Reasoning similar to that of Fiona Trust has been adopted by an Australian court in the Walter Rau case where the court stated that it "must construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration."[63]

However, this tendency is not universal. A recent judgment the Supreme Court of Greece did not follow the rule of extensive interpretation of general words. The court was faced with an arbitration clause stating: "*[a]ll differences arising in relation to the present contract shall be finally resolved in accordance with the Rules of Conciliation and Arbitration of the International*

Chamber of Commerce […]."[64]

The court was required to answer whether the clause would cover a claim based on tort law. The court found that the language "in relation to the present contract" excluded tort claims.[65] *However, at the same time the Court found that the tort claim in question was intrinsically related to a contractual claim and thus fell within the scope of the agreement.* [66]

The approach of the Greek court creates a number of difficulties. Firstly, it is unclear why the parties would be willing to litigate tort issues related to their contract if such litigation involves all the disadvantages of litigating in the foreign forum. Secondly, it creates legal uncertainty, since the jurisdiction of the tribunal become conditioned upon an appreciation of the connection between contract and tort claims. Such appreciation involves a case-by-case analysis with a result hard to predict. Thirdly, such an approach creates a fragmentation of issues and a risk of having related disputes decided in different fora. In other words, this approach of a middle road seems to create more problems than it solves.

While there seems to be a strong trend in most pro-arbitration jurisdictions to disregard subtle differences in wordings of arbitration clauses, the position is different once the clause itself is drafted in a narrower manner. The parties can limit the scope of the clause "to only some of their differences or to certain clearly defined questions."[67] But such limitations can create difficulties in determining the precise scope.[68]

One usual way of limiting the scope of the clause is submitting to arbitration "disputes which might arise from 'the interpretation' and/or 'the performance of the contract'".[69] The French *Cour de Cassation* has held that "the performance" of the contract also implies its validity.[70] Nonetheless, another French court has also stated that an arbitration clause referring to the interpretation of the agreement does not provide arbitrators with competence to decide on the non-performance of the parties.[71] Such a distinction could be based on the assumption that the decision on the performance *per se* implies both the decision on the validity and also on the interpretation of the contract. If a contract is invalid, no performance will be due. Moreover, to know what kind of performance is required, interpretation of the agreement is also required. On the other hand, if the agreement allows only interpretation, this *per se* does not require any additional competences of the tribunal. Thus, it could be reasonable to interpret the narrow scope of an arbitration agreement in a way so that this narrowness does not render an arbitration agreement ineffective.

However, many courts have taken a different path, preferring a more literal interpretation of arbitration clauses. Some courts take the position that arbitration agreements referring to interpretation, performance and termination of the contract do not cover its conclusion.[72] This approach can be criticized since it requires the parties to submit a dispute concerning the conclusion of the agreement to a court. This means that instead of using the natural forum for international disputes – arbitration – the parties are sent to foreign *fora*. Moreover, such a clause risks a contradictory decision, *e.g.*, the tribunal requiring the performance of the contract and later a court pronouncing that the contract is invalid. To avoid these problems, based upon the "one-stop arbitration" doctrine it would be more reasonable to treat such clauses as covering the conclusion of a contract, unless the parties have specifically excluded the conclusion from the clause. In a more general way, every clause that empowers a tribunal to decide on the performance of the agreement should by presumption include interpretation, conclusion and termination of the contract, since all these elements are intrinsically related to the performance of the contract.

To summarize, there seems to be some degree of harmonization between different courts with respect to practices in interpreting the scope of an arbitration agreement. Many "pro-arbitration" courts have abandoned their practice of paying exaggerated attention to nuances in the use of general words in arbitration agreements. Instead, they try to interpret general words in a wide sense, particularly as covering tort claims related to underlying contracts. At the same time, courts do respect the right of parties to provide for arbitration agreements with a narrow scope. However, in such cases courts tend to choose the widest possible interpretation of such agreements, particularly, where it is necessary for the purpose of having an efficient arbitration.

4. Interpretation of the choice of aribtration seat

Designation of the seat of arbitration has a minor importance in domestic cases because usually the seat will be the place of the nationality of the parties.[73] In international arbitration where parties often have different nationalities, the designation of the seat is one of the most important elements of an arbitration agreement.[74] Notwithstanding that, in many developed jurisdictions, "the seat of the arbitral tribunal is not one of the *essentialia negotii* which has to be covered by the parties' consent."[75]

The designation of the seat in arbitration agreements has multiple functions. By choosing the seat, the parties usually want to choose a neutral place of arbitration.[76] The parties should also consider whether a potential seat has modern arbitration legislation, whether the courts are sympathetic to arbitration, as well as the practical convenience of the possible seat.[77] However, the most important role of the seat is to connect the arbitration with a legal system.[78]

Since the designation of the seat is not an essential element of an arbitration agreement, in the event that an arbitration agreement is silent on the issue, many pro-arbitration jurisdictions empower an arbitral tribunal to designate the seat.[79] However, a problem could arise if, due to the non-cooperation of one of the parties or other circumstances, the arbitral tribunal cannot be established without the assistance of a court. In such a case, since an arbitration agreement lacks any guidance on the place of the seat, it might be hard to find a court willing to enforce the agreement and identify the nationality of the award.[80] Fortunately, some arbitration acts allow respective courts to support arbitration even if they have no connection with the arbitration in question.[81]

However, often courts might be unwilling to support arbitration proceedings if there is no connection between their legal order and the particular arbitration. For example, in Sweden "[a] Swedish court will not […] concern itself with

international arbitration issues which have no connection whatsoever with Sweden."[82] The easiest way to provide such a connection is by choosing Sweden as the seat of arbitration.[83] Therefore, an omission to designate a seat in the arbitration agreement might preclude the parties from receiving the necessary help from certain national legal systems to enforce their arbitration agreement.

However, the real challenges of interpretation occur in the event that the designation of the seat is ambiguous. The author submits that since the choice of the seat is not an essential element of the arbitration agreement, its contradictory or ambiguous nature should never lead to the invalidity of the agreement. Some courts appear to follow this reasoning.[84] For example, a court in Hong Kong found a clause requiring arbitration in a "third country" valid.[85] The court stated that the clause implies that arbitration can take place in any state, except those of the parties' nationalities.[86] Similarly, an English court enforced a clause providing for disputes to be "referred to arbitration in Beijing or London in defendant's option".[87] The court considered that such an optional clause does not create a legal uncertainty, but rather allows the defendant in court proceedings or the respondent in arbitration to choose the seat of arbitration.[88]

However, what should be the solution if the clause provides for multiple seats and it is impossible to give preference to any of them, or a clause that is so ambiguous that it is not possible to discern what state has been designated as a seat?

The position of the author is that such ambiguous or contradictory statements should be considered as non-existent and the court should designate another seat. This is based on the following. Firstly, by committing to arbitrate, the parties have chosen a dispute settlement method and this method has to be enforced. Secondly, the designation of a seat is merely a subsidiary term of the main agreement, unnecessary for the enforceability of an arbitration agreement. Reasonable parties would hardly intend to end up in litigation because of the mere failure of a subsidiary term. Thirdly, the inclusion of an ambiguous subsidiary term is itself evidence that the parties did not consider it to be of crucial importance for their agreement.

Unfortunately, the reasoning proposed by the author is not always followed by courts. A case of the Hamn Court of Appeals in Germany serves as a good illustration. The court faced the issue of the validity of a clause providing that "[all disputes] shall be settled by the arbitral tribunal of the the International Chamber of Commerce in Paris, the seat in Zurich."[89] The court found the clause void, since it could not determine, whether the clause provided for ICC arbitration in Paris or for arbitration at the Zurich Chamber of Commerce.[90]

This decision is hardly good law. The clause explicitly stated that the seat was to be Zurich. On the other hand, the word "Paris" was used to describe the institution. It is widely known that the ICC headquarters is in Paris,[91] thus it is hardly surprising that the parties referred to the name of the ICC along with the city of its headquarters. It would seem to be more reasonable to interpret this and similar clauses as providing for the ICC arbitration in the designated place. However, if the clause was so incomprehensible that a court was unable to interpret it in a corrective manner, the court should have established that the parties had made no agreement on the seat and made its own seat-determination.

Sometimes an unclear designation of the seat of arbitration does not place the validity of the agreement at risk, but rather the convenience of the parties (or at least one of them). This was what occurred in the Polymaster case, where a contract between Belarus and Cyprus companies provided that: "[D]isputes […] should be settled by means of arbitration *at the defendant's site*." [92]

The question before the Court of the Ninth Circuit

was whether this clause provided that each party should bring counterclaims at their site. The majority of the Court concentrated on the literal interpretation of the term "dispute". The court reasoned that the arbitration agreement required that any "dispute" be arbitrated at "the defendant's [site]."[93] The term "dispute" encompasses both claims and counterclaims.[94] Thus, the majority held that the defendant had to bring counterclaims in the state of claimant. The court also denied the possibility of interpreting the clause in a pro-arbitration manner because the clause was unambiguous and thus had to be read literally.

This opinion is hardly acceptable. In the case at hand, the court chose the wrong way of reasoning. Instead of playing word games, the court should have recognized the truth – the clause is ambiguous as it does not expressly address where the counterclaims will be heard. And this ambiguity should be resolved by taking into account the following factors. Firstly, the "normal" practice is to have one–stop arbitration in one forum. Since everything else is an anomaly, it should be expressed clearly. Secondly, multiple proceedings mean additional expense in terms of time and money to the parties. Thirdly, multiple proceedings might create an additional dispute over what is a counterclaim and what is a defense, and potentially this question can be answered in opposite manners by two different tribunals.[95] Finally, multiple proceedings on related issues *per se* might raise the problem of contradictory awards. Based on these considerations, the majority should have preferred an interpretation providing for the same seat both for a claim and a counterclaim in order to support efficient arbitration and to avoid unnecessary risks related to an overly literal reading of the arbitration agreement.

As discussed above, parties in international arbitration are often not required to designate a seat of arbitration. However, in the event that such a designation is ambiguous, courts should do their best to choose the most pro-arbitration reading of the arbitration agreement. Finally, if a court is unable to give any meaningful reading to a designation of the seat, it should disregard such designation and act as if the parties have made no choice of seat at all.

5. Conclusion

Most legal issues in international arbitration are resolved by an application of national law. This allows different courts to give different solutions to similar problems. At the same time, the field is truly international; hence national courts are often influenced by the solutions given in other jurisdictions. In particular, those jurisdictions that have decided to become important players in the field of international commercial arbitration seek to adopt similar pro-arbitration approaches while other jurisdictions with less exposure to international commercial arbitration tend to take a less friendly approach towards arbitration.

The interpretation of an arbitration agreement is mainly a matter for the national law. Therefore, the difference between the two approaches is broadly reflected in judgments across the spectrum of jurisdictions. Some jurisdictions have a strong pro-arbitration policy and seek to animate even the most ambiguous and contradictory arbitration agreements. Other jurisdictions demand higher clarity from the parties to enforce arbitration agreements.

The most essential element of the arbitration agreement is the commitment to arbitrate. Pro-arbitration jurisdictions follow the "one mention rule", *i.e.*, the use of the word "arbitration" or its derivative words in the clause is sufficient to trigger the presumption of an enforceable arbitration agreement. In some cases even the use of other words traditionally related to arbitration and its characteristics is sufficient to create such a presumption. However, clear and definite language that shows that the parties were not willing to arbitrate can rebut the presumption.

The alternate approach is to resolve ambiguity relating to the commitment to arbitrate in an opposite manner. This method requires that the commitment to arbitrate should not be presumed, thus preserving the right of the parties to access the courts to a maximum extent. However, in practice, this approach results in even minor ambiguities within arbitration agreements turning out to be fatal for their enforcement. This is hardly a satisfactory result since it leads to litigation in a foreign forum that often ends with a judgment which in many cases cannot be enforced outside the relevant state's borders.

Despite differences across jurisdictions, the general trend in interpreting the scope of arbitration agreements seems to be towards uniformity. Numerous authorities have held that once the parties have agreed to arbitration there is little reason to narrow the scope of the arbitration agreement. For this reason, many jurisdictions ascribe less importance to nuances in the wording as far as the scope of the arbitration agreement is concerned. At the same time, the rule remains that the parties can limit the scope of the arbitration clause by unequivocal language that does not render the arbitration clause ineffective.

Most jurisdictions do not consider the designation of the seat as essential to the validity of the arbitration agreement. Since the designation of the seat is a non-compulsory part of the arbitration agreement, it seems more reasonable to place the risk of ambiguity on the parties. Thus, many courts attempt to interpret the designation in a manner to avoid ambiguity. However, given the subsidiary nature of the seat as compared to commitment to arbitrate, the ambiguous designation of the seat should not place the enforceability of the arbitration agreement at risk.

Thus, at the beginning of arbitration there still is a word. The eagerness of the arbitration community to enforce the most ambiguous arbitration agreements to the maximum extent does not render their words meaningless. However, these words should be interpreted based on the assumption that international commercial arbitration has a purpose - to allow international actors to avoid litigation in a foreign forum carrying with it the risk of bias and the possibility of ending up with a non-enforceable judgment. At the same time it seems formalistic and clearly unfair, since it allows a party in a bad faith to avoid an arbitration agreement merely because the designation of the seat is lacking seven though it has agreed to arbitrate.

Aleksandrs Fillers

1. I want to thank Michael Richter, Legal Counsel at Export Development of Canada, for his comments and advices that have greatly contributed to the content of this article. Needless to say, that all errors and omissions are my sole responsibility.
2. The Holy Bible: King James Version. New York: The Random House Publishing Group [no year of publishing], p. 940.
3. An arbitration agreement is both a clause in a contract (or an independent document) that applies to future disputes as well as a submission agreement by which parties submit disputes that have already arisen to arbitration. This work concerns only the first type of arbitration agreement. Therefore, the terms "arbitration agreement" and "arbitration clause" are used interchangeably. However, conclusions of the work can be applied mutatis mutandis to submission agreements. For a more detailed discussion see, REDFERN, Alan. et al. Redfern and Hunter on International Arbitration. Oxford: University Press, 2009, pp. 86-87.
4. See, GAILLARD, Emmanuel and SAVAGE, John. Fouchard, Gaillard, Goldman on International Commercial Arbitration. The Hague: Kluwer Law International, 1999, pp. 394-395.
5. Ibid., p. 394.
6. SCHWARZ, Franz T. and KONRAD, Christian W. The Vienna Rules: A Commentary on International Arbitration in Austria. The Hague: Kluwer Law International, 2009, p. 35.
7. GAILLARD, Emmanuel and SAVAGE, John. Fouchard.. op. cit., p. 262.
8. One could also phrase this the other way around - every clause is pathological because its meaning is never crystal clear, therefore each clause always requires interpretation against the backround of some legal reasoning to clarify its meaning.
9. See, LEW, Jullian D.M.; MISTELIS, Loukas A. and KRÖLL, Stefan M. Comparative International Commercial Arbitration. The Hague: Kluwer Law International, 2003, pp. 339-340.
10. However, as will be discussed below, usually only expressed commitment to arbitration is essential for the validity of the arbitration clause.
11. LEW, Jullian D.M.; MISTELIS, Loukas A.; KRÖLL, Stefan M. Comparative.. op. cit., pp. 167-171.
12. ABDULLA, Zina. Chapter 2- The Arbitration agreement. In KAUFMANN-KOHLER Gabrielle. et al. International Arbitration in Switzerland: A Handbook for Practitioners. The Hague: Kluwer Law International, 2004, pp. 15-32, p. 15.
13. Cf. REDFERN, Alan. et al. Redfern.. op. cit., pp. 85-86.
14. Cf. Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), drawn up in New York, 10 June 1958.
15. BORN, Gary B. International Commercial Arbitration. The Hague: Kluwer Law International, 2009,,pp. 655-657.
16. LEW, Jullian D.M.; MISTELIS, Loukas A. and KRÖLL, Stefan M. Comparative.. op. cit., pp. 167-171.
17. BESSON, Sebastien and POUDRET, Jean-Francois. Comparative Law of International Arbitration. London: Sweet & Maxwell, 2007, p. 124.
18. Judgment of the United States District Court, Southern District of New York, 20 May 1996, Insurance Company of North America v. ABB Power Generation Inc., 925 F.Supp. 1053 p. 1058. For cases with similar reasoning see, BORN, Gary B. International.. op. cit., pp. 645-646.
19. See, BORN, Gary B. International.. op. cit., pp. 1076-1077.
20. Ibid., p. 646.
21. BESSON, Sebastien and POUDRET, Jean-Francois. Comparative.. op. cit., p. 264
22. Cf., BORN, Gary B. International.. op. cit.,p. 646.
23. Ibid., p. 647.
24. E.g., "arbitrators", "arbitral tribunal" etc.
25. BORN, Gary B. International.. op. cit., p. 646.
26. GAILLARD, Emmanuel and SAVAGE, John. Fouchard.. op. cit., p. 271.
27. This term is a creation of the author of this work. The author is not aware of the use of such term by any other author or court.
28. See, Article II of the Convention.. op. cit. Article II does not state that an arbitration agreement should contain anything more than a commitment to submit disputes in respect of a defined legal relationship. Of course, it is self-evident that a clause in a contract stating "arbitration" relates to arbitration of disputes arising from the specific contract. Thus, the relation to a defined legal relationship does not need to be necessarily expressed. See, also pp. 9-10 of this work.
29. Judgment of United States District Court, N.D. Illinois, Eastern Division, 5 June 2001, CAN Reinsurance Company Ltd. v. Trustmark Insurance Company, 2001 WL 648948, .p. 6 and footnote 4.
30. Judgment of English Court of Appeals (Civil Division), 18 July 1969, Hobbs Padgett & Co (Reinsurance) Ltd. v. JC Kirkland Ltd. [1969] 2 Lloyd's Rep. 547. Quoted from BORN, Gary B. International.. op. cit., p. 676.
31. BISHOP, R. Doak. Drafting the ICC Arbitral Clause. http://www.kslaw.com/library/pdf/bishop5.pdf (Consulted: 18th February 2012.), p. 21.
32. Ibid., 21-22.
33. See, pages 7-8 of this work.
34. McLLWRATH, Michael and SAVAGE, John. International Arbitration and Mediation: A Practical Guide. The Hague: Kluwer Law International, 2010, pp. 18-19.
35. BORN, Gary B. International.. op. cit., p. 81.
36. Judgment of Queen's Bench Division (Commercial Court), 18 February 1991, Paul Smith Ltd. v. H & S International Holding Inc. http://www.trans-lex.org/303000 (Consulted: 26th February 2012), p. 30
37. Ibid., p. 31.
38. BISHOP, R. Doak. Drafting.. op. cit., p. 5.
39. See, BORN, Gary B. International.. op. cit., p. 648.
40. Judgment of United States District Court, W.D. Texas, San Antonio Division, 2 February 2006, Schofield v. International Development Groupd Co., Ltd. In VAN DEN BERG, Albert Jan (Ed.). Yearbook of Commercial Arbitration 2006 – Volume XXXI. The Hague: Kluwer Law International, 2006, pp. 1414-1421, p. 1417.
41. Ibid., p. 1415.
42. See, REDFERN, Alan. et al. Redfern.. op. cit., pp. 48-49.
43. See, BISHOP, R. Doak. Drafting.. op. cit., pp. 21-22.
44. See, McLLWRATH, Michael and SAVAGE, John. International.. op. cit., pp. 18-19. Even though at the same place Mcllwrath and Savage consider that the use of such wording hardly contributes to the validity of the arbitration agreement. However, the judgment of the Texas court proves that sometimes the words"final and binding" make a difference.
45. Judgment of the United States District Court of Eastern District of Kentucky, 5 March 1990, Cravat Coal Export Company v. Taiwan Power Company, Civil Action 90:11. Quoted from KAPLAN, Neil. "The Model Law in Hong Kong – Two Years On". Arbitration International. 1992, Vol. 8, Issue 3, pp. 223-236, p. 225.
46. Cf., BESSON, Sebastien and POUDRET, Jean-Francois. Comparative.. op. cit., p. 265.
47. GAILLARD, Emmanuel and SAVAGE, John. Fouchard.. op. cit., pp. 297-298.
Ibid., p. 298.
48. REDFERN, Alan. et al. Redfern.. op. cit., p. 598.

49. Ibid., p. 647.
50. See, HEUMAN, Lars. Arbitration Law of Sweden: Practice and Procedure. New York: Juris Publishing, Inc., 2003, pp. 51-52; GAILLARD, Emmanuel and SAVAGE, John. Fouchard.. op. cit., p. 260, note 91.
51. GAILLARD, Emmanuel and SAVAGE, John. Fouchard.. op. cit., p. 260.
52. Ibid., p. 260.
53. BORN, Gary B. International.. op. cit., p. 1067 and further.
54. SCHRAMM, Dorothee. et al. Article II. In NACIMIENTO, Patricia et al. Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention. The Hague: Kluwer Law International, 2010, pp. 37-114, p. 58.
55. The term was famously used by the English Court of Appeals. See, Judgment of English Court of Appeals, 24 January 2007, Fiona Trust & Holding Corporation & ors v. Yuri Privalov & ors, [2007] EWCA Civ 20, para. 19.
56. HEUMAN, Lars. Arbitration.. op. cit., p. 53.
57. SCHRAMM, Dorothee. et al. Article.. op. cit., p. 50.
58.BORN, Gary B. International.. op. cit., p. 660.
59. See, Ibid., p. 660.
60. Ibid., pp. 1092-1096.
61. Judgment of the Court of Appeals of Liege, 4 September 1987. Quoted from BORN, Gary B. International.. op. cit., p.1104.
62. Judgment of the House of Lords, 17 October 2007, Premium Nafta Products Limited and other v. Fili Shipping Company Limited and others (Fiona Trust & Holding Corp v. Provalov) 2007 WL 2944855,para. 13.
63. Judgment of the Federal Court of Australia, 10 June 2005, Walter Rau Neusser Oel Und Fett AG v. Cross Pacific Trading Ltd. [2005] FCA 1102, para. 41. See also, Judgment of the US Supreme Court, 7 April 1986, AT & T Technologies Inc. V. Communications Workers of America. 106 S.Ct. 1415, p. 1419.
64. TSAVDARIDIS, Antonios D. Tort Claims and Scope of Arbitration Agreement. http://www.internationallawoffice.com/newsletters/detail.aspx?g=9dfdf9a3-4f77-4b6e-bd8c-297eaa359988 (Consulted: 18th February 2012).
65. Ibid.
66. Ibid.
67. BESSON, Sebastien and POUDRET, Jean-Francois. Comparative.. op. cit., p. 265.
68. Ibid.
69. Ibid., p. 265.
70. Judgment of Chamber of Commerce, 13 March 1978, Hertzian v. Electronska Industrija. Quoted from GAILLARD, Emmanuel and SAVAGE, John. Fouchard.. op. cit., p. 261.
71. Judgment of Paris Court of Appeals, 25 January 1972, Quijano Aguero v. Marcel Laporte. Quoted from BORN, Gary B. International.. op. cit., p. 1107.
72. See, BESSON, Sebastien and POUDRET, Jean-Francois. Comparative.. op. cit., p. 266.
73. In domestic cases all parties involved share the same nationality.
74. BORN, Gary B. International.. op. cit., p. 1679.
75. Ibid., p. 660. Even though, as Professor Born writes, in some jurisdiction "the failure to specify […] the arbitral seat […] may invalidate the arbitration agreement." See, BORN, Gary B. International.. op. cit., p. 1694. This approach is probably motivated by the willingness of some jurisdictions to avoid uncertainties in enforcement of arbitration agreements. At the same time it seems formalistic and clearly unfair, since it allows a party in a bad faith to avoid an arbitration agreement merely because the designation of the seat is lacking seven though it has agreed to arbitrate.
76. Ibid., 73.
77. REDFERN, Alan, et al. Redfern.. op. cit., p. 114; BORN, Gary B. International.. op. cit., p. 64. Of course, it is beyond doubt that the parties should choose only states that are signatories of the New York Convention.
78. BESSON, Sebastien and POUDRET, Jean-Francois. Comparative.. op. cit., p. 125.
79. For more specific discussion which jurisdictions allow such solution, see BORN, Gary B. International.. op. cit., pp. 1699 – 1701.
80. McLLWRATH, Michael and SAVAGE, John. International.. op. cit., p. 21.
81. Thus, new French legislation provides French courts with universal jurisdiction to provide support to an enforcement of any arbitration agreement around the world if no other court is willing to enforce the agreement. See, HARB, Jean-Pierre. New Arbitration Law in France: The Decree of January 13, 2001. http://www.bakermckenzie.com/files/Publication/7ae21a19-7030-4f4a-a537-84251cf6f996/Presentation/PublicationAttachment/d49afd95-4f2a-4b9d-8bfc-90c3b52a386e/ar_paris_arbitrationlawfrance_mar11.pdf (Consulted: 25th February 2012).
82. HEUMAN, Lars. Arbitration.. op. cit., p. 674.
83. Cf. Ibid., p. 675. Previously, Swedish courts have considered that a mere designation of Sweden as a seat of arbitration is insufficient to create a connection with the Swedish legal order, unless at least some hearings took place in Sweden. This practice was overturned in the decision of the Supreme Court of Sweden. See generally, Judgment of the Supreme Court of Sweden, 12 November 2010, Rosinvest Co UK Ltd v. The Russian Federation. http://italaw.com/documents/RosInvestCoSCofSwedenDecision12Nov2010English.pdf (Consulted: 12th February 2012)
84. BORN, Gary B. International.. op. cit., p. 659.
85. Judgment of High Court of Hong Kong, 5 May 1993, Lucky-Goldstar International (H.K.) Limited v. NG Moo Kee Engineering Limited, [1993] 2 HKLR 73, p. 75.
86. Ibid., p. 75.
87. Judgment of the English Court of Appeals (Civil Division), 20 May 1993, Star Shipping AS v. China National Foreign Trade Transportation Corp. [1993] 2 Lloyd's Rep, 445. In VAN DEN BERG, Albert Jan (Ed,). Yearbook International Commercial Arbitration 1997 – Volume XXII. The Hague: Kluwer Law International, 1997, pp. 815-827, p. 816.
88. Ibid., p. 820.
89. Judgment of the Hamn Court of Appeals, 15 November 1994. Quoted from VAN DEN BERG, Albert Jan (Ed.). Yearbook Commercial Arbitration 1997 – Volume XXII. The Hague: Kluwer Law International, 1997, pp. 107-109, p. 707.
90. Ibid., p. 709.
91. GAILLARD, Emmanuel and SAVAGE, John. Fouchard.. op. cit., p. 264.
92. Judgment of the United States Court of Appeals for the Ninth Circuit, 28 February 2010, Polimaster Ltd. V. Rae Systems, Inc. http://www.ca9.uscourts.gov/datastore/opinions/2010/09/28/08-15708.pdf (Consulted: 18th February 2012), p. 16554.
93. Ibid., 16559.
94. Ibid., p.16559.
95. This can even result in denial of justice, if the second tribunal would consider that the claim should have been brought in the first proceedings.

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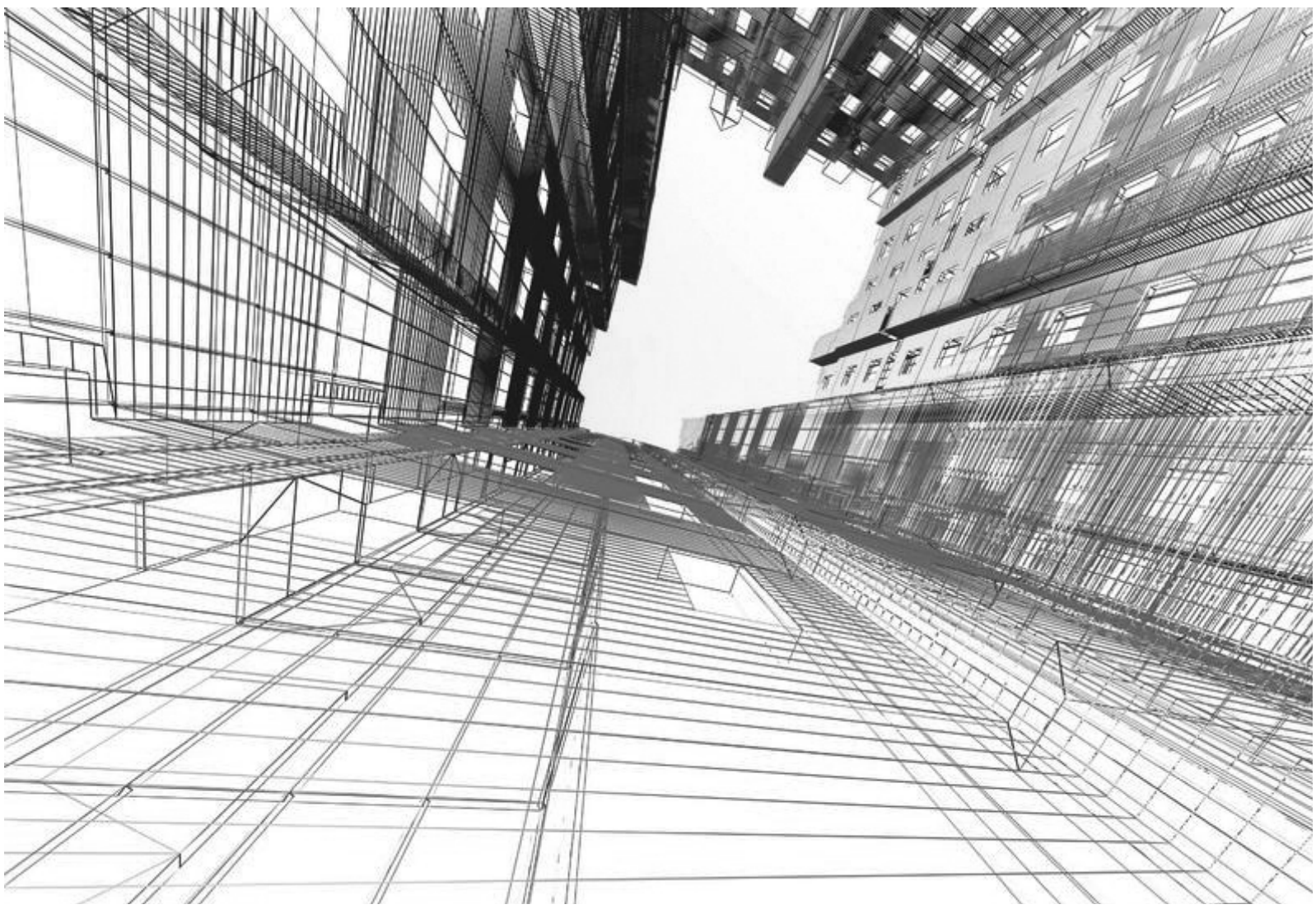
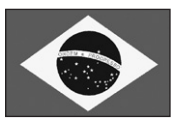
MISCELLANEOUS

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), drawn up in New York, 10 June 1958.



SOFTWARE ARBITRATION AND COMPUTATIONAL THINKING

By Julio Lemos[1]



The computer program was worth not millions, but *billions of dollars*. The two appointed arbitrators – a rare case of an even-numbered Panel – had to work hard for several months on the actual details of the code. Largely commented on on that time was the fact that the parties were lucky they did not have to litigate, for judges usually lack thorough knowledge of computer systems and are not confortable to choose the experts themselves, let alone act as intermediate agents between parties and experts.

It may be said that the news of computer arbitration was spread with *the worlds greatest arbitration case ever*., at least in economic significance. If the greatest arbitration ever was one dealing with computer software, it may be said that computer arbitration is already a classic.

We are talking about the famous case *IBM Corp. v. Fujitsu of Japan Ltd (1985)*. The arbitration was based on 1983 agreements entered into between these companies and had as subject matter the IBM System/360 operating mainframe system for the M series.[2] IBM claimed that Fujitsu's software contained information copied from its program. Fujitsu denied the claim, alleging that IBM had violated the 1983 agreements (by which Fujitsu had agreed to pay IBM so that it would let the company restrictedly use the programs). "For IBM, at stake was the protection of billions of dollars of investment in the development of its operation system software. For Fujitsu, at stake was its ability to continue developing Fujitsu's IBM-compatible systems software, and the protection of its customers' investments in application programs created to run on these operation systems".[3] Interestingly the case reminds some present-day discussions on free software and open source projects.

At the time the first question was: how would one decide whether one computer program was copied from another? Well, one would have to take a detailed look at the programs and their structure. Line by line, block by block. And there were thousands and thousands of them, all machine-language instructions like "MVC 112 15 100 12 100".[4] No wonder the two arbitrators requested a full-term computer science professor to lead a four-day seminar just to instruct them on the basics of the matter. At the end a regime was established, following lots of rulings, expert opinions and issuing of technical rules and procedures, and the conflict was very well settled or, better said, managed in a 10-year transition period. Reflections on this case have always been

very optimistic as regards the efficiency of arbitration in resolving computer disputes. "This experience once again demonstrates that when neutrals can help disputants become problem solvers, parties and neutrals together can design pragmatic, creative ways to successfully resolve large, complex and seemingly intractable conflicts that no judge, jury or legislature could understand or address".[5]

Today computer software arbitration is not only a trend,[6] but an established tradition. AAA has a list of more than 60,000 computer and IT law experts that parties may appoint as arbitrators to resolve their disputes. Thirty years ago that number was already impressive: 187. It is sign that novelty and awe were replaced by a fact.

There is no place in these cases for lawyers or judges who "loves computers" but don't know how to actually program them. "Justice requires knowledge",[7] and that is more likely to be the case in computer arbitration. In what follows, we will lay down some of the issues related to this kind of disputes, independently of the legal system.

Arbitration clauses

It is often heard in the USA: "Arbitration is the traditional way of handling software disputes".[8] But sometimes contracts are in no way straightforward creatures. Back in the 90s a known attorney in the computer industry said (and we still hear it today): "An endemic problem with this industry is a software contract that is so vague about what can and can't be done that it's a worthless document."[9]

Clients should thus be advised to include crystal-clear arbitration clauses in their computer contracts. But if that is not the case, it may well not matter. It is reported that courts are definitely "willing to enforce arbitration clauses in computer contracts".[10] One would argue that the reason is that judges themselves are not prepared to deal with the contracts and services in the computer industry, specially with claims of non-compliance, and would thus avoid them by any means; but a more educated guess – let's not mistake causes for effects -- is that in most countries arbitration is simply the standard means of solving technical and technological disputes.

As Hires Part Service, *Inc. v. NCR Corp*. shows, even a well documented claim that the arbitration clause was "a fraudulent device intended to deny appellant discovery" was not sufficient to preclude software arbitration, as in the Arnold case in which NCR relied upon (an interesting precedent). The respondent, a software house, allegedly sold a computer software that it itself knew to be "plagued with defects". But the court ordered Hires Part Service to proceed with arbitration.

Dive into algorithms

Software is a uniquely complex product that will always have some defects. That is the view of the courts, but specially of the arbitrators in disputes bound by the rules of the American Arbitration Association.[11]

It may be the case that an appointed arbitrator happens to be at odds with the specifics involved in a software dispute. But he or she should know the basics. In Computer Science, notwithstanding, the basics can be very hard to grasp for someone coming from a strictly humanities or social sciences background. Exact sciences require math skills and the ability to follow 'literal minded' arguments and understand formal methods. A receipt for calculating the area of a circle is either 100% correct (semantically and syntactically) or it is a waste of time; if it 'works', either the function returns a correct value or it returns no semantically relevant value at all. Now think of a receipt for organizing all the data relevant to a corporation – several gigabytes or even terabytes of information. In Computer Science, almost everything equates to formulating and evaluating receipts of this kind – they are called 'algorithms', a set of precise instructions that takes an input and returns an output (a solution), or "an unambiguous, ordered sequence of steps that leads to the solution of a given problem", the definition adopted by the U.S. Supreme Court.[12] An algorithm coded in an existing programming language is a computer program, a software. Which means if one cannot think algorithmically – if one cannot think like a computer! –, one cannot understand the basics involved in a computer program. And it would be rather awkward for someone to evaluate, even from a legal perspective, the performance of an algorithm without thinking at least roughly like a computer scientist. "Roughly" here surprisingly means "exactly", for we are dealing with an exact science and art.

A very common example is that of electronic commerce, which enables goods and services to be negotiated and exchanged electronically. Privacy being the main concern in this context, one cannot emphasize enough the importance of public-key cryptography and digital signatures, which are the core technologies used therein. At the core of electronic commerce are numerical algorithms and number theory; these sets of instructions are worth entire economies and even lives may eventually come to depend on them. One will certainly remember Alan Turing (1912-1954), the English mathematician who formally invented modern algorithmics; he was one the most important weapons against the Nazis during the Second World War.

So arbitrators will be at least indirectly evaluating algorithms. To be more precise, they will evaluate the performance of concrete computer programs, i. e. coded algorithms. Also, which is of utmost importance, they will ascertain the *legal consequences* of these facts. One of them is that algorithms are technologies, and therefore subject to ownership, thus capable of being sold and protected as if they were physical objects. Damages caused by encoded algorithms are obviously subject to immediate legal considerations. Failure on the part of American lawyers to understand the nature of algorithms would have deterred the U.S. Supreme Court from "acknowledging that computer programs might be patentable as processes under appropriate circumstances".[13] Now it seems to be settled that abstract algorithms devoid of application are not patentable, but that any useful algorithmic technology is no doubt patentable.[14]

Legal experts will always benefit from the fact that in some situations the legal reading of the matter is not conditioned to a detailed analysis of the software, e. g., when arbitrating whether

the software was delivered or not, or whether it was delivered on time. But then it only proves that non-legal technical expertise is not enough, so that parties should select a team of arbitrators (the usual suspect being the number 3) that together represents combined 'algorithmic' and legal thinking.

Fostering a problem-solving approach in software arbitration

In Europe and South America, a merely technical approach is simply not enough. Although clients might well ignore it, venerable legal traditions (specially the Roman/German one) favors old-fashioned prudence over expertise. The Anglo-Saxon tradition, on the other hand, specially on the North-American side, seems to favor expertise. But the matter is very blurred.

The only way to bring arbitration to a more then satisfactory level, which means aiming at excellence, is to combine both traditions. Fusion is currently a major trend in international arbitration as regards procedure and rules on the taking of evidence. Legal excellence requires erudition, prudence and creativity; technical excellence requires certified skills and exact thinking. Combined, these methods should render an interesting *problem-solving* strategy.

Today the general skill involved is called "computational thinking", a term brought to the forefront by J. M. Wing, President's Professor of Computer Science at Carnegie Mellon University:

Computational thinking is using abstraction and decomposition when attacking a large complex task or designing a large complex system. It is separation of concerns. It is choosing an appropriate representation for a problem or modeling the relevant aspects of a problem to make it tractable. It is using invariants to describe a system's behavior succinctly and declaratively. It is having the confidence we can safely use, modify, and influence a large complex system without understanding its every detail. […] Computational thinking is using heuristic reasoning to discover a solution. It is planning, learning, and scheduling in the presence of uncertainty.[15]

It is up to us practitioners completely wiping out the vagueness of the expression. A lasting contact between computer science and law – a rather sophisticated state of affairs to be brought about mostly by alternative dispute resolution systems – could then bring us to a whole new level of legal thinking, already exemplified by IBM vs. Fujitsu. This line on the case deserves to be quoted again in the light of J. M. Wing's apparently vague words on computational thinking: *"This experience once again demonstrates that when neutrals can help disputants become problem solvers, parties and neutrals together can design pragmatic, creative ways to successfully resolve large, complex and seemingly intractable conflicts that no judge, jury or legislature could understand or address".*

Julio Lemos

1. Partner, Duarte Garcia, Caselli Guimarães e Terra. PhD, University of São Paulo. Post-PhD student and Computer Science researcher.
2. Today, System/360 survives through the System z family for IBM mainframes. Many of the original applications still run unmodified on present-day computers.
3. Mnookin, Robert H.; Greenberg, Jonathan D., Lessons of the IBM-Fujitsu Arbitration: Now Disputants Can Work Together to Solve Deeper Conflicts, 4 Disp. Resol. Mag. 16 (1997-1998).
4. IBM System/360 Principles of Operation, Poughkeepsie, NY, IBM Systems Reference Library, File No. S360-01, Form A22-6821-0.
5. Mnookin, Robert H. cit.
6. Nobles, Kimberley Chen, Emerging Issues and Trends in International Arbitration 43 Cal. W. Int'l L.J. 86 (2012).
7. George Sand, Les Sept Cordes de la Lyre I, 2 (Paris, 1840), our translation.
8. Martin Garvey, Software suits: no real winners, InformationWeek 98 (Sept. 9 1991).
9. Id. ibid. Recently an attorney wrote: "Lawyers will delay the process somewhat but their help in developing a good contract will stand you in good stead if any problems should happen to arise later on. In the event of a dispute, I recommend arbitration rather than a lengthy and costly court battle, where every argument is met with a counterargument from the other side." (Michael Burns, How to negotiate software contracts, CA Magazine Jan.-Feb. 2011).
10. Cf. R. Raysman, P. Brown, Computer Law: Drafting and Negotiating Forms and Agreements (2006) 13-5.
11. Michael A. Cusumano, Who is liable for bugs and security flaws in software?, 47, 3, Communications of the ACM 26 (March 2004).
12. Diamond v. Diehr, 450 U.S. 175, 186 n.9, 101 S. Ct. 1048, 1056 n. 9, 209 U.S.P.Q. 1,8 n.9 (1981).
13. The law, the computer, and the mind – an interview with Roy Freed, Ubiquity Jan. 2012, 1-9.
14. See Brooks, Human ingenuity: a novel standard for patenting algorithms, 22 Golden Gate U. I. Review (1992).
15. Computational thinking, 49, 3 Communications of the ACM 33-34 (March 2006).
16. Mnookin, Robert H.; Greenberg, Jonathan D., Lessons of the IBM-Fujitsu Arbitration: Now Disputants Can Work Together to Solve Deeper Conflicts, 4 Disp. Resol. Mag. 16 (1997-1998).

FLASHnews

YAR: RUNNER-UP FOR THE *CREATIVITY AWARD* ON THE TENTH ANIVERSARY OF THE OGEMID AWARDS 2012

YAR - Young Arbitration Review was awarded second-place at the **Creativity Award** of the OGEMID AWARDS 2012 with 16,5% of the votes, along with Wilmer Cutler Pickering Hale and Dorr's Scholar-in-Residence Program.

YAR was the only Portuguese project to be recognized at the OGEMID Awards amongst many solid and international candidates. This is a massive achievement that leaves us very proud of the work that we have done during the last 3 years.

Amongst the nominations for the Creativity Award, one finds the Government of Sudan / The Sudan People's Liberation Movement/Army; International Institute for Sustainable Development (IISD); Dr. Michael Clancy (PhD thesis); Devashish Krishan (paper); Pedro J. Martinez-Fraga (paper); Proposal for an International Arbitrator Information Project; GAR; A Model Litigation Finance Contract; Abaclat and others vs. The Argentine Republic; UNCTAD Project on Dispute Settlement in Int'l Trade, Investment and Intellectual Property; Vale Columbia Centre; IBA Investor-State Mediation Rules. (http://www.transnational-dispute-management.com/ogemidawards/)

We sincerely congratulate the winners and runners-up of the 4 categories and thank all those who voted for YAR. You may find bellow all the results of the OGEMID Awards 2012:

1. THE RISING STARS AWARD

Winner: Paris Very Young Arbitration Practitioners: 45.1%

Runner-up: Eric Bergsten, the Vis Moot: 14.3%

2. THE DIVERSITY AWARD

Winner: Wilmer Cutler Pickering Hale and Dorr London's Internship Program: 25.8%

Joint Runner-ups:

- Arbitral Women: 13.5%
- Young ICCA's Mentoring Program: 13.5%

3. **THE CREATIVITY AWARD**

Winner: Jerusalem Arbitration Centre: 23.3%

Joint Runner-ups:

- Young Arbitration Review (Portugal): 16.5%
- Wilmer Cutler Pickering Hale and Dorr's Scholar-in-Residence Program: 16.5%

4. MOST INFLUENTIAL AWARD

Winner: Abaclat and others v. The Argentine Republic, Decision on Jurisdiction and Admissibility, in tandem with the Dissenting Opinion of Professor Georges Abi-Saab: 38%

Runner-up: The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration): 17.2%

Lisbon, February 15 2013
Pedro Sousa Uva and Gonçalo Malheiro

[YAR EVENTS]

YAR HOSTS ITS FIRST INTERNATIONAL ARBITRATION EVENT IN S. PAULO, BRAZIL

Following YAR's focus in Brazil, notably by the creation of the Brazilian Chapter and the successful partnership with ABEArb – *Associação Brasileira de Estudantes de Arbitragem* (Brazilian Association of Students of Arbitration), we are happy to announce that YAR will host its first arbitration Conference in Brazil on August, 6 2013 at the University of São Paulo.

This event is organized by YAR with the cooperation of Luis Guerrero and the Law University of S. Paulo and shall include sponsorships of several reputable entities such as the referred University, ABEArb and Brazilian Law Firms.

The Panels of the Conference shall include reputable Brazilian lawyers, arbitrators and Professors, notably Professor Carlos Alberto de Salles, Thiago Marinho Nunes, Luis Fernando Guerrero, Renato Grion, Eduardo Silva da Silva and Adriana Braghetta. We are honored to be part of the Panels as well.

The Conference shall address several topics related to the practice of domestic and international arbitration, as well as the arbitration legal background and experience in Portugal and Brazil.

This shall be the first international arbitration event ever launched by YAR. Thus, we would like to invite our subscribers and readers, as well as all those interested in international arbitration, to save the date and attend the Conference.

The full list of speakers and the conference program will be announced shortly.

We remain available to clarify any queries regarding this event.

Kind regards.

Pedro Sousa Uva and Gonçalo Malheiro

[YAR EVENTS]

THE FIRST ICC YAF EVENT IN PORTUGAL SHALL BE HOSTED BY YAR

"*Arbitral tribunals and state courts: partners or competitors?*"

YAR – Young Arbitration Review shall co-host the first ICC YAF (Young Arbitrators Forum) event in Portugal on May, 16 2013.

This event will take place at the premises of the Portuguese Chamber of Commerce and Industry, in Lisbon, and shall be organized by YAR and ICC Portugal.

Following the style of the ICC YAF events, this will be a "one afternoon open to debate conference" and a great opportunity to discuss current practical issues related to the concurrent powers of state courts and arbitral tribunals, notably interim relief and taking of evidence in international arbitration.

Amongst the Participants, we are honored to include Steven Finizio, Partner at Wilmer Cutler Pickering Hale & Dorr LLP, Dr. Stavros Brekoulakis, Professor in International Law and Arbitration, School of International Arbitration, Queen Mary University of London, Sofia Martins, Counsel at Uría Menéndez - Proença de Carvalho, Alejandro López Ortiz, Counsel at Hogan Lovells International LLP, Porfírio Moreira, Associate at Cardigos e Associados, Luis Guerrero, Partner at Dinamarco, Rossi, Beraldo & Bedalque, Stavroula I. Angoura, LL.M., Partner, Katsika, Samoladas, Associates, academic - research assistant in LL.M in Transnational and European Commercial Law & ADR, International Hellenic University, Pedro Sousa Uva, Associate at Abreu Advogados and co-Founder of YAR, Gonçalo Malheiro, Partner at PBBR and co-Founder of YAR.

Following the Conference, a Cocktail sponsored by Uría Menéndez – Proença de Carvalho shall follow.

This Event will definitely be a great opportunity to network and, for many participants, a chance to meet Lisbon!

We invite all our readers to be present at this Conference.

Kind regards.

Pedro Sousa Uva and Gonçalo Malheiro

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ICC
International Chamber of Commerce
The world business organization

[BIOGRAPHIES]

PEDRO SOUSA UVA

Pedro Sousa Uva is an Associate Lawyer at Abreu Advogados in Lisbon.

He is a graduate from the Portuguese Catholic University of Lisbon Law School and a former scholarship student at the Katolieke Universiteit Leuven, Belgium, where he pursued studies in International Arbitration.

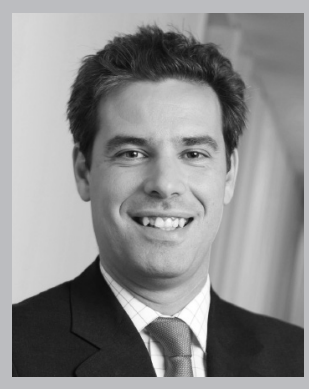
Pedro has an LL.M in Comparative and International Dispute Resolution from Queen Mary - University of London, School of Law. He participated in the International Arbitration Group's Intern Program in London at Wilmer Cutler Pickering Hale and Dorr LLP.

Pedro is a member of the Portuguese Bar Association and a member of the Alumni & Friends of the School of International Arbitration (AFSIA), University of London. He is a co-founder of AFSIA Portugal.

During his ten years as a Lawyer at Abreu Advogados, Pedro has focused on national and international dispute resolution, notably representing clients in complex litigations and institutional and ad hoc arbitrations, as well as in recognition, enforcement and challenge proceedings of arbitral awards in Portugal.

Pedro is co-Founder and Director of YAR – Young Arbitration Review and the author of several articles published on various topics of international arbitration.

Practice Areas of Expertise: Arbitration, Litigation (Civil, Commercial and Criminal Litigation), Mediation, Corporate and Commercial Law.



GONÇALO MALHEIRO

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

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

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

He is a co-founder of AFSIA Portugal. Gonçalo is Chairman of the Young Member Group of the Chartered Institute of Arbitrators.

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

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VIRGINIA ALLAN

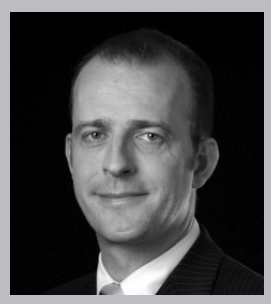
Virginia Allan is an international arbitration specialist in Uría Menéndez's Madrid office.

She represents clients in international commercial arbitration and investment protection disputes, both ad hoc and under the rules of various institutions including the ICC, Swiss Chambers, ICDR and ICSID. Virginia has participated in numerous international proceedings with their seat in Paris, Geneva, Zurich, Budapest, Lisbon, Madrid, Mexico City, Tokyo and Washington, D.C.

Her experience comprises, among others, construction and engineering, public works, oil and gas, electrical energy distribution and professional sports sponsorship.

She has acted as arbitrator pursuant to the ICC Rules and is a CEDR-accredited mediator. Prior to joining Uría Menéndez in 2009, she was an associate in the International Arbitration group at Shearman & Sterling LLP in Paris.

She belongs to a number of professional associations, including IAI Paris, ASA and the European Subcommittee of the U.S. Committee of the ICC. Ms. Allan began her career as a law clerk to the Hon. Roger J. Miner of the United States Court of Appeals for the Second Circuit.



RICHARD BREEN

Richard Breen is a Partner in William Fry's Litigation and Dispute Resolution Department in Dublin.

Richard advises various institutional, national, multinational, State agencies and private clients in dispute resolution at mediations, arbitrations (domestic and international) and before the Commercial Court, High Court and Circuit Court and at statutory inquiries.

His practice areas include:- product liability defence (pharma, tobacco, motor and computer manufacturers); commercial contract and shareholder disputes; property and construction disputes; equine disputes; landlord and tenant disputes; commercial rates and Valuation Tribunal appeals; and maritime/ship arrest.

Richard is a CEDR Accredited Mediator and a member of both the Chartered Institute of Arbitrators and Irish Commercial Mediation Association.

GERARD JAMES

Gerard James is a solicitor in William Fry's Litigation and Dispute Resolution Department in Dublin.

He specialises in commercial and property litigation, arbitration and regulatory matters.

Gerard qualified as a solicitor in 2012 and holds an LLM in Commercial Law from University College Dublin.

DR. STAVROS BREKOULAKIS

Dr. Stavros Brekoulakis is a Professor in International Law and Arbitration at the School of International Arbitration, Queen Mary University of London, as well as an attorney-at-law.

He teaches courses in International Commercial Arbitration, International Construction Contracts and Arbitration, International Commercial Litigation and Conflict of Laws, International Investment Law and Arbitration, International Commercial Law, Alternative Dispute Resolution and Mediation.

His academic work includes the leading monograph on Third Parties in International Commercial Arbitration (OUP 2010), the book Arbitrability: International and Comparative Perspectives (Kluwer 2009) and numerous publications in leading legal journals and reviews.

He has practiced commercial law, arbitration and litigation as an in-house counsel and private practitioner in Greece, and he has been involved in international arbitration for more than 14 years as counsel, expert and arbitrator.

He has been appointed in arbitrations under the rules of the London Court of International Arbitration, the International Chamber of Commerce, the Danish Institute of Arbitrators, as well as in ad hoc arbitrations under the UNCITRAL Arbitration Rules.

His professional expertise focuses on arbitrations in the context of international business and trade transactions, including construction projects, sales of goods and distribution agreements, IP contracts, shipping and insurance contracts, financial transactions.

He holds an LL.B. degree (summa cum laude) from the National University of Athens (1997), an LL.M. degree (summa cum laude) in International Business Law from King's College London (2003) and a Ph.D. degree in Arbitration and Conflict of Laws from Queen Mary, University of London (2007).

OCTÁVIO MARTINS DE BARROS

Octavio Fragata M. de Barros specializes in litigation and arbitration matters, particularly international commercial disputes involving the Brazilian market. An acknowledged expert in international arbitration, Mr. Fragata M. de Barros has participated as counsel in numerous proceedings before arbitration panels worldwide. Currently developing a thesis on "Evidence in International Arbitration" and having defended a dissertation on "The Judicial Opposition to Arbitration: anti-suit injunction" before the Universidade do Estado do Rio de Janeiro, Mr. Fragata M. de Barros has far-reaching experience including corporate, construction, M&A, distribution contracts and electricity-related disputes. He has participated on arbitration matters conducted under the auspices of the ICC, AAA and ICSID as well as under the Brazilian institutions CIESP/FIESP, CCBC and CBMA. He is also listed in the arbitrators roster of prestigious institutions such as CAMARB and CBMA. Mr. Fragata M. de Barros joined Barbosa, Müssnich & Aragão in 2003 and works under the supervision of the founding partner Francisco Antunes Maciel Müssnich. In 2009, as Foreign Associate joined the International Litigation and Arbitration team of Dechert LLP, Paris office. He lectures and publicizes regularly on international arbitration and commercial and investment law topics. Mr. Fragata M. de Barros is fluent in Portuguese, English, Spanish and French.

MARIANA PEDROSA JUNGSTEDT

Practice Areas: Litigation and Arbitration.
Career: Worked as an intern at Pinheiro Neto Advogados, August 2008 to May 2010. Worked as an intern at the International Chamber of Commerce, January and February 2013. Joined Barbosa, Müssnich & Aragão Advogados in August 2010.
Personal: Extension course in Civil Law Contracts, Getúlio Vargas Foundation - FGV/RJ (2003). Law Degree, Federal University of Rio de Janeiro (2011).

PEDRO CARDIGOS

Pedro Cardigos is a Partner at Cardigos e Associados, Sociedade de Advogados R.L. working in Banking, Derivatives, Capital Markets and M&A. Pedro's practice focuses on representing investment banking firms in a wide range of capital markets transactions, derivatives, corporate finance, as well as in mergers and acquisitions. Pedro has also participated in several important arbitrations (national and international) and judicial litigation cases.

PORFÍRIO MOREIRA

Porfírio Moreira is a Senior Associate at Cardigos e Associados, Sociedade de Advogados R.L., working in its Corporate Group. His practice focuses on corporate, EU law, and employment related matters. Porfirio has wide experience in business reorganization, involving private and state-owned companies as well as in litigation and arbitration, frequently in cross-border disputes.

PEDRO M. LOPES

Pedro Moniz Lopes is an Associate at Cardigos e Associados, Sociedade de Advogados R.L., working in its Projects group. Pedro's practice focuses on public procurement contracts, infrastructure and project finance transactions, administrative and regulatory litigation. Pedro also has extensive experience in arbitration proceedings and has been actively involved in some of the most prominent cases both internationally and locally.

MARIA ALMEIDA FERNANDES

Maria Almeida Fernandes is an Associate at Cardigos e Associados, Sociedade de Advogados R.L , working in its Banking, Derivatives and Capital Markets group. Maria's practice focuses on banking and capital markets' regulatory matters and has been involved in several transactions, mainly focused on the issue and placement of debt and equity instruments. Maria has also been actively involved in several litigation cases, representing domestic and international clients in disputes involving commercial law before judicial courts as well as in arbitration.

THERESA FRAUCHES

Thereza Valladares Souza Frauches is an Associate Attorney at Azevedo Sette Advogados. Graduated at the Federal University of the State of Minas Gerais Law School on 2012. Practice Areas: Banking and Capital Markets, Corporate, Foreign Investments, Mergers and Acquisitions.

RAINER WERDNIK

Rainer Werdnik is partner at WERDNIK KUSTERNIGG Rechtsanwälte GmbH in Klagenfurt am Wörthersee, Austria.

He graduated from the University of Vienna and holds an LL.M. degree of the University of Edinburgh, where he studied, inter alia, International Commercial Arbitration.

He gained experience in internationally recognised business law firms in Vienna focusing on business and company law as well as arbitration. His practice focuses on business and company law, civil law, contract law and arbitration.

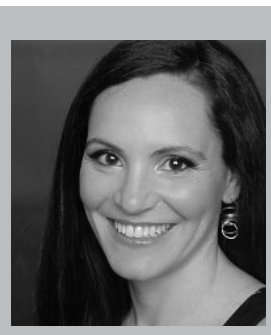
He is admitted to the Austrian Bar.

JULIO LEMOS

Associate (senior lawyer) at Duarte Garcia Caselli, Guimarães e Terra law firm. PhD University of São Paulo / LMU-Munich. Researcher in Law and Computer Science at the Institute of Mathematics and Statistics (IME-USP).

JULIANA FONSECA

Juliana Fonseca is an associate attorney at Azevedo Sette Advogados. Graduated at the Federal University of Minas Gerais Law School with Postgraduate Studies in Business Administration – CBA (Finance) – Ibmec. Coordinator of the graduation course on Corporate Legal Consultancy at the Praetorium Institute. Professor of "International Contracts" at the graduation course on Corporate Legal Consultancy at the Praetorium Institute.
Founder of the International Commercial Law Study Group (GEDICI) of the Federal University of Minas Gerais (UFMG). Professor at the LLM in Corporate Law at IBMEC. Practice Areas: Banking and Capital Markets, Corporate, Economic Law, Antitrust and Antidumping, Foreign Investments, International Law, Mergers and Acquisitions, Succession Planning.



FILIPA CANSADO CARVALHO

Filipa Cansado Carvalho is a senior associate at PLMJ working in the Arbitration Group.
Filipa started acting as counsel in international arbitration in 2000 and has since been involved in several international arbitrations in English, Portuguese and French (mostly in construction and sub-areas of corporate and commercial law) under different rules (ICC, ICSID, OHADA) and with different seats (Lisbon, Paris, Abidjan).
She has also acted in several domestic proceedings, both ad hoc and under the rules of different Portuguese arbitral institutions and been involved in arbitration-related judicial proceedings (such as set aside proceedings).
Filipa is a member of the Portuguese Bar Association, of APA – Associação Portuguesa de Arbitragem, of the CEA – Club Español del Arbitraje and is a listed arbitrator of the Arbitration Center of the Câmara de Comércio e Indústria Portuguesa (Lisbon).
She also speaks Spanish.

GILVAN HANSEN

Gilvan Hansen graduated in Philosophy at the University of Passo Fundo (1985) and in Law at the Plínio Leite University (2010).

Master's degree in Philosophy from the Catholic University of Rio Grande do Sul (1997) and Doctor's Degree in Philosophy at the Federal University of Rio de Janeiro (2004).

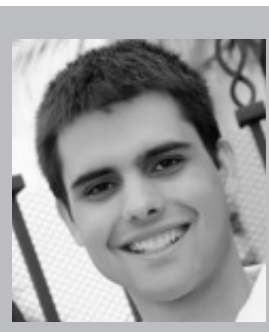
He is professor in the Department of Private Law at Fluminense Federal University, lecturing classes in the graduation, "Administrative's Justice" and "Juridical and Social Sciences" Master's Degree, and in the "Juridical and Social Sciences" Doctor's Degree.

Gilvan has experience and publications in the area of Philosophy and Law, with emphasis on Ethics, History of Law, Philosophy of Law, Theory of Law, Philosophy of Education and Political Philosophy. Leader of the CNPq Research Groups "Democracy, State of Law and Citizenship" and "Habermas: concepts, confluences and dialogues."

He also participate in the Research Groups "Law, Business and Society," discussing ethics and corporate social responsibility, and the "Judiciary Center of Sciences - NUPEJ" Line Search "Ethics, media and judiciary."

SERGIO PAUSEIRO

Sergio Pauseiro is Professor of Bussiness Law in Anhanguera Educacional, Rio de Janeiro, Brazil. He is a Doctor's Degree student in Sociology and Law and is coaching the arbitration team of Fluminense Federal University – UFF for moot courts. Sérgio is also a Researcher of the Research Group "Democracy, State of Law and Citizenship" in the subject "Mediation and Arbitration through the Habermasian prism".



EDUARDO HELFER

Eduardo Helfer is an associate at Mac Dowell Advogados in Rio de Janeiro, Brazil, and member of the Brazilian Association of Students of Arbitration - ABEArb. He graduated at the Federal University of Rio de Janeiro (UFRJ) and was a founding member of his university research group on arbitration and international commerce. Currently, He is a Master's Degree student at the Fluminense Federal University (UFF) and is coaching its research group on arbitration for moot courts.

ALEKSANDRS FILLERS

Aleksandrs Fillers is currently pursuing his Master studies at the University of Strasbourg.

He holds a bachelor degree in law from the University of Latvia, and an LLM degree in International Commercial arbitration from the Stockholm University. He has been participated as a competitor at the Philip C. Jessup International Law Moot Court, XVII Edition of Willem C. Vis International Commercial Arbitration Moot, and Frankfurt Investment Arbitration Moot Court.

He has worked as an associate at the Deloitte Latvia, where his practice encompassed matters related to European Union law, international law, civil litigation, domestic and international arbitration.

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