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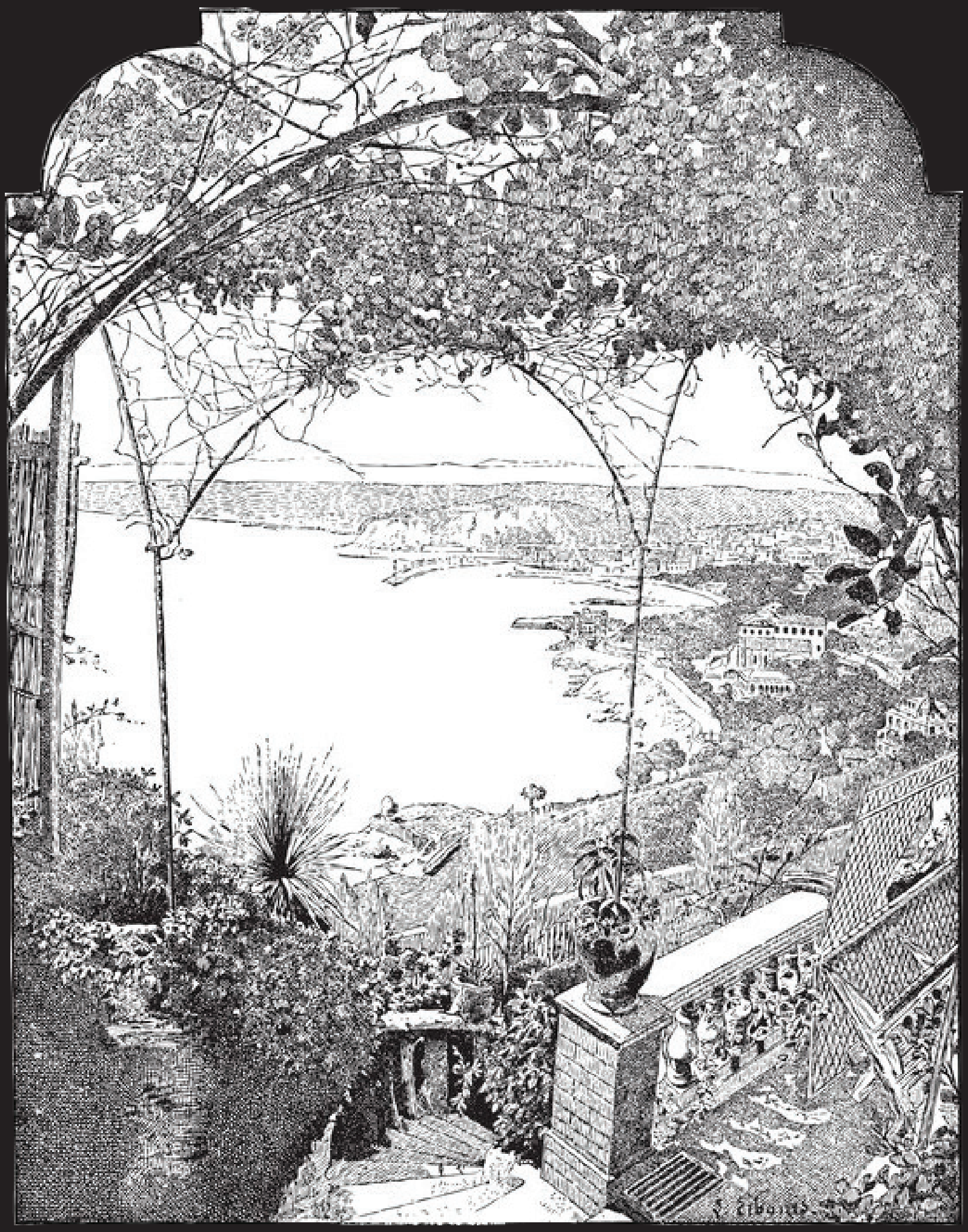

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FROM NAFTA TO USMCA: PROVIDING CONTEXT FOR A NEW ERA OF REGIONAL INVESTOR-STATE DISPUTE SETTLEMENT

By Kiran Nasir Gore*

Introduction

For the past quarter century, since 1994, the North American Free Trade Agreement (*NAFTA*) has enabled a free trade zone between the economies of the U.S., Canada, and Mexico.[1] As outlined in its Preamble, NAFTA sought to "establish clear and mutually advantageous rules governing [] trade" and "ensure a predictable commercial framework for business planning and investment."[2] When it entered into force, legal scholars heralded NAFTA as an "unprecedented" multilateral agreement which represented a "model for similar arrangements in other contexts."[3] NAFTA's early success went beyond mere positive assessment by legal scholars, it was credited with stimulating trade development, economic growth, and cooperation among the economies of each of its Member States.[4]

Yet, NAFTA was not without controversy. Its Chapter 11, which sets forth an Investor-State Dispute Settlement (*ISDS*) mechanism with protections comparable to those in many 1990s era bilateral investment treaties (*BITs*), had unintended consequences.[5] American and Canadian trade negotiators expected Chapter 11 to provide security for investors from their own countries, based on concerns about possible risks with resolving trading disputes within Mexico's legal infrastructure.[6] They did not expect to see Chapter 11 claims asserted against their own governments, concerning everything from their environmental legislation to their national judicial processes.[7]

With this context, Donald Trump's campaign focus on renegotiating NAFTA perhaps appears more rational, as do his swift actions to effect this intent. Only weeks into his presidential

term, Trump announced that he would renegotiate NAFTA.[8] By May 2017, his Administration formally launched the clock on a 90-day waiting period, after which renegotiations with Canadian and Mexican counterparts could officially begin.[9] In the following months, the Trump Administration applied aggressive import tariffs on both Canadian and Mexican goods to influence renegotiation.[10]

In October 2018, Trump, alongside his Mexican and Canadian counterparts, delivered what many have dubbed "NAFTA 2.0." But the new U.S.–Mexico–Canada Agreement (*USMCA*) adopts not only a new name, but also a new approach to ISDS within its Chapter 14.[11] On November 30, 2018, the leaders of all three nations signed the USCMA and now it is up to the legislatures of each country to ratify the Treaty.[12] It remains to be seen whether Chapter 14's ISDS scheme will remain intact during the ratification process. Regardless, NAFTA is now a historic relic and we face a new era in regional ISDS. This raises salient questions on motivation and timing. Criticisms of NAFTA are not new. Indeed, they have been around since its very early days. Why the focus on renegotiating now and what does the shift from NAFTA Chapter 11 to USMCA Chapter 14 mean for the future of regional ISDS (and, more broadly, patterns of global dispute resolution)?

These developments and questions are considered in three parts. Part I reviews NAFTA's Chapter 11, including its substantive protections, dispute resolution mechanisms, and general criticisms after twenty-five years of experience. Part II presents context for the emergence of USMCA, followed by an analysis of its Chapter 14 identifying key changes from the former NAFTA regime. Finally, Part III provides concluding remarks and attempts to place USCMA within broader regional and global shifts in international affairs, trade, and dispute resolution.

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I. NAFTA and the Role of Chapter 11

In this Part, Section A provides an overview of NAFTA Chapter 11, including context for its development, its objectives, and finally the protections and means it offers to investors to pursue claims against NAFTA Parties. Section B summarizes key criticisms of Chapter 11, based on the experiences of Member States and investors.

A. Context, Objectives, and Means

When launched, NAFTA and its Chapter 11 ISDS framework were historic for two reasons: the balanced approach among and toward NAFTA Parties and the immense economic impact on the region.

First, through NAFTA, the U.S. and Canada (two fully developed economic powers) submitted themselves to binding arbitration for the resolution of foreign investment claim in any fora other than their own domestic courts.[13] In the 1990s, this was unprecedented. As explained by Judge Charles N. Brower and Lee A. Steven in 2001:

> The only potentially unique aspect of NAFTA Chapter 11 is that the governments of two nations with developed economies agreed to enter into an investment protection treaty between themselves. The overwhelming majority of BITs to date have been north to South, between capital-exporting countries and capital-importing countries, and the private investors who actually have benefited from such treaties have been those from the North.[14]

Second, the trade and economic opportunities created by NAFTA were immense. As explained by Congressman William L. Owens of New York and R. Andrew Fitzpatrick (legislative director to Congressman Owens) in 2015:

> NAFTA's Chapter 11 aims to create a fair and predictable framework to allow for expanded flows of cross-border investment, which in turn can generate greater economic growth across North America. Improving the efficiency of capital allocation is meant to enable each signatory nation to benefit from the corresponding growth in cross-border investment associated with freer trade in goods and services. "Since NAFTA came into force in 1994, foreign direct investment in North America has risen from $110 billion per year in 1992 to $650 billion per year in 2010, a 490% increase."[15]

Taken together, these features embody NAFTA Chapter 11's main objectives: breaking down barriers to foreign investment, instilling investor confidence throughout the region with clear, balanced, and fair rules, and eliminating political elements which might hinder success.[16]

Structurally, NAFTA Chapter 11 is divided into two parts.

Section A outlines the substantive protections available to investors from other NAFTA Parties.[17] These protections generally mirror those found in U.S. BITs during the 1990s.[18] In summary:

- Investors are entitled to three types of treatment: (1) national treatment; (2) most favored nation (*MFN*) treatment; and (3) treatment meeting minimum standards of international law in the event that local treatment (particularly in the event of expropriation) does not meet such standards.[19] In effect, an aggrieved investor may pursue a claim based on the standard that is most favorable given its particular circumstances.

- Performance requirements, such as requiring the export of a minimum percentage of production or achieving a specific level of local content, are prohibited.[20]

- Investors are free to select senior management without regard to nationality (subject to certain exceptions regarding numerical majorities on the board of directors) and may transfer or repatriate profits or investment proceeds in freely convertible currency.[21]

- Direct or indirect expropriation of investor property is prohibited, except when it is undertaken for a public purpose, on a non-discriminatory basis and in accordance with due process and minimum standards of international law. In all cases of expropriation, compensation equivalent to fair market value based on the value prior to the date of the expropriation must be paid "without delay" and in "fully realizable" convertible currency.[22]

Various Annexes to NAFTA outline exceptions and reservations to these general protections.[23]

Section B reinforces these protections with a dispute resolution framework. Following a conciliation and negotiation period, investors may bring claims in arbitration against other NAFTA Parties before the International Centre for Settlement of Investment Disputes (*ICSID*) in Washington, DC for breach of the substantive protections available in Section A.[24] Allowing an aggrieved investor to directly bring claims against a State is not the only way to resolve investment disputes, but it without a doubt provides investors with confidence in the system.

B. Experiences and Criticisms

During the last twenty-five years, NAFTA's Chapter 11 has been put to the test. Dozens of investor claims have been brought against each of the NAFTA Parties. This has been particularly unexpected for the American and Canadian governments – both of which, as discussed above, expected NAFTA to protect investors from their own countries, rather than trigger claims which they would have to defend.[25]

These experiences have led to criticisms and much ink has been spilled analyzing two Chapter 11 protections: the standard for investor treatment and the meaning of indirect expropriation.[26] While the precise contours of criticisms vary based on the identity of the critic, all share a common theme: providing an aggrieved investor with the right to assert a claim directly against a national government may unduly infringe on the sovereign's right to legislate, enforce, and adjudicate according to its own laws.[27] Some commentators have astutely observed that these criticisms are primarily rooted in concern that private arbitral tribunals may not reach "correct" decisions, rather than concern about the substance of these protections.[28]

To those well-versed with ISDS and recent discussions about its merits and future viability, these concern are familiar, well-worn, and likely alone not enough to signal the end of NAFTA, especially in light of NAFTA's successful and reliable stimulation of North American economic development.

II. USMCA: Why Now and What's Changed with Chapter 14?

Trump's presidential campaign hinged on an economic plan that would "make American great again."[29] This "America First" ideology captured the concerns of many American workers – social inequality and economic stagnation – and campaign rhetoric focused on creating more jobs for American workers.[30] NAFTA became a symbolic target under this agenda and has been characterized by many commentators as "scapegoat" for Trump's economic plan.[31]

Immediately upon entering office, President Trump took two steps to put this plan into action: withdrawing from further negotiations on the Trans-Pacific Partnership and announcing his intent to renegotiate NAFTA.[32] Both decisions reflected economic nationalism and deployed protectionist trade policies to defend U.S. industries from foreign competition.

Since the release of USMCA's text in September 2018, many commentators have undertaken side-by-side comparisons of NAFTA and USMCA. From a trade and economic perspective, the resounding view is that not much has changed.[33] From an ISDS perspective, USMCA's Chapter 14 reflects some noteworthy shifts. Several revisions tie rights to the identity of individual investors and States. This approach contrasts starkly from NAFTA's approach, which generally provides mirrored rights and supports balance among all three contracting States.

Notably, Canada has withdrawn from Chapter 14. Its consent for legacy claims will expire three years after NAFTA's termination (a currently undetermined date).[34] It is not clear what this means in practice. "Termination" is a vague concept and it is possible that the concurrent existence of NAFTA and USMCA could lead to confusing interpretation and adjudication by tribunals. Moreover, it is unclear whether the legacy claims provision applies if a State does not ratify USMCA. ISDS survives for the benefit of American and Mexican investors, but as discussed below, the types of

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disputes investors may pursue (and the procedural means to do so) have been realigned and no longer mirror each other.

Investor-claimants are now required to litigate claims "before a competent court or administrative tribunal of the respondent."[35] Claimants must litigate until a "final decision from a court of last resort," or alternatively, 30 months have elapsed since local court proceedings were initiated.[36] There is an exception to this local litigation requirement "to the extent recourse to domestic remedies was obviously futile or manifestly ineffective"[37] This scheme is accompanied by a four-year concurrent statute of limitations for asserting any treaty claim.[38]

In a departure from NAFTA, USMCA provides an "asymmetrical" fork-in-the-road provision.[39] If, during local court proceedings, an American investor alleges a breach of the USMCA itself (as opposed to a breach of Mexican law), this will bar any right to arbitration under USMCA.[40] USMCA does not contain a parallel provision for Mexican investors, thereby altering dispute resolution procedures and the scope of investor rights based solely on nationality.

Investors may seek arbitration of claims involving: (i) direct expropriation (but not indirect expropriation),[41] (ii) violations of national treatment,[42] or (iii) violations of USMCA's MFN provision.[43] There is a carve-out for national treatment or MFN claims "with respect to the establishment or acquisition of an investment."[44] Notably, footnote 22, which accompanies the MFN provision, provides that "treatment" "*excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations*; rather, 'treatment' only includes measures adopted or maintained by the other Annex Party, which may include measures adopted or maintained pursuant to or consistent with substantive obligations in other international trade or investment agreements."[45] This reflects a departure from the language of similar provisions in other investment agreements.

Additional ISDS rights are available for investors who are parties to government contracts in identified "covered sectors," which includes oil and natural gas, power generation, telecommunications, transportation, and infrastructure, each a highly regulated industry involving significant government involvement.[46] These additional rights include the option to assert claims for violations of the minimum standard of treatment under customary international law, claims of indirect expropriation, or claims about the establishment or acquisition of an investment.[47]

Finally, provisions to promote transparency and ethical conduct have been added. With respect to transparency, specific articles now support the publication of documents concerning arbitral proceedings, access to hearings, and the possibility of amicus participation.[48] With respect to ethical conduct, arbitrators must now adhere to the International Bar Association's Guidelines on Conflicts of Interest in International

Arbitration and refrain from acting as arbitrator in one USMCA proceeding while acting as party representative in another (*e.g.*, as counsel, party-appointed expert, or witness).[49] These revisions reflect current debates in the field and aim to promote public confidence in the ISDS system and its legitimacy.

In sum, while it is difficult to discern whether these revisions tip the scales in favor of investors or States, it is clear that the balanced and equitable playing field that previously was a lynchpin of NAFTA has been lost. This is inherent in the fact that American and Mexican investors no longer have ISDS rights against Canada. It is further reinforced by the fact that possible claims and associated remedies available to American and Mexican investors are now driven by national identity.

III. Concluding Remarks on Protectionism, the New Order for Regional ISDS, and Globalism

After the November 30, 2018 signing ceremony at the G-20 Summit in Buenos Aires, President Trump tweeted that the USMCA represents "one of the most important, and largest, Trade Deals in U.S. and World History."[50] This is likely true – once finalized it will account for more than $1.2 trillion in trade in one of the world's largest free trade zones.[51] It is not, however, clear that degrading and eliminating the NAFTA system is a positive long-term solution to Trump's job-centric economic plan, or even as a means to promote regional trade and dispute resolution. As noted by Professor Frederick Mayer in 2017:

> NAFTA was always far from perfect and there is a need to update it — not surprising for an agreement negotiated a quarter century ago. But just as NAFTA did not cause inequality, killing NAFTA would do nothing to address it. The danger is that the demonization of NAFTA will distract from the much harder work of figuring out how to make economic globalization more equitable, more inclusive and more sustainable.[52]

Since Professor Mayer wrote those words we have had the benefit of seeing the results of the renegotiation process and it remains to be seen whether either investors or States will be fare any better. Yet, placing USMCA within the context of "America First" ideology and the protectionist economic values which motivated its development clarifies the possible negative impact of USMCA on global dispute resolution. As discussed, NAFTA was long heralded as an example of regional economic cooperation. It is axiomatic that building an institution and structure of this nature is harder than degrading it. Cracks in its foundation create the risk of instability and conflict for the region. The Trump Administration's cavalier attitude toward NAFTA and its replacement do not bode well for the future of regional dispute resolution or the global trends that it may inspire.[53]

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1 North American Free Trade Agreement (Jan. 1, 1994), available at https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement (*NAFTA*).

2 NAFTA, Preamble, cl. 5 and 6.

3 David A. Gantz, "Resolution of Investment Disputes under the North American Free Trade Agreement," 10 ARIZ. J. INT'L & COMP. L. 335, 348 (1993).

4 *See e.g.*, "NAFTA: A Decade of Success," Office of the United States Trade Representative (July 2004), available at: https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2004/july/nafta-decade-success; Daniel Griswold, "The Success of NAFTA," CATO Institute (originally appearing on freetrade.org) (July 1, 1998), available at: https://www.cato.org/publications/commentary/success-nafta ("Despite what opponents of trade liberalization such as Pat Buchanan contend, the North American Free Trade Agreement has been a success by any measure. Trade among the United States, Canada, and Mexico has flourished since the passage of NAFTA, benefiting American consumers and exporters. Since 1993, two-way trade with our NAFTA partners has increased by 44 percent, to $421 billion in 1996. That compares with a 33 percent increase in American trade with all other countries. Mexico has now become America's second largest market for exports, just ahead of Japan and behind only Canada.").

5 Charles N. Brower and Lee A. Steven, "Who Then Should Judge: Developing the International Rule of Law under NAFTA Chapter 11," 2 CHI. J. INT'L L. 193, 193-94 (2001) (*Brower and Steven*) ("In the last decade the BIT has become the predominant method by which States regulate investment on the international plane' and it should come as no surprise that NAFTA's investment protection scheme, including provision for the arbitration of investor-State disputes, is essentially identical to that of the vast majority of BITs concluded since 1990. The NAFTA Parties themselves have negotiated no less than eighty-six BITs with other States and Chapter 11 closely follows the US Model BIT."). *See also* Fredrick M. Abbott, Max Planck Encyclopedia of Public International Law: North American Free Trade Agreement, Dispute Settlement (Oxford University Press, 2014), ¶ 18.

6 Fredrick M. Abbott, Max Planck Encyclopedia of Public International Law: North American Free Trade Agreement, Dispute Settlement (Oxford University Press, 2014), ¶ 18. *See also* Ian A. Laird, "NAFTA Chapter 11 Meets Chicken Little," 2 CHI. J. INT'L L. 223, 230 (2001) ("The main response of government officials who negotiated Chapter 11, or act on the government side of disputes, is that 'we did not intend NAFTA to mean that.' What they are really saying is that Chapter 11 was intended to protect Canadian and US investments from arbitrary or discriminatory conduct of the Mexican government, and that Canada and the US should never attract claims. They never thought that their own governments might violate international treatment obligations.").

7 Fredrick M. Abbott, Max Planck Encyclopedia of Public International Law: North American Free Trade Agreement, Dispute Settlement (Oxford University Press, 2014), ¶ 18; David A. Gantz, "Some Comments on NAFTA's Chapter 11," 42 S. TEX. L. REV. 1285, 1302 (2001) ("[t]he focus on litigation between Canada and the United States was probably not anticipated by the Canadian and American negotiators of Chapter 11, although perhaps it should have been. It is only as [both the American and Canadian governments] gain experience in defending their respective governments that the magnitude of the potential problems become clear.").

8 "USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement" Office of the United States Trade Representative (May 18, 2017), available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces.

9 Megan Cassella, "Trump launches NAFTA renegotiation," *Politico* (May 18, 2017), available at: https://www.politico.com/story/2017/05/18/trump-administration-formally-kicks-off-renegotiation-of-nafta-238552.

10 Max Bouchet and Joseph Parilla, "How Trump's steel and aluminum tariffs could affect state economies," *The Brookings Institute Blog*, available at: https://www.brookings.edu/blog/the-avenue/2018/03/06/how-trumps-steel-and-aluminum-tariffs-could-affect-state-economies/.

11 *See generally* Robert Landicho and Andrea Cohen "What's in a Name Change? For Investment Claims Under the New USMCA Instead of NAFTA,

(Nearly) Everything," *Kluwer Arbitration Blog* (Oct. 5, 2018), available at: http://arbitrationblog.kluwerarbitration.com/2018/10/05/whats-in-a-name-change-for-investment-claims-under-the-new-usmca-instead-of-nafta-nearly-everything/.

12 Bill Chappell, "USMCA: Trump Signs New Trade Agreement With Mexico And Canada To Replace NAFTA," *NPR* (Nov. 30, 2018), available at: https://www.npr.org/2018/11/30/672150010/usmca-trump-signs-new-trade-agreement-with-mexico-and-canada. *See generally* Agreement between the United States of America, the United Mexican States, and Canada (signed Nov. 30, 2018), available at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14_Investment.pdf (*USMCA*).

13 David A. Gantz, "Some Comments on NAFTA's Chapter 11," 42 S. TEX. L. REV. 1285, 1302 (2001).

14 Brower and Steven, *supra* at 193-94.

15 William L. Owen, "Investment Arbitration under NAFTA Chapter 11: A Threat to Sovereignty of Member States?" 39 Can.-U.S. L.J. 55, 56 (2015), available at: https://scholarlycommons.law.case.edu/cuslj/vol39/iss/4 (quoting Diana Villiers Negroponte, "North American Leaders Meet in Toluca, Mexico: What Can We Hope For?" BROOKINGS (Feb. 18, 2014), available at: http://www.brookings.edu/blogs/upfront/posts/2014/02/18-north-american-leaders-toluca-negroponte).

16 Brower and Steven, *supra* at 195 ("In establishing this investment regime, the NAFTA Parties wanted to achieve three main objectives: (1) to tear down existing foreign investment barriers by eliminating arbitrary and discriminatory restrictions; (2) to build investor confidence throughout the region through the elaboration and enforcement of clear and fair rules; and (3) to "depoliticize" the resolution of investment disputes by eliminating the need for State to-State adjudication.").

17 NAFTA, Chapter 11 (Investment), Section A (Investment; Articles 1101-1114).

18 *See supra* note 5. *See also* David A. Gantz, "Resolution of Investment Disputes under the North American Free Trade Agreement," 10 ARIZ. J. INT'L & COMP. L. 335, 341-42 (1993).

19 NAFTA, Chapter 11 (Investment), Articles 1102-1104.

20 *Id.*, Article 1106.

21 *Id.*, Articles 1107 and 1109.

22 *Id.*, Article 1110.

23 *See, e.g.*, *id.*, Annex IV (Exceptions from Most-Favored-Nation Treatment).

24 *Id.*, Chapter 11, Section B (Settlement of Disputes between a Party and an Investor of Another Party), Articles 1115-1138.

25 *See supra* note 7. Fredrick M. Abbott, Max Planck Encyclopedia of Public International Law: North American Free Trade Agreement, Dispute Settlement (Oxford University Press, 2014), ¶ 18; David A. Gantz, "Some Comments on NAFTA's Chapter 11," 42 S. TEX. L. REV. 1285, 1302 (2001) ("[t]he focus on litigation between Canada and the United States was probably not anticipated by the Canadian and American negotiators of Chapter 11, although perhaps it should have been. It is only as [both the American and Canadian governments] gain experience in defending their respective governments that the magnitude of the potential problems become clear.").

26 *See generally* Robert Meltz, "Foreign Investor Protection Under NAFTA Chapter 11," U.S. Congressional Research Service Report for Congress (Sept. 29, 2003).

27 Zachary M. Eastman, "NAFTA's Chapter 11 - For Whose Benefit," 16 J. INT'L ARB. 105, 112 (1999).

28 Brower and Steven, *supra* at 199-200.

29 Kimberly Amadeo, "President Donald Trump's Economic Plan," *The Balance* (June 25, 2019), available at: https://www.thebalance.com/donald-trump-economic-plan-3994106; "Trade wars, Trump tariffs and protectionism explained," *BBC* (May 10, 2019), available at: https://www.bbc.com/news/world-43512098.

30 Daniel J. Ikenson, "USMCA: A Marginal NAFTA Upgrade at a High Cost," Cato Institute (April 10, 2019), available at: https://www.cato.org/publications/commentary/usmca-marginal-nafta-upgrade-high-cost.

31 *See e.g.*, Frederick Mayer, "The politics of NAFTA have been driven more by story than by fact," *The Hill* (August 18, 2017), available at: https://thehill.com/blogs/pundits-blog/international/347078-the-politics-of-nafta-have-been-driven-more-by-story-than-by.

32 Catherine Rampell, "Trump's 'historic' trade deal doesn't look so historic after all," *The Washington Post* (Oct. 1, 2018), available at: https://www.washingtonpost.com/opinions/trump-didnt-blow-up-our-trade-system-whoop-de-doo/2018/10/01/2137be18-c5b7-11e8-9b1c-a90f1daae309_story.html?utm_term=.e3cdfefe98ef

33 *See e.g.*, Daniel J. Ikenson, "USMCA: A Marginal NAFTA Upgrade at a High Cost," Cato Institute (April 10, 2019), available at: https://www.cato.org/publications/commentary/usmca-marginal-nafta-upgrade-high-cost; Gwynn Guilford, "The net impact of Trump's new NAFTA is probably nothing," *Quartz* (Apr. 22, 2019), available at: https://qz.com/1600240/the-net-impact-of-trumps-new-nafta-is-probably-nothing/.

34 A "legacy investment" is defined as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry of force of this agreement." USMCA, Annex 14-C (Legacy Investment Claims and Pending Claims), Article 6(a).

35 *Id.*, Annex 14-D (Mexico-United States Investment Disputes), Article 14.D.5 (Conditions and Limitations on Consent).

36 *Id.*

37 *Id.*, footnote 24.

38 *Id.*, Article 14.D.5 (Conditions and Limitations on Consent).

39 For an in-depth discussion, *see* Alexander Bedrosyan, "The Asymmetrical Fork-in-the-Road Clause in the USMCA: Helpful and Unique," *Kluwer Arbitration Blog* (Oct. 29, 2018), available at: http://arbitrationblog.kluwerarbitration.com/2018/10/29/usmca/.

40 USMCA, Annex 14-D (Mexico-United States Investment Disputes), Appendix 3.

41 "Direct expropriation" occurs when "an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure." *Id.*, Annex 14-B (Expropriation), Article 2.

42 National treatment" means "treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory" *Id.*, Article 14.4.1 (National Treatment).

43 A MFN claim arises when a State's treatment of an investor is "less favorable than the treatment it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory" *Id.*, Article 14.5.1 (Most-Favored-Nation Treatment).

44 *Id.*, Annex 14-D (Mexico-United States Investment Disputes), Article 14.D.3 (Submission of a Claim to Arbitration).

45 *Id.*, Annex 14-D (Mexico-United States Investment Disputes), Article 14.D.3 (Submission of a Claim to Arbitration), footnote 22 (emphasis added).

46 *Id.*, Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts), Article 6.

47 *Id.*

48 *Id.*, Annex 14-D, Article 14.D.8 (Transparency of Arbitral Proceedings), Annex 14-D, Article 14.D.7 (Conduct of the Arbitration), cl. 3.

49 *Id.*, Annex 14-D, Article 14.D.6 (Selection of Arbitrators), cl. 5.

50 President Donald Trump's Twitter status (Nov. 30, 2018) available at https://twitter.com/realDonaldTrump/status/1068516326010830849. The USMCA is not yet the law of the land. Each country must now follow its domestic procedures for ratification, and in the U.S., this will mean Congressional approval. For discussion, see Bob Bryan, "Trump is about to play a dangerous game of chicken with Democrats to try to ram through his trade deal with Mexico and Canada," *Business Insider* (Dec. 3, 2018), available at https://www.businessinsider.com/trump-nafta-congress-usmca-mexico-canada-trade-deal-2018-12.

51 Bill Chappell, "USMCA: Trump Signs New Trade Agreement With Mexico And Canada To Replace NAFTA," *NPR* (Nov. 30, 2018), available at https://www.npr.org/2018/11/30/672150010/usmca-trump-signs-new-trade-agreement-with-mexico-and-canada.

52 *See e.g.*, Frederick Mayer, "The politics of NAFTA have been driven more by story than by fact," *The Hill* (August 18, 2017), available at: https://thehill.com/blogs/pundits-blog/international/347078-the-politics-of-nafta-have-been-driven-more-by-story-than-by.

53 *See generally* Kiran Nasir Gore, "An Introduction to the Trump Effect on the Future of Global Dispute Resolution" 51 GEO. WASH. INT'L L. REV. Issue 4 (forthcoming, 2019), available at: https://ssrn.com/abstract=3356649 or http://dx.doi.org/10.2139/ssrn.3356649.

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ARBITRATION CLAUSES CONTAINED IN PUBLIC CONTRACTS: SHOULD CONTRACTING AUTHORITIES CALL ALL THE SHOTS?

By João Lamy da Fontoura

1. More often than not, lawyers are perceived as keen on discussing technicalities and issues, that are for others no more than purely formal in nature. That may be quite right when assessing theoretical matters, but perhaps not as much at those times when solving a material dispute arising from a contract and involving different parties should be underway. Many times, such arguments fall upon the actual meaning of contract provisions. Of course, in those cases where contracts address the very question of how parties should solve their disputes, then such discussions may (and do) involve the very scope and outline of dispute resolution proceedings, that parties have agreed upon.

That is precisely the case of arbitration clauses, which are a domain where less than perfect wording may (and indeed does) generate arguments, that may stall, let alone thwart the effectiveness and speed usually behind the option of the parties for arbitration.

The reasons for that to happen are known and have been lengthy debated in the field of commercial arbitration: drafting by non-specialists, copying arbitration clauses from prior situations and pasting to draft contracts regardless of context, the parties' unwillingness to address dispute resolution matters at the time they are negotiating their agreements or addressing the matter at the last minute (hence the nickname *midnight clause*)[1]. In the commercial arbitration field, where parties may freely shape the contents of contractual provisions, discussions then are about what was the actual intent of the parties.

2. However, there are situations where freedom to shape the contents of the arbitration clause is not bestowed upon all parties to the agreement, that being the case of public contracts subject to Portuguese law, whose procurement is governed by the Portuguese Public Contracts Code.

As a matter of fact, clauses inserted in public contracts – and the arbitration clause too – are drafted solely by the contracting authority even before the procurement procedure is launched, a draft contract being indeed one of the procurement documents[2]. (Of course, those parties thinking of submitting candidatures or bids in procurement proceedings may ask the contracting authority to clarify the meaning of the procurement documents[3], which includes the draft contract and the arbitration clause contained in it. But one should acknowledge that clarifying the meaning of arbitration clauses is not the most common focus of interested parties when preparing candidatures or bids. Besides, clarifications issued by the contracting authority during the time limit for the submission of candidatures or bids are not supposed to change the actual meaning of tender documents, but only to overcome doubts that may result from assessing the tender documents.)

The question then arises of how less than perfectly drafted arbitration clauses contained in public contracts should be construed when disputes occur, notably as to the scope of the intended arbitration proceedings. The issue is all the more pertinent in those situations where arbitral proceedings are launched by the economic operator (who has not drafted the arbitration clause) and then the contracting authority (who indeed drafted it) submits that the subject matter of the dispute is outside of the scope of the arbitration clause. Should contracting authorities that have been the sole authors of ill-drafted arbitration clauses call all the shots? In other words, should contracting authorities be allowed to rely on such imperfections to avoid arbitration proceedings launched by the economic operator and refer the dispute to state courts or indeed both to arbitral tribunals and state courts, so that each may rule on different aspects of the very same contractual relation?

Consider, for instance, an arbitral clause providing that disputes concerning the interpretation or the performance of a public contract should be subject to arbitration. Consider also that said arbitration clause is contained in a public contract qualifying as an administrative contract, the contracting authority thus being vested with the power to issue administrative acts concerning the performance of said contract. (Indeed, administrative contracts "*are defined as contracts between an administrative body or agency and an individual, or company, which are not ruled by civil law, but instead by administrative law, according to the needs of public interest*"[4]. As a result, the contracting authority may then be vested with the power to issue certain administrative acts[5], that is, unilateral decisions issued based on an administrative power and binding upon their recipients.) Should then the challenge by the economic operator to an administrative act adopted by the contracting authority and concerning the performance of the contract be construed as being subject to arbitration or should otherwise such challenge be launched at state courts?[6] Put differently, may an arbitral clause providing that disputes concerning the interpretation or the performance of an administrative contract be subject to arbitration be construed in a way that challenging the legality of administrative acts issued within the context of the performance of the contract is subject to arbitration? Such an issue is indeed relevant as it may, and has, been raised in actual arbitral proceedings.

3. First of all, there is no doubt that contracting authorities are not entitled to impose their own interpretation of the arbitration clause, as the law expressly provides that they are not vested with any public powers as to the interpretation of contracts[7]. But then, of course, the truth is that contracting authorities were the ones actually drafting the arbitration clause. Not forgetting the legal framework applicable to the interpretation of contracts stemming out from the Portuguese Civil Code[8], there seems to be no actual good reason why the issue addressed here should not be assessed in the same way it would be within the context of commercial arbitration and taking into account the way economic agents (contracting authorities included) are expected to operate in the market.

Furthermore, an all-out emphasis on the actual wording of the arbitration clause would also seem somewhat out of place. As a matter of fact, it is worth noting, that "*despite the draft arbitration agreements recommended for institutional arbitration, a wording unquestionably determining the scope of arbitration clauses in broad terms is yet to be found, be it for institutional arbitration or for* ad hoc *arbitration*"[9]. In actuality, "*foreign courts have been troubled in the attempt to find out differences among the ways of drafting arbitration clauses* (…) *in order to determine whether certain actual dispute is covered by the clause or not. Such strain is quite pointless, as it is assumed that some intention* (…) *underlies such wording and that looks is – in general terms, as there is the possibility of there being some different case – unrealistic*"[10]. Unrealistic, of course, because of the rationality underlying the behaviour of economic agents, which favours the option for a single means of solving all disputes arising from, and connected to, a contract containing an arbitration clause. And this is not to mention the advantage of concentrating the assessment of disputes in a single legal action.

In actuality, as the Court of Appeal in England points out, "*ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or other very similar set of words… If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so*"[11]. For that reason, it is not difficult to accept that "*Where parties include an arbitration agreement in their contract, they usually intend to resolve* all *disputes between them by this model (unless a specific exception is made)*".[12] That is, "*in principle, an arbitration clause is about a category of disputes. Most frequently, the parties have intended that all matters, that may be brought up regarding the executed contract should be subject to arbitration*"[13]. As a matter of fact, "*the question that should be posed is more generic: has there been or has there not been the intention to establish a broad connection between the dispute its* [contractual] *source. Otherwise, reasoning on this matter would have no real foundation*"[14]. It follows that "*save for some clause which breadth is not as wide as it seemed at first glance, the general intention is that all disputes having a key link to the* [contractual] *source should be covered. The important thing then is to establish such a link*"[15].

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4. This seems to be arguable not only in these general terms, but also specifically with regard to an arbitration clause reading that disputes concerning the interpretation and the performance of a public (and an administrative) contract should be subject to arbitration. In fact, the expression *interpretation and performance* is known by the arbitral community both in Portugal and beyond.

In fact, "*a clause stating that 'all disputes concerning the interpretation or the performance of the contract' is much less satisfactory. At least in theory, such a wording might put into doubt that the arbitration agreement would apply to disputes concerning the validity of the contract. The respondent in the arbitral proceedings concerning the non-performance of the contract might then invoke the nullity of the contract and argue that such matter should be referred to a state court for preliminary ruling. Fortunately, jurisprudence from both state courts and arbitral tribunals come to the rescue of such cumbersome wordings and construes provisions contained in arbitration agreements in a relatively generous way as means of ensuring their effectiveness*"[16].

Indeed, it is arguable that "*the clause referring to disputes concerning the 'interpretation' of the contract is not unequivocal as to the matter of knowing whether or not it encompasses disputes concerning the validity of the contract or the order to pay damages arising from non-performance of contract. With the exception of those cases where the actual will of the declaring party is known, the recipient party does not perceive the word 'interpretation' in so broad a sense. Conversely, the word 'performance' may, and should, be interpreted in the sense of encompassing disputes concerning the non-performance of the contract, that is, the actual fact consisting of non-performance and its implications on the legal and the contractual levels. Performance and non-performance are each one side of the same coin, one not being allowed to look at one of those sides and not at the other*"[17]. Furthermore, "*it also does take much effort for disputes concerning the unlawful termination of contract by one of the parties to be encompassed within disputes concerning the performance of the contract, as said termination involves non-performance*"[18].

In a word, in the absence of any particular evidencing that the will of the parties is to exclude a category of disputes from arbitration, it should be concluded that the scope of the arbitration agreement goes beyond *interpretation and performance* despite an arbitration clause expressly referring only to them. Some factors favour such a conclusion, including the *raison d'être* of arbitration agreements and the rationality and positive outcomes of concentrating the resolution of disputes in a single action. As a matter of fact, "*in principle and unless the will of the parties is expressly stated otherwise, the* raison d'être *of arbitration agreement is to provide the parties with a complete means of regulating the disputes that may arise between them due to their contractual relation. In other words, it is of the essence of arbitration agreements to provide the parties with a means of regulating all disputes that may arise in the future in relation to the contract binding them. Such an agreement should therefore be interpreted accordingly*"[19]. Really, not only "*favor negotii* but also *favor arbitrationis*"[20] are relevant when interpreting arbitration clauses. A "*principle of concentration*" may then be acknowledged, as "*arbitration is fundamentally a service, that is rendered to the parties. In that light, it should be a thorough service and a service rendered at the highest level. To concentrate the activity of the tribunal on a single core of issues that are perceived as the dispute proper and putting aside related matters would be a negative outcome: that would refer the parties to subsequent proceedings, with all that means in*

terms of costs, uncertainty and even litigiousness among the parties. Accordingly, there should be a principle of concentration: the dispute entrusted to arbitrator, be it by means of an arbitration clause or of a submission agreement, should encompass related, material connected matters, provided that they are a part of the petitum"[21].

Furthermore, "*fortunately, most national courts now regard arbitration as an appropriate way of resolving international commercial disputes and, accordingly, seek to give effect to arbitration agreements wherever possible, rather than seek to narrow the scope of the agreement so as to preserve the court's jurisdiction. Thus, the English Court of Appeal referred to a 'presumption of one-stop arbitration' in the interpretation of the arbitration agreement that is increasingly reflected in law and practice around the world. Similarly, the Swiss Federal Tribunal tends to interpret arbitration clauses broadly* (…)"[22]. By the same token, "*in general terms, case law is relatively flexible when assessing whether that requirement* [that of the identification of the subject matter of the dispute]*; identifying the subject matter of the dispute entails a clear definition of said subject matter, no further explanation of details being needed*"[23].

This is so, firstly, in what concerns arbitral tribunals since "*arbitrators tend to apply certain principles governing the interpretation of contracts in general to the interpretation of arbitration agreements. That is the case of good faith interpretation of contracts, where when in doubt the actual will of the parties may be made to prevail over the stated will of the parties; the principle of effectiveness, which is referred to in article 1157 of the* [French] *Civil Code; or the principle of interpretation contra proferentem referred to in article 1162 of the* [French] *Civil Code, inviting to an interpretation against that has drafted the unclear or vague clause. In contrast, the purportedly principle of strict interpretation of the arbitration clause, which is sometimes invoked, has in actuality largely been put aside, particularly in international arbitration but also ever more in domestic arbitration. Most arbitrators reject such a principle of interpretation, as it could encourage a party acting in bad faith to take advantage of a cumbersome wording to escape arbitration. They rather prefer the 'effectiveness' of arbitration agreements*"[24]. State courts take the same approach. In fact, "*the state judge follows a similar path. They seem to be guided in their interpretation of arbitration agreements by a focus on the effectiveness of such agreements. If necessary, that takes him to look at the wording employed by the parties with some freedom. In spite of some contrary approaches, the case law is that arbitration clauses should be interpreted in broad terms somewhat in the name of effectiveness with a view to prevent the pulverization of litigation. It is accepted, in particular, that in the absence of provisions clearly restricting the jurisdiction of the arbitral tribunal, matters concerning the validity of the contract may be subject to arbitration even though the arbitration clause refers solely to the interpretation and the performance of the contract*"[25].

5. Indeed, that is the reason why "*in many jurisdictions, national law provides that international arbitration agreements should be construed in light of a 'pro-arbitration' presumption. This presumption provides that an arbitration clause should be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether the clause also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums).* [§] *In the United States, the Supreme Court has declared that 'any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration'. In England, the House of Lords reasoned similarly: 'The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes. Courts in other states adopt similar presumptions*"[26].

6. In light of the above, one should conclude that an arbitral clause providing that disputes concerning the interpretation or the performance of a public contract should be subject to arbitration may indeed be construed in a way that challenging the legality of administrative acts issued within the context of the performance of the contract is also be subject to arbitration.

The reasoning put forward here points out in this direction, such as the fact that an all-out emphasis on the actual wording of the arbitration clause would be out of place; or the rationality underlying the behaviour of economic agents, which favours the option for a single means of solving all disputes arising from, and connected to, a contract containing an arbitration clause.

On the other hand, both state courts and arbitral tribunals come to the rescue of less than perfect wordings and construe provisions contained in arbitration agreements in a relatively generous way as means of ensuring their effectiveness. As such, in the absence of any particular expressly evidencing that the will of the parties is to exclude a category of disputes from arbitration, it should be concluded that the scope of the arbitration agreement goes beyond interpretation and performance despite an arbitration clause expressly referring only to them and indeed it may include challenges to administrative acts issued within the context of the performance of an administrative contract, the presumption of one-stop arbitration also applying here. The *raison d'être* of arbitration agreements, the rationality and positive outcomes of concentrating the resolution of disputes in a single proceeding, the role of good faith or the *contra preferentem* norm (which seems in line with the requirement of good faith as to the performance of contracts[27]) and the effectiveness of the arbitration intended by the parties all testify to this effect.

1 V. Sofia Martins, «A Redação de Cláusulas Arbitrais: Riscos a Prevenir», *in VII Congresso do Centro de Arbitragem Comercial*, Coimbra: Almedina, 2014, pp. 13-27, pp. 13-14.

2 V. article 42.1 of the Public Contracts Code.

3 V. articles 50 and 166 of the Public Contracts Code.

4 V. Diogo Freitas do Amaral / João Caupers, «Administrative Law», *in* Carlos Ferreira de Almeida / Assunção Cristas / Nuno Piçarra (ed.), *Portuguese Law – An overview*, Coimbra: Almedina, 2007, pp. 99-112, **p. 106**.

5 Such as those referred to in article 307.2 of the Public Contracts Code.

6 It is worth noting that the law (namely, article 180.1.a of the Code of Procedure in the Administrative Courts) has expressly provided since 2015, that disputes concerning the legality of administrative acts issued within the context of the performance of contracts may be subject to arbitration. Before that the issue was subject to discussion, but there were judgments by the Supreme Administrative Court accepting such possibility. That was the case of the judgments issued on 12 May (File no. 043544) and 23 September 1998 (043343) – on this issue, v. Pedro Siza Vieira, «A Arbitrabilidade de Direito Público em Portugal: Um Ponto de Situação», *in Revista Internacional de Arbitragem e Conciliação*, VII, 2014, pp. 28-45, **pp. 33-34**; Raul Relvas Moreira, «O âmbito da arbitragem administrativa no domínio dos contratos», *in* Carla Amado Gomes / Ricardo Pedro (coord.), *A Arbitragem Administrativa em Debate: Problemas Gerais e Arbitragem no Âmbito do Código dos Contratos Públicos*, Lisboa: AAFDL, 2018, pp. 217-275, **pp. 230-231**.

7 V. article 307.1 of the Public Contracts Code.

8 V. articles 236 to 239 of the Civil Code.

9 V. Raúl Ventura, «Convenção de Arbitragem», *in Revista da Ordem dos Advogados*, 1986 (Ano 46.º), pp. 289-413, p. 359: "*apesar das fórmulas de convenções de arbitragem recomendadas para arbitragens institucionalizadas, nem para estas nem para arbitragens* ad hoc *foi ainda descoberta uma redação que, inquestionavelmente, defina o âmbito das cláusulas compromissórias concebidas em termos amplos*".

10 V. Raúl Ventura, «Convenção de Arbitragem», *in Revista da Ordem dos Advogados*, 1986 (Ano 46.º), pp. 289-413, p. 359: "*a tentativa de descoberta de diferenças entre as fórmulas usadas tem afadigado tribunais estrangeiros* (…)*, para determinar se certo litígio concreto está ou não abrangido pela cláusula. Fadiga que se afigura bastante escusada, pois parte do princípio de serem intencionais* (...) *as redações das cláusulas, o que se me afigura – em geral, pois não quero excluir a possibilidade de algum caso diferente – irrealista*".

11 V. Nigel Black / Constantine Partasides with Alan Redfern / Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th edition, Oxford: Oxford University Press, 2015, p. 95.

12 V. Nigel Black / Constantine Partasides with Alan Redfern / Martin Hunter, *Redfern and Hunter on International Arbitration*, *op. cit.*, p. 93.

13 V. Christophe Seraglini / Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, Paris: Montchrestien, 2013, p. 205: "*une clause d'arbitrage vise en principe une catégorie de litiges determines. Le plus souvent, les parties auront, lors de sa stipulation, entendu soumettre à l'arbitrage toute question susceptible de s'élever entre elles relativement au contrat qu'elles ont conclu*".

14 V. Raúl Ventura, "Convenção de Arbitragem», *op. cit.*, p. 359: "*sob pena de ingressar em congeminações sem base séria, a questão tem de ser posta em termos mais genéricos: houve ou não houve intenção de estabelecer um relacionamento amplo entre o litígio e a sua fonte*".

15 V. Raúl Ventura, "Convenção de Arbitragem», *op. cit.*, pp. 359-360: "*ressalvada alguma cláusula cujos termos não tenham a amplitude aparente à primeira vista, a intenção geral fará abranger todos os litígios que tenham a ligação* essencial *com a fonte. Importante é, pois, definir essa ligação*".

16 V. Christophe Seraglini / Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, *op. cit.*, p. 206: "*la clause selon laquelle 'seront soumis à l'arbitrage tous les différends relatifs à l'interpretátion ou à l'execution du présent contrat' est beaucoup moins satisfaisante. Un tel libellé pourrait, par exemple, en théorie au moins, faire maître un doute quant à l'applicabilité de la convention d'arbitrage au contentieux de la validité du contrat. Une partie assignée devant le tribunal arbitral pour inexécution du contrat pourrait tirer argumente de ce libellé apparement restrictif pour invoquer la nullité du contrat et prétendre que cette question, préalable à l'execution, n'est pas de la compétence du tribunal arbitral, et doit* être *tranchée par une jurisdiction* étatique*. Heureusement, la jurisprudence,* étatique *comme arbitrale, vient au secours de ces redactions maladroites, en retenant une interpretation relativement génereuse des dispositions des conventions d'arbitrage, afin d'en assurer l'efficacité*".

17 V. Raúl Ventura, «Convenção de Arbitragem», *op. cit.*, p. 368: "*a cláusula que apenas se refere a litígios relativos à 'interpretação' do contrato não é equívoca quanto a saber se abrange litígios relativos à validade do contrato ou à condenação em indemnização por inexecução deste. Ressalvada a vontade real e conhecida do declarante, o destinatário normal não entende 'interpretação' em tão amplo sentido.* [§] *Pelo contrário, a palavra 'execução' pode e deve ser interpretada no sentido de abranger os litígios respeitantes à inexecução do contrato, isto é, o próprio facto da inexecução e as consequências legais e contratuais deste. Execução e inexecução são verso e anverso da mesma medalha, não se pode apreciar uma sem olhar a outra*".

18 V. Raúl Ventura, "Convenção de Arbitragem», *op. cit.*, p. 368: "*também não é preciso grande esforço para incluir, nos litígios relativos à execução, aqueles em que uma parte reclama contra a resolução ilegal do contrato pela outra parte, pois essa resolução implica a inexecução*".

19 V. Christophe Seraglini / Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, *op. cit.*, p. 207: "*La raison d'*être *d'une convention d'arbitrage est, en principe et à defaut d'une volonté contraire des parties clairement exprimée, de leur fournir un mode complet de règlement des différends pouvant surgir entre elles du fait de leur relation contractuelle. Autrement dit, l'essence de la convention d'arbitrage est a priori fournir un mode de règlement de tous les différends pouvant surgir relativement au contrat liant les parties. Cette convention doit donc* être *interprétée en conséquence*".

20 V. António Menezes Cordeiro, *Tratado da* Arbitragem, *op. cit.*, p. 108: "ao *favor negotii* juntaríamos o *favor arbitrationis*".

21 V. António Menezes Cordeiro, *Tratado da* Arbitragem, *op. cit.*, p. 108: "*a arbitragem é, fundamentalmente, um serviço prestado às partes. A essa luz, deve ser um serviço cabal e do mais elevado nível. Concentrar a atividade do tribunal num único núcleo problemático eleito como 'litígio' e deixar por decidir questões envolventes é negativo: remete as partes para ulteriores processos, com tudo o que isso implica no plano dos custos e da incerteza e, até, da litigiosidade entre elas. Adiantamos, pois, o princípio da concentração: o litígio cometido aos árbitros, seja por compromisso seja por cláusula compromissória, envolve as questões circundantes, materialmente conectadas, desde que inseridas no* petitum".

22 V. Nigel Black / Constantine Partasides with Alan Redfern / Martin Hunter, *Redfern and Hunter on International Arbitration*, *op. cit.*, pp. 93-94.

23 V. Christophe Seraglini / Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, *op. cit.*, p. 175: "*la jurisprudence se montrait généralement relativement souple quant à la satisfaction de cette condition* [a da determinação do objeto do litígio]*; la determination der l'objet du litige supposait seulement une designation claire de la nature duy litige, sans qu'il soit necessaire d'en préciser les details. Cette souplesse devrait perdurer sous l'empire du texte nouveau*".

24 V. Christophe Seraglini / Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, *op. cit.*, pp. 206-207: "*Les arbitres tendent à appliquer à l'interpretation de la convention d'arbitrage certains principes qui gouvernent l'interpretation des conventions en general: l'interprétation de bonne foi des conventions, commandant de faire prévaloir, en cas de doute, la volontée réelle sur la volonté déclarée; le principe de l'effet utile, visé à l'article 1157 du Code civil; ou encore le principe d'interprétation contra proferentem, visé à l'article 1162 du Code civil et invitant à une intérpretation défavourable a celui qui a rédigé la clause obscure ou ambiguë. En revanche, le prétendu principe, parfois avancé, d'interprétation stricte de la clause d'arbitrage est en realité largement écarté, particulièrement dans l'arbitrage international, mais de plus en plus* également *dans l'arbitrage interne. Les arbitres rejettent majoritairement un tel principe d'interprétation qui pourrait encourager une partie de mauvaise foi à se saisir d'une maladresse rédactionelle pour* échapper *à l'arbitrage, et lui préfèrent celui de 'l'effet utile' des conventions d'arbitrage*".

25 V. Christophe Seraglini / Jérôme Ortscheidt, *Droit de l'arbitrage interne et international*, *op. cit.*, p. 207: "*le juge* étatique *suit une ligne similaire. Il semble guidé, dans son interpretation des conventions d'arbitrage, par un souci d'efficacité de ces conventions, qui le conduit à prendre, au besoin, quelques libertés avec les termes employés par les parties. Malgré quelques declarations en sense contraire, au demeurant relativement anciennes, la jurisprudence interprète largement les termes des clauses compromissoires, en quelque sorte au nom de leur effet utile commandant d'eviter toute dispersion du contentieux. Elle admet notamment qu'à default de stipulations restreignat clairement la competence arbitrale, les question de validité du contrat peuvent* être *soumises à l'arbitrage alors même que la clause d'arbitrage ne vise que les litiges relatifs à l'interprétation et à l'execution du contrat*".

26 V. Gary B. Born, *International Arbitration: Law and Practice*, Alphen aan den Rijn: Wolters Kluwer, 2012, p. 88.

27 V. articles 1-A.1 of the Public Contracts Code and 762.2 of the Civil Code

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THE PRAGUE RULES: THE NEW KID ON THE BLOCK

By Dr. Benjamin Lissner

I. Introduction

On 14 December 2018 the Rules on the Efficient Conduct of Proceedings in International Arbitration, commonly more known as the "**Prague Rules**" were published. Their purpose is to provide an alternative set of rules on the conduct of arbitral proceedings as a counterpart to the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"). The following article will show the main differences between those two sets of rules and provide a (subjective) prognosis whether the individual provisions will be attractive to and adopted by the users in the future.

II. History of the Prague Rules

The roots of the Prague Rules lie in a session with the rather provocative title "Creeping Americanization of International Arbitration: is it the right time to develop inquisitorial rules of evidence?" on the occasion of the IV RAA Annual Conference of the Russian Arbitration Association in Moscow on 20 April 2017.[1] The Prague Rules were drafted by a working group consisting of 46 arbitration practitioners, predominantly with a civil law background.[2] This also explains the heavy influence by inquisitorial principles on the Prague Rules, which was intentionally applied in order to set a counterpoint to the IBA Rules. A survey on arbitration procedures in different jurisdiction as one of the bases for the drafting of the Prague Rules was apparently filled in by only 29 participants, mainly from civil law jurisdictions.[3] Thus, it remains to be seen how widely the arbitration community will accept those new rules.

III. The Prague Rules and their Differences to the IBA Rules

1. Role of the Arbitral Tribunal

One of the key features but also one of the most controversial aspects of the Prague Rules is the more proactive role of the arbitral tribunal compared to the provisions in the IBA Rules. Explicitly mentioned in the Preamble of the Prague Rules, the more proactive approach adopted by inquisitorial tribunals shall be emphasized when applying the Prague Rules. The IBA Rules on the other hand are also intended to increase

the efficiency of arbitral proceedings, but do not emphasize the proactive role of the arbitral tribunal in the same sense the Prague Rules do.

a) Proactive Role

Art. 2 of the Prague Rules provides that the arbitral tribunal is encouraged to take a proactive role during the case management conference and to clarify its own view on how the case should proceed. The arbitral tribunal is further empowered to indicate to the parties the disputed and undisputed facts, legal grounds and its preliminary view of the case in order to limit the scope of the further proceedings. Art. 2.4 lit. e of the Prague Rules clarifies that such actions by the arbitral tribunal shall not be regarded as evidence for the lack of independence or impartiality of the arbitrators.

The IBA Rules on the other hand take a much more cautious stance and stipulate in Art. 2 that early consultations between the parties regarding the efficiency and fairness of the proceedings shall be proposed by the arbitral tribunal. Furthermore, the tribunal itself shall consider identifying to the parties as soon as possible any issues that the arbitral tribunal may regard as relevant to the case and material to its outcome and/or for which a preliminary determination may be appropriate.

The wording of Art. 2 of the IBA Rules shows that it is much more cautious with regard to the tribunal taking an active role in determining relevant facts early in the proceedings. The Prague Rules on the other hand provide powers to the arbitral tribunal that have their roots in many civil law systems that assign to judges much more active roles than in common law systems. While from a civil law perspective those powers might indeed lead to more efficiency of the proceedings and invite the participants to focus the dispute on the relevant issues that are material for the outcome of the case, such powers may seem deterring to users coming from a common law background.[4] Moreover, arbitral tribunals with sufficient experience and confidence will have made use of such preliminary assessments already before the Prague Rules were released, if approved by all parties, without the need of having them in writing. On the other hand, rather inexperienced arbitrators might be incentivized by Art. 2 to adopt at a very early stage a firm view with regard to the factual and legal issues without knowing the "full picture", raising the risk of raising concerns about their impartiality.

b) Fact Finding

Regarding the fact finding the Prague Rules bestow on the arbitral tribunal powers very similar to the one provided for in the IBA Rules. Art. 3 of the Prague Rules stipulates that the arbitral tribunal is entitled and also encourages to take a proactive role in establishing the facts of the case. In order to reach this goal, the tribunal is entitled to request documentary evidence, hearing of a witness, expert evidence of site inspections on its own initiative. This is very much in line with the powers the IBA Rules provide to the arbitral tribunal (see Art. 2.3, 3.10, 4.10, 6, 7 of the IBA Rules).

c) Iura Novit Curia

While the IBA Rules are silent on the issue of *iura novit curia*, Art. 7.2 of the Prague Rules distinctively provides that the arbitral tribunal may apply legal provisions not pleaded by the parties and rely on legal authorities not submitted by the parties, provided that the parties have had the opportunity to express their views on those provisions and authorities.

This approach by the Prague Rules shows the intention to expressly provide the arbitral tribunal with inquisitorial powers and to put the tribunal into the driver's seat of the proceedings. This is contradictory to the understanding of common law jurisdictions of the role of the judge. Under common law the principle of *iura novit curia* does not exist, because common law places emphasis on the material truth-finding between the parties without intervention from the judge. However, even under English law more flexibility is given to the arbitral tribunal in arbitral proceedings. Sec. 34 (2) (g) of the English Arbitration Act 1996 provides that the arbitral tribunal has the discretion to decide whether and to what extent the tribunal itself should take the initiative in ascertaining the facts and the law of the underlying dispute.

The caveat of Art. 7.2 of the Prague Rules that such course of action should only be done after having heard the parties' views intends to strike a balance between common law- and civil law-influenced arbitral proceedings. However, it remains to be seen how the international arbitration community receives such power given to the arbitrators. On the one hand it could indeed lead to more efficient proceedings if the tribunal provides guidance on points of law to the parties, in particular if parties and/or counsel are not very experienced in or familiar with arbitration proceedings. However, on the other side a notice by the tribunal to the parties that it considers applying additional legal provisions not being pleaded by the parties may lead to a situation that such notice leads to substantiating a claim which initially was unsubstantiated so that without such notice the claiming party might not have succeeded. There is a fine line between actively propelling the proceedings forward through giving appropriate guidance to the parties on the one hand and helping only one party by giving too much guidance and thus making its case on the other.

d) Assisting the Parties in Amicable Settlement

Art. 9 of the Prague Rules provides the arbitral tribunal with far-reaching powers for facilitating an amicable settlement between the parties and does not have a counterpart in the IBA Rules. Unless one of the parties objects, the arbitral tribunal may assist the parties at any stage of the proceedings in reaching such amicable settlement. Furthermore, any member of the tribunal may act as a mediator during the amicable negotiations if all parties agree.

The aforementioned powers are again an example for a very different understanding of the role of the judge/arbitrator in a common law- or civil law-based dispute. While in common law jurisdictions the role of the judge/arbitrator as a neutral includes

Reichstag Dome, Berlin | andreahast

that there should be no involvement in settlement negotiations, many civil law jurisdictions interpret the role in a different way. Provided that the parties wish them to do so, in civil law-influenced arbitrations the arbitrators are more inclined to assist the parties with finding an amicable solution while having less fear to appear biased. In that regard, if the arbitral tribunal is well-experienced, it will be cautious to avoid any concerns regarding its impartiality and independence, while at the same time giving the parties an idea how a solution could look like. There is a fine line for doing this without overstepping the commonly accepted boundaries of the arbitrator's role.

What is quite unusual - even for civil law-based arbitrations - is the med-arb approach in Art. 9.2 of the Prague Rules.[5] While the assistance of the parties by e.g. providing a preliminary assessment of the case in the plenary of the arbitration is widely accepted in such arbitrations, the role of the mediator usually allows for *ex parte* caucus sessions with each party. This mediation tool bears much more risk to raise concerns about the impartiality of the arbitrator/mediator, as one party does not know what has been discussed *in camera* with the other party and does not have an opportunity to comment on such discussed matters. It is thus quite unlikely that Art. 9.2 of the Prague Rules will receive much practical use for the aforementioned concerns.

One further potential flaw of this provision is the treatment of the arbitrator/mediator after the mediation has failed. Art. 9.3 of the Prague Rules provides that in case the mediation fails all parties have to provide written consent that the arbitrator may continue to act in the arbitration afterwards. This may lay the ground for obstructive parties to get rid of arbitrators they do not feel comfortable with. In this regard, it is surprising that the drafters of the Prague Rules decided to include another threshold of written consent by the parties for the return of the arbitrator/mediator into the role as arbitrator. As the parties also have to give written consent prior to initiating the mediation, one could have expected that such consent also includes the parties' consent for a return of the arbitrator into the arbitration once the mediation might have failed. If the arbitrator/mediator should give raise to concerns regarding his/her impartiality or independence during the mediation process, the parties would have the usual tools at their disposal for challenging an arbitrator pursuant to the applicable arbitration rules. The additional layer of written consent in Art. 9.3 of the Prague Rules however facilitates the removal of an arbitrator, as besides rejecting to consent there is no further requirement for such removal.

2. Hearing

While the IBA Rules assume that an evidentiary hearing will take place during the arbitration, the Prague Rules choose a different path. Art. 8.1 of the Prague Rules provides that the Parties should seek to resolve the dispute on a documents-only basis as a default rule, i.e. generally without conducting an evidentiary hearing. Only if one of the parties requests such hearing or if the arbitral tribunal deems it appropriate, a hearing shall take place in the most cost-efficient manner possible (Art. 8.2 of the Prague Rules).

While the intention of the drafters of the Prague Rules to promote cost efficiency should generally be welcomed, it

is doubtful that Art. 8.1 will gain much relevance in arbitral proceedings. Usually, there is always at least one party which wants its "day in court" and be able to present its case and evidence to the arbitrators. Only in cases with small amounts in dispute or where the parties prefer a quick and inexpensive decision over full-fledged proceedings, Art. 8.1 might be applied. However, in most arbitrations the parties will be hesitant to waive the conduct of an oral hearing, in particular if a lot is at stake.

3. Documentary Evidence

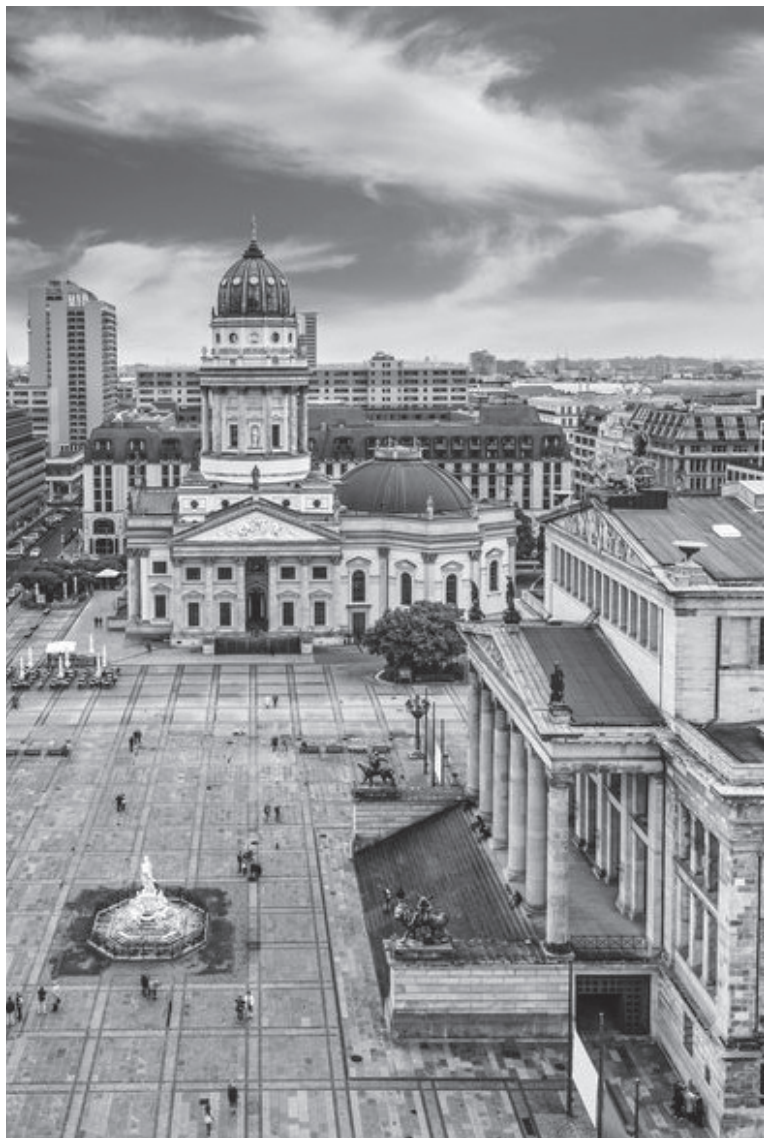
With regard to documentary evidence the IBA Rules adopt an approach which very much leans into the common law understanding of document production. However, they try to limit the excesses of document discovery that are well-known in particular from US litigation cases by relying on the requirements of relevance and materiality of the documents requested.

The Prague Rules take an entirely different approach and stipulate as a default rule in Art. 4.2 that the arbitral tribunal and the parties are encouraged to avoid any form of document production including e-discovery. This is heavily influenced by the civil law-understanding that each party is responsible for providing the documents to the tribunal it requires to prove its case and if it is not able to do so, this is to the procedural detriment of the failing party without any obligation of the other party to disclose documents to the failing party. This is of course a generalization because even in many civil law systems limited document disclosure is known and possible (e.g. sec. 142 (1) of the German Code of Civil Procedure). However, a document production process as provided for in the IBA Rules is rather alien to court litigation proceedings in those jurisdictions.

The intention behind Art. 4.2 of the Prague Rules is clear. Its purpose is to limit the extensive document productions many arbitrations see nowadays, partly caused by arbitral tribunals which simply rely on their standard templates for procedural orders which provide for such document production even if it may not be useful in the individual case and partly caused by inexperienced parties which are afraid to waive document production even if it will not be to their benefit.

However, the question remains whether Art. 4.2 is the proper instrument to avoid such extensive document productions. On an international level document production as provided for by the IBA Rules has become an established and accepted tool and in particular e-discovery is widely accepted in modern arbitral proceedings.[6] Thus, it remains to be seen whether the users will be willing to adopt Art. 4.2 of the Prague Rules and to waive document production. It certainly might make sense in disputes with limited amounts in dispute or relevance or where the relevant documentary evidence is already accessible to all participants.

Generally, it is positive that the Prague Rules emphasize an early discussion of the possibility of document production during the arbitration (Art. 4.3) and the confidentiality of the disclosed documents (Art. 4.8). It is further positive that Art. 4.5 – similar to the IBA Rules – limits document production to relevant and material documents. However, Art. 4.5 also provides that only a specific document and not document categories can be requested. While fishing expeditions should rightfully be avoided, it is questionable in many cases whether a specific document can actually be identified by the requesting party. In many cases the requesting party only knows that a certain category of documents must exist in the possession of the other party without being able to identify the exact document it is looking for. Thus, the limitation of Art. 4.5 of the Prague Rules seems impractical for effective use of document production in arbitral proceedings.



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4. Witness Evidence

With regard to witness evidence the Prague Rules and the IBA Rules are quite similar. Both sets of rules give the arbitral tribunal the power to control the hearing, give directions and exclude appearance of a witness (see Art. 5.2 and 5.3 of the Prague Rules; Art. 4.1, 8.2, 8.5 of the IBA Rules).

With regard to the hearing of witnesses the IBA Rules are heavily influenced by the adversarial principle of cross examination in relation with the submission of written witness statements. The Prague Rules also allow cross examination but do not have such detailed provisions on it but leave it to the arbitral tribunal to organize the questioning of witnesses.

However, the Prague Rules take one step further and allow the arbitral tribunal to ask a party to submit a written witness

Hamburg | Leonid Andronov

statement even if this witness will not be heard and to still give the witness statement as much evidentiary value as it deems appropriate. It seems doubtful that practitioners not used to civil law litigation principles will accept such provision, if they do not have the opportunity to question a witness based on such written witness statement.[7]

5. Expert Evidence

Both the Prague Rules and the IBA Rules provide rules for the use of tribunal- and party-appointed experts. However, while the IBA Rules have distinct provisions for both party-appointed experts (Art. 5) and tribunal-appointed experts (Art. 6), the Prague Rules clearly focus on the role of the tribunal-appointed expert (Art. 6). Although in Art. 6.5, 6.6 and 6.7 of the Prague Rules the use of party-appointed experts is dealt with, the majority of the rules in Art. 6 is related to the use of tribunal-appointed experts, which again shows the proximity of the Prague Rules to civil law systems.

IV. Conclusion

It should be welcomed that the Prague Rules provide an alternative concept to the established IBA Rules. The regular use of the IBA Rules in international arbitrations sometimes seems to have led to the result that many arbitration users do not consider alternative procedural rules and tools anymore which could increase the efficiency of the proceedings. The Prague Rules might provide some inspiration on how to do things differently.

However, in their current form they are influenced by inquisitorial principles to such a large extent that it will hardly be possible to convince users from common law jurisdictions to apply the Prague Rules in their entirety. Furthermore, many experienced arbitrators have already used useful efficiency-increasing techniques promoted by the Prague Rules before they were issued.

Thus, it remains to be seen whether users will actually include the Prague Rules in their contracts and adopt them for their disputes. In any event, they are a good toolkit for arbitrators for considering procedural steps as an alternative to the ones provided for by the well-established IBA Rules and provide the arbitral tribunals and the parties with more options to tailor their proceedings to their specific needs in order to make arbitration more efficient.

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1 https://praguerules.com/news/is-it-time-for-a-change-/.
2 https://praguerules.com/working_group/.
3 Tevendale, Are the Prague rules the answer?, GAR, 7 January 2019.
4 Javin-Fisher/Saluzzo, Prague Rules on evidence in international arbitration: a viable alternative to the IBA Rules?, Humphries Kerstetter, 25 January 2019.; Kocur, Why Civil Law Lawyers Do Not Need the Prague Rules; Rombach/Shalbanava, The Prague Rules: A New Era pf Procedure in Arbitration or Much Ado about Nothing?, SchiedsVZ 2019, 53, 55.
5 Rombach/Shalbanava, The Prague Rules: A New Era pf Procedure in Arbitration or Much Ado about Nothing?, SchiedsVZ 2019, 53, 58.
6 McIlwrath, The Prague Rules: The Real Cultural War Isn't Over Civil vs. Common Law, Kluwer Arbitration Blog, 12 December 2018.
7 Rombach/Shalbanava, The Prague Rules: A New Era pf Procedure in Arbitration or Much Ado about Nothing?, SchiedsVZ 2019, 53, 57.

Milan, Italy | Preve Beatrice

WHEN ARBITRATORS SLEEP… DELAY IN DELIVERING THE AWARD. ONE ISSUE, MANY (POSSIBLE) SOLUTIONS

By Bernardo Cartoni

1. The aim of this article.

One of the duties of an arbitral tribunal is to conduct the proceedings in a speedy and cost effective way; for instance, Art. 17(1) UNCITRAL Arbitration Rules 2010 says that: "The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute".

The LMAA has issued its own guidelines "with a view to making the decision-making process as cost-effective and efficient as possible"[1].

However, sometimes the arbitrators are not able to deliver their award timely, and such a delay can take weeks, months[2] and – in worst cases – more than one year.

So, this lack of efficiency is perceived as a major problem among the arbitral community[3]. Cost and lack of speed were both ranked by respondents as amongst the worst characteristics of international arbitration[4].

The aim of this article is to analyze how this issue has been dealt with in various jurisdictions, at the legislative level[5] or by the arbitral institutions.

At the end, the author will try to sum up the different solutions and to propose some tools in order to avoid excessive delay in conducting arbitration proceedings.

2. The need for speed in international arbitration.

"Efficiency" is a key word in international arbitration[6].

A research has estimated that in 65% of cases, efficiency is the main factor in choosing a dispute resolution process[7].

Heydon J said that: "the attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy"[8] .

A distinguished practitioner has underlined that "over the last few years there has been a huge focus on techniques for controlling time and cost in arbitration; all are designed to reduce the duration of arbitrations. However, it's not only arbitration proceedings that can take a long time. Perhaps the biggest source of frustration for parties, and their advisers, is that it can sometimes take months for the arbitrators to issue an award"[9].

There are many tools that can be used in order to achieve actual cost-effective and time-efficient arbitral proceedings[10].

One of the more efficient tools is to provide for simplified procedures, that are more suitable for low-value cases and for – relatively – straightforward claims, but an in-deep analysis of the relevant arbitration rules issued by the leading arbitral institutions is beyond the scope of this article.

We are going to analyse:

1) where a time limit for rendering the award is provided for and

2) which the consequences are, if such limit has not been complied with.

It goes without saying that we can find very different positions and solutions.

3. Different jurisdictions and different solutions.

Italy.

In Italy[11], the relevant law states an explicit limit in order to complete arbitral proceedings.

Under art. 820 Civil Procedure Code, the parties can determine a time limit to render an award; otherwise, the statutory limit (240 days from the constitution of the arbitral tribunal[12]) shall apply.

This limit can be extended for 180 days, if:

- There are lay witnesses and evidential hearings
- There is a tribunal-appointed expert
- There is a partial or interim award
- There is a change in the composition of the arbitral tribunal

In any case, the time limit can be extended if all the parties agree or by the President of First Instance Court[13] of the seat of the arbitration.

Pursuant to art. 821 Civil Procedure Code, each party may notify the arbitral tribunal and the other party (or parties) that it wants to terminate the proceedings, because of they are beyond the time limits.

The Italian Supreme Court[14] stated that this is a personal prerogative of the party[15]; but this power can be exercised by its counsel, too[16].

If a party had failed in doing this, the delay cannot be a ground to set aside the award[17]; otherwise, the award is null and void, according to art. 829 n. 6 Civil Procedure Code[18].

Even though the proceedings are terminated because of the time limit is expired, the arbitration clause is still valid and the parties have to submit their claims before a fresh arbitral tribunal[19].

Under the current CAM[20] Arbitration Rules[21] there are stricter time limits.

Pursuant to art. 36 CAM Arbitration Rules: "The Arbitral Tribunal shall file the final award with the Secretariat within six months from its constitution, unless otherwise agreed by the parties in the arbitration agreement"; the Secretariat may extend or suspend the time limit, even on its own initiative.

Mainland China.

PRC Arbitration Law 1994 does not provide for a time limit to render an award.

This limit is provided for at institutional level.

A distinguished scholar has noted that "in CIETAC Arbitration, the arbitral tribunal must render an arbitral award within six months (foreign-related cases)[22] or four months (domestic cases) from the date on which the arbitral tribunal is formed"[2324].

Upon application of the arbitral tribunal, the Secretary General may extend the time limit, if he deems it "truly necessary and the reasons for the extension are truly justified"[25].

Under art. 47 BAC[26] Arbitration Rules 2014, the arbitral tribunal "shall render its award within four months of its constitution"; this limit increases up to six months for international arbitration[27]. The Secretary General, upon request of the presiding arbitrator, can grant a suitable extension of the time limit, "if there are special circumstances".

Art. 44 SHIAC Arbitration Rules 2015 provides for a double time limit:

- Six months upon the date the arbitral tribunal is constituted for international or foreign-related disputes and for disputes relating to the Hong Kong Special Administrative Region, the Macao Special Administrative Region or the Taiwan region;
- Four months upon the date the arbitral tribunal is constituted for domestic cases[28].

But, what if this limit has been not complied with?

Is it possible to argue that the award is null and void or that the award can be set aside?

Under art. 58 (3) PRC Arbitration Law 1994, an award can be set aside if "the arbitration procedure was not in conformity with statutory procedure" and art. 20 Supreme People's Court's Interpretations of Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China (September 8, 2006) clarifies that it "refers to the case where the arbitration proceedings are in violation of the provisions of the Arbitration Law and the arbitration rules selected by the parties concerned and *may affect the correct ruling of the case*"[29].

Usually, a mere delay in delivering the award does not affect the correct ruling of the case and this cannot constitute a ground for setting aside the award[30].

Hong Kong.

Hong Kong is a Model Law Country; so, Hong Kong Arbitration Ordinance Cap. 609 does not provide for a time limit to issue an award.

Even the HKIAC Arbitration Rules 2018 do not provide for an explicit time limit to deliver the award[31]. Article 13.1 states that "the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay…" and art. 13.5 stresses that "the arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration".

So, "the length of time for arbitral proceedings in Hong Kong can and does range from months to years depending on the arbitral rules adopted by the parties"[32].

Sec. 81 Hong Kong Arbitration Ordinance is a verbatim adoption of art. 34 UNICITRAL Model Law; under art. 34(2)(a)(iv) a breach of the procedural rules[33] can lead to set aside the award.

However, Hong Kong is a very arbitration-friendly jurisdiction; so, this power has been used very sparingly.

For instance, in the *Pacific China Holdings* case[34], Hon Tan VP underlined that "the conduct complained of must be serious, even egregious, before a court could find that a party <<was otherwise unable to present his case>>. It is unnecessary for me to decide, and I do not decide, how serious or egregious the conduct must be before a violation could be established. Nor, do I decide whether<<the conduct … must be sufficiently serious to offend … basic notions of morality and justice>>. I am inclined to the view that the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process"[35] and "the court may refuse to set aside the award if the court is satisfied that the arbitral tribunal could not have reached a different conclusion. How a court may exercise its discretion in any particular case will depend on the view it takes of the seriousness of the breach. Some breaches may be so egregious that an award would be set aside although the result could not be different"[36]

Singapore.

The International Arbitration Act (Chapter 143A) is shaped on the UNCITRAL Model Law[37], so no time limit is provided for by the law.

Pursuant to Rule 32.3 SIAC Arbitration Rules 2016: "Unless the Registrar extends the period of time or unless otherwise agreed by the parties, the Tribunal shall submit the draft Award to the Registrar not later than 45 days[38] from the date on which the Tribunal declares the proceedings closed"[39].

The award can be set aside on the grounds provided for by art. 34 UNCITRAL Model Law or if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced"[40].

A mere delay cannot amount to a breach of the rules of natural justice. V K Rajah JA has underlined that "It is necessary to prove that the breach, if any, had caused actual or real prejudice to the party seeking to set aside an award. It may well be that though a breach has preceded the making of an award, the same result could ensue even if the arbitrator had acted properly"[41].

Taiwan.

Under art. 21 Taiwan Arbitration Act 1998 "The arbitral tribunal shall render an arbitral award within six months [of commencement of the arbitration]. However, the arbitral tribunal may extend [the decision period] an additional three months if the circumstances so require".

Distinguished scholars have noted that: "The legislative intent of Article 21 is to make arbitration an efficient and speedy process"[42].

Pursuant to art. 40 Taiwan Arbitration Act 1998, a party may apply for setting aside an award, if "the arbitral proceedings is contrary to the arbitration agreement or the law".

Theoretically, a late delivery of the award is contrary to the law; but Taiwanese scholars have underlined that it is necessary a "gross violations of procedural justice during the arbitration proceedings"[43], so, it does not constitute a valid ground t set aside the award.

Under art. 41 CAA Arbitration Rules: "The final award shall be made within 10 days after the closure of the hearings" and this provision shall apply mainly to domestic cases. For international disputes, the Chinese Arbitration Association has created CAAI[44].

Under art. 30.1 CAAI Arbitration Rules 2017: "Within six months from the date of its constitution, the Tribunal

Italy | Mikael Damkier

shall declare the proceedings closed and state the date of such closure in writing" and pursuant to art. 33.1 "The Tribunal shall make its final award within six weeks from the date of its closure of proceedings[45] as stated in accordance with Article 30.1". According to art. 33.3, this deadline may be extended by CAAI "pursuant to the Tribunal's reasoned request or on its own initiative if it decides necessary to do so".

England and Wales.

There is no time limit in the English Arbitration Act 1996; Sec. 33(1)(b) states that the arbitral tribunal shall "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense".

LCIA Arbitration Rules 2014 do not provide for a time limit to render the award, either.

Under Sec. 68 EAA, a party may challenge an award on the ground of serious irregularity, and Sec 68(2) clarifies that "serious irregularity" means also a "failure by the tribunal to comply with section 33 (general duty of tribunal)"[46].

Anyway, a delay of two years is not a sufficient ground to challenge an award; Cooke J has noted that: "Such a period is inordinate and unacceptable, but it was common ground between the parties that, although it might constitute a breach of the general duty of the Tribunal, no substantial injustice could be shown unless some other form of irregularity in the closed list in section 68 was demonstrated. The most that can ordinarily be said about such delay is that it can give rise to a suspicion that the Tribunal may have either forgotten what points were raised and required determination or that it, consciously or subconsciously, sought a shortcut in order to finalise a delayed award"[47].

Scotland.

The Arbitration (Scotland) Act 2010 does not provide for an explicit time limit to render the award.

Anyway, under Rule 24 Schedule 1: "The arbitral tribunal must […] conduct the arbitration without any unnecessary delay" and this is a mandatory rule that shall apply to every arbitration seated in Scotland, pursuant to Sec. 7 Arbitration (Scotland) Act 2010.

Under Rule 68(1) Schedule 1: "A party may appeal to the Outer House against the tribunal's award on the ground of serious irregularity" and serious irregularity means also "the tribunal failing to conduct the arbitration in accordance with […] these rules" (Rule 68(2)(a)(ii)).

Even in this case, a delay in delivering the award is not a serious irregularity.

Lord Wolman said: "Three general points can be made about serious irregularity appeals. First, they are designed as "a long stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected": Departmental Advisory Committee on Arbitration Report on the Arbitration Bill 1996. That passage has been quoted with approval in several cases, see for example

Walsall Metropolitan Borough Council v Beechdale Community Housing Association Ltd [2005] EWHC 2715. Second, the court will not intervene on the basis that it might have done things differently, or expressed its conclusions on the essential issues at greater length. Third, such an appeal can only succeed if there has been substantial injustice. If the result of the arbitration would have been likely to be the same or very similar, then there is no basis for overturning the award: *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84. Accordingly a dissatisfied party has to meet a high test"[48].

France.

In France, like in Italy, there is no separate Arbitration Law.

The matter is dealt within the Civil Procedure Code.

Under art. 1463: "If an arbitration agreement does not specify a time limit, the duration of the arbitral tribunal's mandate shall be limited to six months as of the date on which the tribunal is seized of the dispute"; this period can be extended by agreement between the parties or by the supporting judge[49].

Under ICC Arbitration Rules 2017, art. 31 states that "The time limit within which the arbitral tribunal must render its final award is six months[50]. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court". The Court may fix a different time limit or may extend the default time limit.

On 17 December 2015, the ICC International Court of Arbitration stated "that ICC arbitral tribunals are expected to submit draft awards within three months after the last substantive hearing concerning matters to be decided in an award or, if later, the filing of the last written submissions (excluding cost submissions). This timeframe will be set at two months for cases heard by sole arbitrators. If a draft award is submitted beyond that timeframe, the Court -unless satisfied that the delay is justified by factors beyond the arbitrators' control or to exceptional circumstances- may lower the arbitrators' fees"[51] up to 20% or even more if the draft award is submitted for scrutiny more 10 months after the last substantive hearing or written submissions.

4. Conclusive remarks.

Trying to sum up this rhapsodic brief overview, we can say that – only in very few cases – a delay in delivering the award can constitute a valid ground to challenge it.

In other cases, it is up to the arbitral institutions to deal with a "lazy arbitrator".

For instance, the arbitrator's fees can be reduced as decided by ICC.

Recently, on 11 June 2019, the ICC released the figures for 2018.

There was a dramatic increasing in efficiency: "These delay measures have improved the ICC Court's efficiency, according to the latest statistics. Already, the introduction of delay measures resulted in a decrease in the number of late awards from 54% in 2016 to 38% in 2018. At the same time, there has been an overall decrease in 'delays,' or awards allocated three to six months late, from 52 in 2016 to 33 in 2018. Furthermore, awards delayed by seven months or more decreased from 18 in 2016 to 6 in 2018"[52].

Art. 4 CAM Code of Ethics states that: "When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to devote the necessary time and attention to the arbitration to perform and complete his task as expeditiously, diligently and efficiently as possible"; so, if an arbitral tribunal was not able to comply with the deadline, this is a breach of the above and "The arbitrator who does not comply with this Code of Ethics may be replaced by the Chamber of Arbitration, which, may also refuse to confirm him/her in subsequent proceedings by taking into consideration the seriousness and the relevance of this violation"[53].

Another kind of sanction is that provided for by art. 41 CAA Arbitration Rules: "Notwithstanding that the time within which the arbitral tribunal must render its final award has not yet exceeded the time limit prescribed in Article 21 of the Arbitration Law, if the arbitral tribunal fails to render a final award within one month after the closure of the hearings, CAA may send a notice of reminder; if it fails to render its final award within three months, CAA may make the names of the arbitrators public in the Arbitration Journal published quarterly by CAA nevertheless, if the arbitral tribunal fails to render its final award within the time limit prescribed in or agreed pursuant to Article 21 of the Arbitration Law, the CAA may make the names of the arbitrators public in its Arbitration Journal without giving prior notice". This is an effective kind of pillory.

My personal view is that the delay should not affect the validity of the award; a delayed award is not – *per se* – a wrong one.

But, the "lazy arbitrators" should be sanctioned.

The fees reduction should be linked to a not appointment in future proceedings[54] and the arbitral institutions should make the names of the arbitrators public in their website; so, the arbitral community can be aware of the arbitrators that – usually – indulge in "late delivery"[55].

This could avoid the hoarding of appointments by "the happy few" and it could give more chances of an appointment to the young arbitrators, less experienced but not necessarily less good than the old ones.

1 Preamble of LMAA Checklist, available at www.lmaa.london/uploads/documents/CHECKLIST.pdf.
2 "On average, arbitrators take 3 months to produce awards" (LCIA Facts and Figures – Costs and Duration 2013-2016, p. 2).
3 Nigel Blackaby – Constantine Partasides – Alan Redfern – Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, 2009, p. 36. The Authors stressed that one of the main reasons for delay "is the workload of the chosen arbitrators, particularly if they have other professional commitments".
4 White & Case – Queen Mary University of London International Arbitration Survey 2015, p. 24.
5 It is worth noting that the UNCITRAL Model Law on International Commercial Arbitration does not provide a time limit to render an award.
6 "Efficiency is the key priority of Parties in choice of dispute resolution processes" ("Global Data Trends and Regional Differences", in Global Pound Conference Series, p. 3).
7 "Global Data Trends and Regional Differences", in Global Pound Conference Series, p. 10.
8 High Court of Australia in *Wesport Insurance Corp vs. Gordian Runoff Ltd*, quoted in Gregory Burton, "Arbitration and Expedited Court Procedures in Commercial Disputes", in *Corporate Dispute Magazine*, Jan-Mar 2016, p. 40.
9 Victoria Clark, *Time limits for awards: the danger of deadlines*, Practical Law Arbitration Blog, August 3 2016, http://arbitrationblog.practicallaw.com/time-limits-for-awards-the-danger-of-deadlines/.
10 See White & Case – Queen Mary University of London International Arbitration Survey 2015, pp. 24-32.
11 Italy is not a Model Law Country. Artt. 806 to 840 Civil Procedure Code deal with arbitration (including recognition and enforcement of foreign awards). There are no special provisions about international arbitration.
12 In Ecuador, according to art. 25 Arbitration and Mediation Law (Ley 145 of 4 September 1997) the time limit is 150 days from the date of the first hearing in which the arbitral tribunal holds that it has competence to hear the case (Audiencia de sustanciación). But the delay in issuing the award is not among the grounds to set aside the award, pursuant to art. 31 Arbitration and Mediation Law.
13 Presidente del Tribunale.
14 Corte di Cassazione.
15 Cass. Sez. I 11.7.2003 n. 10910.
16 Art. 816 bis Civil Procedure Code states that the power of attorney grants the counsel of the very same powers and prerogative of the represented party, unless there is an explicit limitation in the power of attorney.
17 Cass. Sez. I 26.3.2004 n. 6069.
18 There was a similar provision in artt. 760 and 771 of the National Code of Civil Procedure of Argentina. Currently, the Arbitration Law 2018 (Ley 27449 of 4 July 2018 "Ley de Arbitraje Comercial Internacional") provides for no time limits to issue the final award.
19 Cass. Sez. I 25.11.2013 n. 25735.
20 Milan Chamber of Arbitration.
21 In force as from 1 March 2019.
22 Art. 48 CIETAC Arbitration Rules 2015.
23 Jingzhou Tao, *Arbitration Law and Practice in China*, Wolters Kluwer, 2012, p. 162.
24 In summary procedures (value within 5,000,000 RMB) "the tribunal shall render the award within three months upon the date the tribunal is constituted" pursuant art. 62.1 CIETAC Arbitration Rules 2015.
25 Fan Yang, *Foreign-Related Arbitration in China. Commentary and Cases*, Cambridge University Press, 2016, Vol. I, p. 146.
26 Beijing Arbitration Commission, also known as Beijing International Arbitration Center (BIAC).
27 Art. 68 BAC Arbitration Rules 2014. In the event of an expedited procedure (claims value within 1,000,000 RMB), the time limit is of 90 days for international disputes (art. 68) and of 75 days for the domestic ones (art. 58).
28 For summary procedures (value within 1,000,000 RMB or more if agreed by the parties), "the tribunal shall render the award within three months upon the date the tribunal is constituted" (art. 57 SHIAC Arbitration Rules 2015).29 Emphasis added.
30 In the *Shanxi Explosion- Proof Motor (Group) Co. Ltd v Paolino Castro* case (in Fan Yang, *Foreign-Related Arbitration in China. Commentary and Cases*, Cambridge University Press, 2016, Vol. II, pp. 1379-1383) the Supreme People's Court held that extensions of time (even beyond the relevant applicable rules) did not have any adverse effect on the parties' rights (23 February 2006, No. 54 of the Fourth Civil Tribunal of the Supreme People's Court [2005]). In the *Tianjin Sinta Hotel v Daeil Co. Ltd of Korea* case (case (in Fan Yang, *Foreign-Related Arbitration in China. Commentary and Cases*, Cambridge University Press, 2016, Vol. II, pp. 1418-1424) the Supreme People's Court dismissed the application for setting aside the award, because the applicant "has not put forth evidence to show how the refusal of evidence had any material effect on the outcome of the award".
31 Under art. 42(2) f, in case of Expedited Procedure, "the award shall be communicated to the parties within six months from the date when HKIAC transmitted the file to the arbitral tribunal. In exceptional circumstances, HKIAC may extend this time limit".
32 Shahla Ali, *Balancing Procedural and Substantive Arbitration Reforms*, in The Developing World of Arbitration. A Comparative Study of Arbitration Reform in the Asia Pacific, Anselmo Reyes and Weixia Gu (eds.), Hart, 2018, p. 58.
33 In this case, the word "rules" means provisions stated by the applicable law(s) or by the applicable arbitration rules or rules agreed by the parties.
34 *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holding Ltd* [2012] HKCA 200.
35 *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holding Ltd* [2012] HKCA 200, at 94.
36 *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holding Ltd* [2012] HKCA 200, at 105.
37 Sec 3 states that: "Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore".
38 This time is extended to 90 days, in case of an investment arbitration under SIAC Investment Arbitration Rules 2017 (Rule 30.3).
39 In case of Expedited Procedure, Rule 5.2.d shall apply ("the final Award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time for making such final Award").
40 Sec. 24 (b) IAA.
41 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28, at 86.
42 Nigel NT Li, Angela Y. Lin, Jeffrey CF Li, *Cautious Optimism for Arbitration Reform in Taiwan*, in The Developing World of Arbitration. A Comparative Study of Arbitration Reform in the Asia Pacific, Anselmo Reyes and Weixia Gu (eds.), Hart, 2018, p. 74.
43 Angela Y. Lin, Jeffrey Li, *Chapter 14: Taiwan,* in The International Comparative Legal Guide to: International Arbitration 2013, on July 1, 2013.
44 CAA International Arbitration Centre. It is worth noting that CAAI is seated in Hong Kong, so CAAI arbitrations are governed by Hong Kong law. Taiwan is not a New York Convention signatory party; so, the choice to locate CAAI in Hong Kong allows CAAI award to enjoy the benefit of a New York Convention award.
45 The same time limit shall apply in case of Expedited Procedure (amount in dispute less than 250,000 USD), as provided for in art. 41.4.e.
46 Sec. 68(2)(a) English Arbitration Act 1996.
47 *K & Ors v P &Ors*, [2019] EWHC 589 (Comm), at 3.
48 *X v Z* [2014] CSOH 83, at 18.
49 In international arbitration, the supporting judge is the President of the *Tribunal de grande instance* of Paris, unless otherwise agreed by the parties (art. 1505 Civil Procedure Code). It is worth noting that – in international arbitration – the statutory limit of six months shall not apply, because art. 1506 (2) Civil Procedure Code refers only to art. 1463 (paragraph 2) and the limit is provided for in art. 1463 paragraph 1.
50 In case of a dispute administered under the Expedited Procedure Rules (Appendix VI), the time limit is the same but the clock begins to tick "from the date of the case management conference" (art. 4.1 Appendix VI).
51 https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/
52 https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/
53 CAM Code of Ethics art. 13.
54 Of course, it is necessary a serious delay. Missing the deadline for one day or two cannot lead to such a consequence.
55 So, it can affect the appointment of the party-appointed arbitrator and not only the arbitrators appointed by the institutions as pursuant to art. 13 CAM Code of Ethics.

Dublin, Ireland | Laurentiu Iordache

IRISH ALTERNATIVE DISPUTE RESOLUTION IN 2019: AN OVERVIEW

By Dermot Flanagan S.C & Arran Dowling Hussey

1

The Republic of Ireland ('Ireland') would not until a decade ago have been a traditional seat for international Alternative Dispute Resolution ('ADR')[2] activity. In the last ten years changes domestically and internationally have led to changes in Ireland's position in the marketplace for international work. This article takes an overview of recent developments in Irish ADR in 2019. There are obviously a range of ADR methods and whilst processes other than arbitration can be availed of to address cross border disputes the focus herein will be more weighted towards comment on arbitration than other processes.

Statutory construction adjudication as it approaches its third anniversary in the Republic of Ireland has been slow to bed in. International parties contracting to work on a construction project in the Republic of Ireland can not opt out of this legislation. However, where the stakes demand and they are unhappy with the decision of the adjudicator they can proceed to progress the dispute by way of an application to the High Court or an arbitration.[3] The international effect of mediation is sure to grow as has been sent recently there has been an increased focus on niche areas such as mediating investor-state disputes.[4] Moreover, more generally the 'Singapore convention', formally United Nations Convention on International Settlement Agreements Resulting from Mediation, strengthens the international reach of mediation[5]. However, for now focus below will largely be on arbitration.

Historically international seats such as London, New York and Geneva have developed a scale and scope in terms of the volume of disputes they deal with. A range of factors drove the development of those seats.[6] The geographical location of any one seat and the size and economic strength of the jurisdiction within which the seat is located are some of the relevant issues that underpin the success of a seat. From in and around the turn of the of the millennium what are sometimes described as secondary seats have looked at strengthening their position. Juxtaposed with this development there has perhaps been increased criticism of traditional seats. Surveys such as that conducted by Queen Mary University in London[7] have raised discussion of some of the pitfalls that can be seen when using seats such as London and Paris. Popularity can sometimes see

seats become more static, less responsive and more expensive than users would like.

Within the sphere of arbitration Ireland's legislation before 2010 would have been a strong disincentive to users of international arbitration considering coming to Dublin. The 1954-1998 Acts[8] were seen as off the pace in terms of international best practice.[9] There were wider grounds to apply to the competent court before, during or after an arbitration then would have been seen in other common law jurisdictions. Moreover, all applications were subject to appeal. At that time there were frequently considerable delays between any hearing in the Dublin High Court and a subsequent appeal to the Supreme Court[10]. In one noted instance the arbitration commenced in May, 2006 the arbitrator issued his award on liability in October, 2007 and the Irish High Court declined to set the award aside in October, 2008.[11] The appeal to the Supreme Court saw a decision of that court issue in March, 2010.[12] In this instance after the passage of not quite 4 years the parties were left in a position where the arbitrator was held to have misconducted the proceedings and was therefore removed and they had to start afresh before a new arbitrator some 6 years after they first signed a contract in relation to a construction project some 200 KM outside Dublin.

The 2010 legislation has removed the risk of such elongated court intervention. Commentators such as *Global Arbitration Review* have noted both how user friendly the 2010 Act and the manner in which it has been interpreted by the Irish courts.[13] In 2019 the one known unknown is the impact of Brexit. Much analysis of the position emanating from London suggests that in fact not only will London's position as a seat not be weakened it will in fact strengthen and there will be more international arbitrations held in that city.[14] External comment tends to agree with the suggestion that the seat will at least not be weakened.[15] However it occurs to the instant authors that many of those who look at this issue have presupposed that the market-place for international dispute work is rational.

Brexit, as of the time this article was written, is an inherently unstable project. The next Prime Minister of Britain[16] whoever he shall be has in each instance offered no rational explanation as to how the United Kingdom will end the present impasse it finds itself in.[17] A 'no deal Brexit' will bring uncertainty which may deter users of London as a seat. As *Lowe* notes 'No-deal Brexit would not be the end of the world – just very, very, very bad Britain would survive no deal – but survival should not be the height of a country's aspiration.'[18] Might it be the case that overarching uncertainty and disruption in a jurisdiction will be a drag on the attractiveness of a seat that in a textbook sense should retain its existing prominence ?

London based international arbitrator John Tackaberry Q.C notes-

'I'm *familiar with the steps that Dublin has taken to attract international dispute work. In my experience the marketplace is quite conservative. However, it would seem to me that over the next 5 to 10 years the volume of activity in what is sometimes called secondary seats will undoubtedly grow. There are a range of factors that can see a dispute process conducted outside one of the 'usual suspects.' Its not possible to succinctly outline all the issues that might be relevant in determining which seat is used. However, where the volume of air travel is expected to double in the next twenty years it seems to me that the world will become even more diverse than it is now, we will all be travelling more both for personal and business reasons. Dublin as an English-speaking jurisdiction remaining within the European Union will be an increasingly attractive seat. The courts are pro-arbitration and there are good travel and communication links. On a prosaic level if you have 50 or more people gathered for an international arbitration the accompanying costs on a daily basis will be less than in larger cities*.'[19]

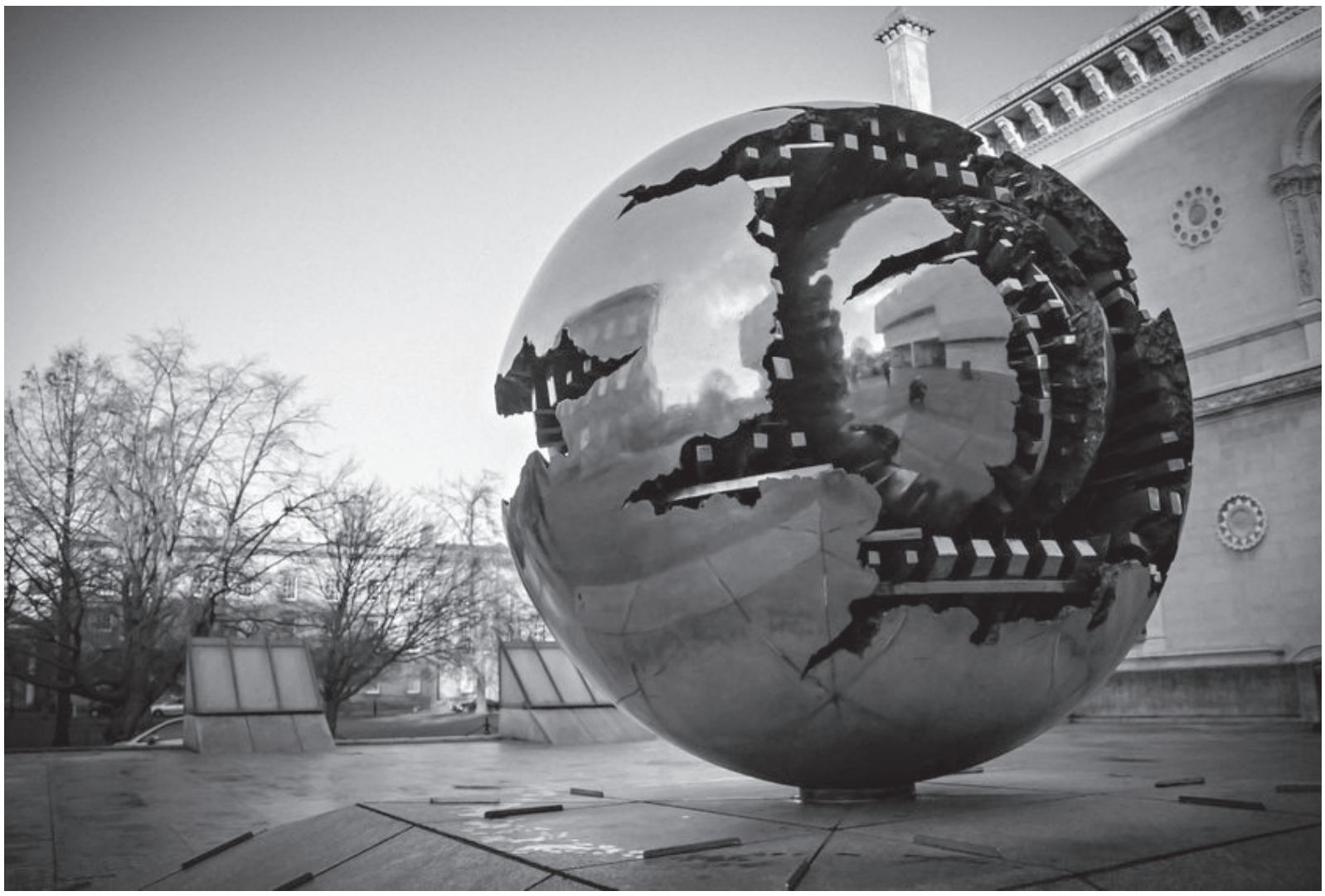
If parties chose not to go to London it may be that some of them will use a seat in an English speaking, EU member about a 45-minute flight away. It follows that in reviewing that issue as of the middle of 2019 we are not in a position to offer any comment on the degree to which that might happen. Indeed, we are unaware of any reliable statistics on the flow, however small, to secondary seats since the referendum in the United Kingdom in June 2016. The nature of ADR where hearings can be conducted on either an ad-hoc basis or under the auspices of an institution mean that holistic figures on activity in any one seat are often not available.

Some minor issues have emerged within 2019 that might be more unhelpful than helpful. However, it does not seem at the time of writing that they will have a material effect on arbitration in the Republic of Ireland. For a number of years, the Irish courts have, as has already been set out, been widely noted as being arbitral friendly. The 2010 Act provides that only a limited pool of judges shall hear applications arising from an arbitration. S 9(2) notes-

'(2) The functions of the High Court-..shall be performed by the President or by such other judge of the High Court as may be nominated by the President, subject to any rules of the court made in that behalf.[20]'

The practical operation of s 9(2) has seen an assigned arbitration judge deal with all such applications.[21] In 2019 we have however seen two cases relating to arbitration which were heard by way of judicial review applications with the applications heard by judges other than the arbitration judge. In each case they relate to domestic arbitrations and should not in any way impact on the course of an international arbitration heard in Dublin. The first case is *Cavanaghs of Charleville Ltd v Fitzpatrick* [2019] 161.[22]

This application related to an application under Article 8, Schedule 1 of the 2010 Arbitration Act. Whilst the thread running through the 2010 Act is that the High Court is the forum for arbitral applications the position varies where the issue is as in this case in relation to an application to stay litigation. As would follow as a matter of logic however an application to stay has to be brought in the court in which the litigation was commenced. In the case in point where the value of the claim was below €75,000 the proceedings said to have been brought in the teeth of a valid arbitration clause were brought in the Circuit Court. The party who moved the application to stay the litigation lost on that issue before the circuit judge and were in the normal course precluded



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from appealing the decision.[23] However, decisions of judges in the Irish Republic at the District and Circuit Court level are amenable to judicial review. In this case the High Court allowed a judicial review of the circuit court judges decision. It is difficult to take issue with this. One can not carve out an exception to established Irish jurisprudence for the instances where a District or Circuit Court hears an article 8 application judge and falls into error. By necessity the instant authors have to fall back on anecdote rather than statistics: but it seems that there are in broad terms few applications to stay litigation in Ireland below the High Court level and those applications that there are would normally follow the clear terms of article 8.[24]

More recently the High Court, in *Electricity Supply Board v Boyle & Anor*[25], allowed a judicial review of a decision of a compulsory purchase order ('CPO') arbitrator. CPO arbitrators are held in Ireland under the Acquisition of Land (Assessment of Compensation) Act, 1919.[26] It should be noted that aside from such arbitrations being creatures of domestic Irish law they also do not, as would normally be seen, proceed as an arbitration held by consent of the parties. On a public policy basis local authorities can purchase land without the consent of the vendor. In some parts of the world the phrase CPO is not used and such transactions arise under the doctrine of eminent domain. It is thought the public interest demands that certain land can be purchased for the development of public works projects such as roads, tunnels, ports and airports and where there is a public interest in the particular infrastructure project the unwillingness of any one seller of required land, to sell that land should not be allowed frustrate the project and set matters at naught. In such circumstances Irish law requires a seller of land unhappy with the price that the local authority acquiring their land has presented to engage in a CPO arbitration before one of the statutory arbitrators. The effect of *ESB v Boyle* is to allow the statutory property arbitrators present questions of law to the High Court. The facility to state a question of law to the High Court was formally allowed under the 1954-1998 Acts[27] but is not permitted under the 2010 Arbitration Act.

In dealing with the interplay between the 1919 Act and the 2010 Arbitration Act the court was terser than it might have been. One of the parties had contended that the application could not succeed due to the effect of the 2010 Act, which as has just been noted does not allow questions of law to be stated to the court. Mr. Justice Twomey noted-

'There *is one other issue which should be briefly referenced, that is the effect of the Arbitration Act, 2010 on these proceedings. This is because the 2010 Act, and in particular Article 5 of the UNCITRAL Model Law, which is adopted into Irish law by s. 6 of the 2010 Act, is prima facie inconsistent with section 6 of the 1919 Act, insofar as Article 5 states that no Court shall intervene in matters governed by the Model Law. However, section 29 of the Arbitration Act, 2010 also states that the 2010 Act shall apply to every arbitration under any other act 'except in so far as this Act is inconsistent with that other Act'. Since the entitlement of the High Court to intervene in a property arbitration under the 1919 Act is inconsistent with Article 5, it seems clear to this Court that Article 5 of the Model Law does not apply to property arbitrations* under the 1919 Act and that therefore a decision made by a property arbitrator under the 1919 Act may be subject to judicial review.'

As a matter of statutory interpretation applying the purposive approach to the intent of the Irish parliament in 2010 it could be suggested that if they wished some arbitrations to be subject to the stating a question of law measure but not others that they may have addressed the point in clearer and starker terms. One of the golden threads running through the 2010 Act

allows that courts should not be allowed to hear applications in the more liberal manner that prevailed under the 1954-1998 Acts. Moreover, it is presupposed that courts should be slow to second guess the decision of an arbitrator. On the facts of ESB v Boyle the aggrieved party could have contended that:

- Under Article 33 to remove gaps, correct any material or clerical errors and to clarify ambiguities in the award on the issue of 'double compensation';
- Under Article 34, Schedule 1 of the 2010 Act public policy considerations meant the award should have been set aside due to the manner in which the issue of 'double compensation' was approached;

- Under Article 34, 4 the award could have been remitted back to the arbitrator to allow the arbitral tribunal to resume the proceedings and take whatever action which may be needed to obviate the need to set aside proceedings.

However, as stated it is hard to see that this decision whether correctly decided or not and whether in keeping with the planned effect of the 2010 Arbitration Act will have any impact on international hearings in Dublin.

It can be seen that Ireland remains positioned to grow its capacity as an international seat. During the course of 2019 two decisions have emerged which are outliers to the general position that Irish courts are arbitration friendly. The decisions arise from the operation of domestic law and are unlikely to have any impact on the course of an international hearing in Dublin. We can but await what actual impact Brexit will have on international arbitration in London and indeed Dublin.

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2 The authors prefer the term Alternative Dispute Resolution to Amicable Dispute Resolution or Appropriate Dispute Resolution. A full discussion of the distinctions if any between the three different umbrella terms referred to are outside the scope of this paper.
3 https://dbei.gov.ie/en/Legislation/Construction-Contracts-Act-2013.html (accessed on July 5, 2019)
4 For further discussion of this issue see inter alia http://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes/ (accessed on July 5, 2019)
5 https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_I.pdf (accessed on July 5, 2019)
6 A full discussion of the history of international seats outside the Republic of Ireland is outside the scope of this article. For further discussion of this topic see inter alia Barrett A History of Alternative Dispute Resolution (Jossey-Bass San Francisco, 2004).
7 http://www.arbitration.qmul.ac.uk/research/2019/ (accessed on July 5, 2019)
8 Re the 1954 Arbitration Act see:- http://www.irishstatutebook.ie/eli/1954/act/26/enacted/en/html (accessed on July 5, 2019; re the 1980 Arbitration Act see:- http://www.irishstatutebook.ie/eli/1980/act/7/enacted/en/html (accessed on July 5, 2019) and for the 1998 Arbitration Act see:- http://www.irishstatutebook.ie/eli/1998/act/14/enacted/en/html (accessed on July 5, 2019)
9 Complete background to the commencement of the 2010 Arbitration Act which includes discussion of the 1954-1998 legislation can be found in Arbitration Law, 3rd edition, Dowling-Hussey and Dunne (Round Hall, Dublin 2018).
10 Whilst due to the nature of the 2010 Arbitration Act the issue is not relevant in the manner it was before the Republic of Ireland introduced a Court of Appeal in 2014- http://www.irishstatutebook.ie/eli/2014/act/18/enacted/en/html (accessed on July 5, 2019). Before the introduction of that court all appeals from the High Court fell to be determined by the Supreme Court. Now the latter court is meant to hear matters of some import rather than dealing with all appeals against say the size of an award of quantum in a personal injuries case.
11 https://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2008/H429.html&query=(galway)+AND+(city)+AND+(council) (accessed on July 5, 2019)
12 https://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IESC/2010/S18.html&query=(galway)+AND+(city)+AND+(council) (accessed on July 5, 2019)
13 See inter alia https://globalarbitrationreview.com/article/1078186/irish-energy-company-settles-feud-over-polish-gas-field (accessed July 5, 2019)
14 See inter alia https://www.nortonrosefulbright.com/en/knowledge/publications/a655ac50/how-will-brexit-impact-arbitration-in-england-and-wales (accessed July 5, 2019)
15 https://www.matheson.com/news-and-insights/article/what-impact-will-brexit-have-on-arbitration (accessed on July 5, 2019)
16 It is presently understood that Boris Johnson or Jeremy Hunt will be announced as the next leader of the Conservative party, and by default Britain's Prime Minister, on July 22, 2019. See inter alia- https://www.telegraph.co.uk/politics/2019/07/06/tory-leadership-race-contest-vote-leader-conservative-who-when/ (accessed on July 5, 2019)
17 https://www.cbc.ca/news/world/boris-johnson-jeremy-hunt-conservative-leadership-britain-brexit-1.5182937 (accessed on July 5, 2019)
18 https://www.newstatesman.com/politics/staggers/2019/04/no-deal-brexit-would-not-be-end-world-just-very-very-very-bad (accessed on July 5, 2019)
19 Mr. Tackaberry spoke to the authors on July 5, 2019.
20 http://www.irishstatutebook.ie/eli/2010/act/1/section/9/enacted/en/html#sec9 (accessed on July 5, 2019)
21 The present assigned Irish arbitration judge is Mr. Justice Barniville S.C who succeeded Mr. Justice McGovern S.C when Judge McGovern was appointed to the Court of Appeal. The first arbitration judge after the passage of the 2010 Act was the now President of the High Court Mr. Justice Kelly S.C.
22 https://www.bailii.org/cgibin/format.cgi?doc=/ie/cases/IEHC/2019/H161.html&query=(Cavanaghs)+AND+(of)+AND+(Charleville)+AND+(Ltd.)+AND+(v.)+AND+(Fitzpatrick)+AND+(.2019.)+AND+(IEHC)+AND+(161) (accessed on July 5, 2019)
23 Contrast this with Maguire & Anor –v- Motor Services Limited t/a MSL Park Motors & Anor [2017] IEHC 532 (Unreported, High Court, Barrett J, 7 September 2017) where a circuit court Arbitration Law (Roundhall, Dublin 2018) that 'It is not at all clear on what legal basis the matter reached the High Court. The terms of the 2010 Act do not allow for an appeal of a determination of a court on an application for a stay under art 8. Going forward parties will np doubt invite those District or Circuit Court judges who might be about to fall into error to consider the effect of Cavanaghs of Charleville Ltd v Fitzpatrick and perhaps spend a few more moments on considering the application before them. http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/784bb1bae6cfa10d8025842b00383e71?OpenDocument (accessed on July 5, 2019) http://www.irishstatutebook.ie/eli/1919/act/57/enacted/en/print.html (accessed on July 5, 2019). decision on an application to stay litigation was revisited by the High Court on appeal and moreover the matter was not heard by the arbitration judge. The instant authors agree with Dowling-Hussey and Dunne who noted at p390 of the 3rd edition of Arbitration Law (Roundhall, Dublin 2018) that 'It is not at all clear on what legal basis the matter reached the High Court. The terms of the 2010 Act do not allow for an appeal of a determination of a court on an application for a stay under art 8.
24 Going forward parties will np doubt invite those District or Circuit Court judges who might be about to fall into error to consider the effect of Cavanaghs of Charleville Ltd v Fitzpatrick and perhaps spend a few more moments on considering the application before them.
25 http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/784bb1bae6cfa10d8025842b00383e71?OpenDocument (accessed on July 5, 2019)
26 http://www.irishstatutebook.ie/eli/1919/act/57/enacted/en/print.html (accessed on July 5, 2019).
27 S.35 of the 1954 Arbitration Act.

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INTERNATIONAL INVESTMENT ARBITRATION – ANALYZING THROUGH THE LENS OF PROCEEDINGS IN THE ENERGY SECTOR

By Yashasvi Tripathi*

Abstract

The paper analyzes the extant regime of international investment arbitration by the help of arbitration matters in the energy sector, particularly from Ecuador and Venezuela, as they are the countries, which have faced maximum number of claims and expressed unequivocal disapproval of the present Investor State Dispute Settlement (ISDS) regime and of the International Centre for Settlement of Investment Disputes (ICSID).

The proceedings in the energy sector conspicuously present the observations because of their magnanimity, multifaceted impacts on the economy and desire of the nation states to control the energy sector. After a brief introduction in the first part, the second part of the paper delves into the present debates and controversies of the ISDS regime, particularly the controversy of independence of arbitrators and seeks to address both sides of the debate. The third part of the paper presents few of the most important case studies of ISDS in the energy sector which are: Bridas SAPIC, Bridas Energy International Ltd. v. Government of Turkmenistan and Concern Balkannebitgazsenagat,[1] Chevron Corp. v. Republic of Ecuador,[2] Occidental Petroleum Corporation v. Republic of Ecuador[3] and Venezuela Holdings v. Bolivarian Republic of Venezuela,[4] Conoco Phillips v. Bolivarian Republic of Venezuela.[5] These cases highlight some of the major concerns of stakeholders of the ISDS.

The fourth part of the paper is dedicated to rebound reaction of countries like Ecuador, Venezuela, India and Brazil towards their investment regime as a result of growing disquietude amongst the states. This part studies India and its new reform in a greater depth as India brought major changes to its Model BIT which is useful to study plausible reforms and trends to the present system of ad hoc international investment arbitration. The fifth part of the paper ends with the conclusion of the present scenario. The paper ends with studying the plausible reforms to the ISDS. The reforms are further subdivided in reforms to be brought to the current regime of ad hoc international arbitration and about forming a permanent investment court with tenured judges and entire legal framework of a court as an alterative to the present ad hoc system.

I

Introduction - Implementation and Usage

Developing countries are in need of foreign investments as it increases Gross Domestic product (GDP), employment options, brings new technologies and helps in alleviating poverty.[6] The present trend and works indicate that these investments are done mainly through investment treaties, bilateral or multilateral.

Developing countries enter into Bilateral Investment Treaty (BIT) in hope to attract foreign investments.[7] The need of international adjudication and international enforcement of awards in dispute settlements in these treaties made arbitration an obvious choice as the dispute settlement mechanism. The need of international arbitration in investments disputes has been understood to prove an effective international remedy to the investors,[8] instead of diplomatic protection that rests on discretion of host states.[9] Some scholars suggest that presence of BIT, including international dispute resolution mechanisms, is one of the determinative factors for investors to decide in investment decisions.[10]

Earlier, BITs had restrictive arbitration clauses. Under some of the old BITs, investment arbitration was possible only if there was a separate arbitration agreement made between the investors and the government. [11] However, now several scholars gauge the level of protection granted to an investor on the basis of presence of investment arbitration under a BIT.[12] Hence, later BITs tend to have unrestricted access to investment arbitration.[13]

There is a consistent increase in the number of arbitrations between an investor and a state.[14] The total number of ISDS cases under international investment agreements has reached to a whooping number of 942 as of January 1, 2019.[15] For instance, International Centre for Settlement of Investment Disputes (ICSID) registered 45 cases in 2016[16], 49 cases in 2017 [17] and 57 cases in 2018.[18] One of the most famous forum for resolution of foreign investment dispute is ICSID. It is a global arbitration institution, which offers specialized forum and rules for international investment dispute resolution.[19] It had its 50th year of establishment in 2016.[20] Some 162 states have signed the convention establishing the Centre as of June 30 2018.[21] It administers more than 70% of all the international investment proceedings.[22] It is to be noted that ICSID additional facility rules allow resolution of disputes even where neither of the parties are contracting states to the convention, if a bilateral treaty states so.[23] Other famous frameworks include United Nations Commission on International Trade Law (UNCITRAL) arbitration rules[24] and the International Chamber of Commerce (ICC) arbitration.

This paper is confined to proceedings in the energy sector. Impacts of the outcomes in the energy sector proceedings make observations about the investment arbitration much more conspicuous and compelling to address because of their magnanimity and eco-political intertwinement.

II

Debates and Discussions

Arbitrations involve interpretation of several contested terms or ambiguous terms of the investment agreement.[25] This has made countries to approach BIT cautiously given plausibility of different and expanded interpretation to BIT provisions contrary to what the states had envisaged while framing of BIT.[26] The way the BITs are interpreted by arbitrators hugely affects the outcome of arbitration which in turn affects the states. At times, BITs are interpreted without giving any credence to specific circumstances in which the BIT was entered into between different countries.[27]

Another main debate is about the independence and fairness of international investment arbitrations proceedings, which is engrained in the role of arbitrators in the process. Given the plethora of issues and views on this aspect, it is dealt in a separate part below.

Incoherent and inconsistent awards from various ad hoc tribunals around the world are a major concern for ISDS regime. For instance, the inclusion of country risk premium in the compensation for expropriation. The *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*[28] tribunal held that country risk premium should not be included, however, *Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela*[29] award held exactly the opposite. Another, inconsistency is about if receipts of an investor under a political risk insurance policy should be deducted from the compensation it is to be awarded at an investment arbitration when the grounds of claim under the policy and initiation of the arbitration are the same. In this instance as well the two ICSID tribunals in *Hochtief AG v. Argentine Republic*[30] and *Ickale Insaat Ltd Sirketi v. Turkmenistan*[31] have answered the issue differently.

George Kahale, an international investment arbitrator, in his lecture has rather comprehensively discussed some of the deficiencies of the Investor - State Dispute Settlement (ISDS).[32] In his words, they are: the way the tribunals are constituted, no required qualification of arbitrators, the inherent bias against the state, the absurd legal interpretations given to international law by the arbitrators, unchecked powers of the arbitral tribunal, lack of appropriate post award review mechanism.[33]

While some scholars espouse that the unexpected increase in the number of investment arbitration is because such arbitration is deemed to be a moneymaking machine by the global law firms.[34] They believe that major law firms of the world ensures that investment arbitration becomes one their most lucrative business, to maximize their profits and hence the recent boom.[35] Some study and lawyers maintain that the current system of investment arbitration wouldn't exist today but for the lawyers.[36]

It is specifically in the energy sector, that financial awards in these arbitrations are sometimes disproportionately

huge for smaller host countries. It may amount to a large part of the annual budget of these countries,[37] which consequently affects public policy of a nation. For example, a decision awarded USD 1.77 million to an investor, Occidental Co. in a dispute against Ecuador[38] or an award of USD 8.7 billion plus interest was awarded to another investor, ConocoPhillips against Venezuela.[39] These huge awards are indicative of vast power that a tribunal has. [40]

Poulsen and Aisbett concluded after their study that 92% of the stakeholders in the developing countries do not even understand the far reaching implications and obligations under BITs and investment treaty arbitrations until the first claims against them at investment treaty arbitrations. [41]

Independence and Fairness: Role of arbitrators & Conflict of interest

Arguably, most widely held concern is about the fairness and independence of investment treaty arbitrations.[42] This hinges on the role of arbitrators amongst other factors. One view is that the international arbitral tribunals are neutral forum to decide disputes between state and investor. Another view is that this mechanism is lopsided towards the investor companies and against the respondent states, especially the developing countries.[43]

Moreover, the fact that private arbitrators are deciding issues of public law or issues having huge implications on a nation, without any supervision by public judges in international investment law is seen as another red flag[44] in equity of such cases, which in certain cases can be argued to lack expertise to adjudicate the matters. For instance, the issues decided in these cases have implications on environment policy, sovereign debt restructuring etc.[45] While in the string of disputes against the dueling regime of Republic of Venezuela some tribunals can be said to simply ignore the definition of 'nation states' in international law.

Foreign investors can easily garb the issues of constitutional law or issues of great public importance of host states as treaty claims and present to private arbitrators, bypassing local courts and public judges.[46] Hence, some of the recent BITs have a requirement of exhaustion of local remedies before initiation of international investment arbitrations.[47]

Additionally, arbitrators involved in the ISDS regime perform multiple roles.[48] They represent parties in arbitrations, they advise governments in drafting of its investment treaties, they advise companies as to the structure of their investment in a host state via most arbitration friendly route etc. [49]By the very set up of this kind of regime, it is argued that there is inherent interest of the arbitrators in continuance and sustenance of investment disputes.

Arbitrator's neutrality can be easily questioned, as they have a financial interest in the existence of investment arbitration. [50] Unlike judges, they have no fixed salary or tenure, but they earn huge amount of money on their services on being appointed as one of the arbitrators.[51] It is not difficult to imagine the possibility of corporate bias, if arbitrator's source of income depends on decisions of companies to sue and whom to appoint as an arbitrator, [52] as it is only an investor who can sue.

A study has shown that there is a small group of arbitrators who are repeatedly appointed as investment arbitrators. [53] They are referred as an elite group of arbitrators or *a smaller inner mafia* by other arbitrators. [54] Another study shows that only 15 arbitrators out of hundreds of arbitrators have decided 55% of cases of all known investment treaty disputes by the end of 2011.[55] They have also handled most of the biggest cases in terms of compensation awarded.[56] The UNCTAD Fact Sheet on Investor-State Dispute Settlement cases in 2018 mentions that some 14 arbitrators have been appointed to more than 30 ISDS cases each out of the 942 ISDS cases known as of January 1, 2019.[57]

Especially in the energy sector, Benoit Le Bars mentions that it is because the complexity of the subject matter, there is increasing need and demand of expertise and experience in arbitrators.[58] This leads to a very limited pool of experts in this subject area of arbitration.[59] Hence, this increases the risk of conflict of interest [60] and the discussed repeated appointments.

There are studies conducted by the scholars that present both the views: of ISDS regime being fair and equitable, while the other group maintains that it is lopsided in favor of investors. A comprehensive statistical study of 140 investment treaty cases concluded that arbitrators tend to adopt a more expansive (claimant friendly) interpretation of various clauses in investment treaties instead of a restrictive interpretation.[61] Also, as the career of an arbitrator is dependent on his appointment, they may be motivated by policy to appease parties with power or influence on their appointment. [62]

Two clear trends were observed in a study of investment treaty awards conducted by Prof. Gus Van Harten that is antithetical to equity in investment arbitration. Apart from the more expansive treaty interpretation, for example, the definition of investment, parallel claims, minority shareholder interest etc.[63], that increases the compensatory chances for the claimants and increases the liability of the respondent states,[64] the second trend is that this expansive resolution got heightened when the claimants were from a western capital exporting state.[65] In the study he categorized France, Germany, the U.K. or the U.S. as western capital exporting states. [66] It was observed that likelihood of an expansive interpretation of a contested provision increased by 84% when the claimants were form any of the western capital exporting state.[67] The variations between claimants form these countries and from other countries were too significant to be ignored.[68] The study concluded *tentative evidence of systemic bias* in investment treaty arbitration.[69]

Arguably, the self-interest induced bias of arbitrators towards corporates can be countered by saying that arbitrator's professional reputation is a great incentive for them to remain

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impartial.[70] Impartiality and credibility can be argued to affect lawyer's appointment as an arbitrator and also as counsels, or academicians.[71]

Another study by Prof. Franck concluded that arbitration investment system was performing in an unbiased manner. [72] She maintains that developing countries are not facing excessive number of claims and nor that investors win majority of cases.[73] Further, she found no relationship between development status of the respondent country and outcome of the arbitration.[74]

Another practitioner of the law, Ms. Catherine Amirfar espouses that the absence of records of awards evidencing bias in favor of investors; sates complying with the awards and that states not exiting from the current system show that there is no pro- investor bias in the current system of treaty arbitration.[75] Further, increasing numbers in the dispute settlement mechanism does not support the pro – investor bias. [76]

Though bias remains unproven, there are other very pressing and ramified issued as will be discussed through ensuing case study that need to be addressed. With the help of case study in the energy sector, we plan to study the present ISDS mechanism

III

Case Study and Analysis

The paper aims to analyze the present system, by the help of energy arbitration cases, particularly cases from Ecuador and Venezuela as they are the countries which have faced huge number of claims and have expressed unequivocal disapproval of the present investment regime and particularly, the ICSID. In fact, Ecuador has withdrawn from the ICSID convention upon submission of a written notice of denunciation of the Convention in July 2009.[77] Similarly, Venezuela withdrew from ICSID in 2012.[78]

One of the major critiques of the present system is the unpredictability of the ISDS mechanism, which is widely known. However, another growing intertwined concern of the ISDS is about the justified parties to the arbitration proceedings, i.e., who can be a party to arbitration proceedings.

Bridas SAPIC,. v. Government of Turkmenistan and Concern Balkannebitgazsenagat

In one of the earlier cases in ISDS, *Bridas SAPIC, Bridas Energy International Ltd. v. Government of Turkmenistan and Concern Balkannebitgazsenagat,*[79] the government of Turkmenistan was made a party to the arbitration by an ICC tribunal, [80] even when the Government of Turkmenistan had not signed the arbitration agreement.

The dispute arose out of an oil concession given to a joint venture entity constituting of an Argentinian company and a Turkmenistan state-owned company for exploration of oil and gas resources in Turkmenistan.[81] The claimants, *Bridas SAPIC,* initiated arbitration not only agaisnt the state owned company but also agasint the Goverrntment of Turkmenistan.

The germane issue from this case for the purpose of this paper is the much discussed unpreditability involved in the arbitration. The scholars studied this case intentivley that if and how the gvernment of Turkmenistan can be made a party to the arbitration. The tribunal looked at the overall circumstances of the contractual relastionship towards the formation of the joint venture entity, both prior and post formation of the entity.[82] The tribunal held the government

of Turkmenistan to be a party to the arbitraiton agreement.[83] They held this as: *the legitimate expectation of a party can transform into intention.*[84] They looked at several factors in the contract, like the requirement of government's permission for carrying out certain operation under the contract that reflected direct control of the government.[85]

Marc Blessing, the President of the Swiss Arbitration, mentions certain *teaching* from the award.[86] He says that the award is not just to be based on plain text of the contract but the award will be based on a thorough analysis of three distinct periods on the time axis.[87] First, how the award came into the existence, the history of the award; second, the contract is to be analyzed in its true intentions and implications and third, the interpretation of the contract is not to be ended at the time when contract is signed but to be looked into how it is performed or in further course of dealings of parties.[88]

Thus, contrary to what Marc Blessing concludes as to the predictability of an arbitral award, that this could be argued that there is no way to predict an award of the tribunal in investor-state arbitrations, given the wide array of circumstances the tribunal is empowered to consider. This award is testimony to the unpredictability in the ITAs and also the wide power that an international arbitral tribunal has.

This unpredictability as to who can be the parties to an international arbitration leads to another issue of effects on the rights of the non – parties to an arbitration agreement. This issue can be understood by the next case analysis.

Chevron Corp. v. Republic of Ecuador

In the proceedings *of Chevron Corp. v. Republic of Ecuador,*[89] under United States of America and the Republic of Ecuador BIT,[90] the investor claimed that Ecuador was evading its obligation under the investment agreements. [91] The investor claimed that Ecuador refused to notify the domestic court that the investor had been fully released from any liability for environmental impact as per the Settlement Agreement of 1995, and refused to defend the rights of claimants, rather went ahead and supported the plaintiffs, Ecuadorian citizen, in the domestic court proceedings.[92]

The Ecuadorian citizens were harmed by the investor's oil drilling company operations in Ecuador.[93] The domestic court had ordered the investor to pay approximately USD18.2 billion award for soil remediation, health care considerations, groundwater remediation for the Ecuadorian citizens.[94] The investor did not want to comply with the domestic court order on the basis of the prior settlement agreement between the parties.

In an unprecedented move the arbitral tribunal ordered the Republic of Ecuador to take all measures, to suspend or cause to be suspend the recognition or enforcement of any judgment against the investor, in and out of Ecuador[95] in the domestic case proceedings. This order for interim measures is testimony to the wide and unbridled powers that the arbitral tribunal has. Notably, this order of the tribunal impacts the rights of the non-parties, the Ecuadorian citizens, much more than the rights of the parties to the arbitration agreement. After all, Cheveron had not asked any measures against the Ecuador state as such.

Ecuador state did raise an objection regarding the jurisdiction of the tribunal over the Ecuadorian citizens, of the third party rights, that its award affects the citizens' rights.[96] The tribunal rejected this objection. [97] The tribunal maintained that the question for them is whether the Respondent violated the rights of the claimant under the BIT through the way it acted in relation to the Settlement Agreement.[98] It held that rights of Ecuadorian citizens are not directly engaged by this question. [99] The tribunal categorically held that if anything deprives the Ecuadorian citizens of their rights then it would be a matter between the citizens and the Respondents and not the investors.[100] This understanding of the tribunal could be seen as an indifference to the citizens of the nation states involved in the arbitration proceedings. The tribunal chose not to appreciate that a legal right that is possessed by Ecuadorian plaintiffs, a right granted by a Ecuadorian judgment is being adversely impacted by the award.

Apart from demonstrative of wide and unbridled power of the investor – state arbitral tribunals, which sought to prevent the implementation of a domestic court judgement, rooted in entire national legal system, the award illustrates how the current regime could be used to trample over human rights of the citizens,[101] without any restraint. This award was hugely criticized for its impact on human rights and the way it dealt with it.[102] The International Institute for Sustainable Development (IISD) has mentioned that one impact of this order is to raise caution towards arbitral restraint in future.[103]

The wide power of arbitral tribunal can be conspicuously observed by the disproportionate amount of damages that these tribunals order, while again adjudicating on the rights of the third party or impacting their claims, even when they are not party to any arbitration agreement. *Occidental Petroleum Corporation v. Republic of Ecuador*[104] is a good example of this phenomenon. This case is demonstrative of many critiques that scholars have about the current investment regime as discussed below.

Occidental Petroleum Corporation v. Republic of Ecuador

In 2012, ICSID tribunal awarded its largest award till then of US $ 2.3 billion to an oil company, Occidental Petroleum Corporation against Ecuador. [105] The germane facts of the case is that a participation contract was entered into in May 1999, for exploration and exploitation of hydrocarbons in Ecuador between the investor, Occidental and the respondent, the Ecuadorian government.[106] In 2000, the investor transferred ownership rights of 40% to a third party, AEC, a Chinese company.[107] Later, in 2006 the Ecuadorian government terminated the participation contract as the transfer of ownership rights of 40% was done in contravention of the Ecuadorian law, as it was done without the required ministerial approval.[108] The claimants filed for arbitration at

Little India, Singapore | Luciano Mortula

ICSID for violation of US-Ecuador BIT.[109] The majority of the ICSID tribunal held that though the investor breached the Ecuadorian law and the contract, but the termination of the participation contract by the Ecuadorian government was a disproportionate measure as other recourses were available.[110] It held that the action of the Ecuadorian state was in breach of the BIT and the customary international law.[111] Thus, awarded damages of USD 1.76 billion plus the interest (US$ 2.3 billion) to the investor. [112] The GDP of Ecuador in 2012 was US$ 87.92 billion[113] and the net sales from operations of Occidental Co. in 2012 was itself US$ 24.17 billion.[114] Hence, the compensation amounts to a whopping 2.62% of the entire Ecuador's GDP of 2012 and 9.52% of Occidental's net sales from operation of 2012.

Professor Brigitte wrote a dissent in the case. She disagreed the way the damages were calculated, though she agreed with the finding of the tribunal that the respondent had acted in a disproportionate manner.[115] She believed that the violation of the Ecuadorian law by the investors was underestimated and insufficiently taken into account.[116] She disagreed also because she reasoned that there was a gross error of law in the interpretation of the content of Ecuadorian law.[117] She also differs on the factual basis than the majority and believes that a reasonable and fair apportionment here should have been a 50/50 split.[118]

This tells how disagreeable this arbitral tribunal adjudication can be, when even the members of the tribunal have different views on the content of applicable law and the facts of the case. Disagreeability and dissent are common phenomenon in any adjudicatory proceedings. However, the effects of investment arbitration awards are magnanimous. It also impacts the nation's economic reputation on the international plane.

The dissenting arbitrator categorically espoused that there was a manifest excess of power by the majority as while granting the award in favor of the investor, the tribunal nullified a contract with a company which was not even a party to the arbitration.[119] The tribunal did not have jurisdiction over the third party which was a Chinese company, under the US-Ecuador BIT.[120] She maintains that had the majority not exceeded its power in annulling the right of a non - party, the tribunal could have granted only 60% of the damages to the claimants, in conformity to the public international law.[121]

This case brings forth another debate and conundrum in international investment arbitrations which inevitably involve adjudication on the basis of domestic laws of a nation state: that how individual arbitrators can differ on interpretation of domestic laws, despite having the required legal expertise. Here, the dissent interpreted the Law 42, a domestic Ecuadorian law, as imposition of a tax, however for the majority it was a unilateral decision of the respondent to allocate itself a percentage of revenues earned by the investors.[122] The dissent notes that the Law 42 is not even regulated by the Participation Contract, whereas as per the majority, Law 42 had violated the participation contract.[123] Similarly, as regards to validity of the 'Farmout Agreement' by which the investor transferred ownership rights to a third party, the majority and the dissent differed significantly. The dissent said, that on application of any of the laws in question, the New York law or the Ecuadorian law, the farmout agreement will not be automatically nullified, even if it was not as per the conditions in the contract between the investor and the Ecuadorian state and that it was to be declared to be nullity by a court. [124] However, the majority held the 'farmout agreeement' to be automatically nullified as per the Ecuadorian law, as it did not satisfy the pre-requisite conditions of entering into a contract as required by the agreement between the investor and the Ecuadorian state, which

required the ministerial approval.[125] The dissent reasoned that the majority used inchoate Ecuadorian laws and cherry picked the Ecuadorian judgments that were in its favor.[126]

This particular interpretation played heavily into calculation of damages by the majority as well as by the dissent, which in turn resulted into different amount of compensation as assessed by the two. The dissent holds that as per the farmout agreement, the investor had only 60% of the ownership rights and hence it had to be compensated to the account of the 60% of the ownership rights. [127] However, the majority compensated the investor pursuant to the full 100% of the ownership rights owing to the held nullity of the farmout agreement by the majority itself. It is notable that it was the largest award ordered by the ICSID, despite the majority and the dissent differing significantly.

It was in 2015, that the ICSID annulment committee partially annulled the award while agreeing with the dissenting opinion in many ways.[128] Cueing the dissenting opinion, the annulment committee reduced the compensation from 100% to 60% of the value of total investment and held that the tribunal had manifestly exceeded its power by assuming the jurisdiction over the investment that was then beneficially owned by a third party.[129]

Hence, it illustrates many challenges in the present system, such as: difference of opinion amongst arbitrators of a tribunal on domestic law and facts, assessment of damages, the difference in opinion of arbitrators regarding their jurisdiction and third- party rights.

These conundrums are not only found in particular to one country, Ecuador, but these are indeed general to the extant ISDS adjudication, as evident by investment arbitration proceedings against Venezuela.

Venezuela Holdings v. Bolivarian Republic of Venezuela

In the case of *Venezuela Holdings v. Bolivarian Republic of Venezuela,*[130] in 2014 the ICSID tribunal awarded USD 1.6 billion to the investors for 2007 expropriation of investors' assets in oil project in Venezuela under the Netherlands – Venezuela BIT. The dispute arose out of nationalization of the Venezuela's oil industry in 2007, and delved specifically into the nature and amount of compensation due.[131]

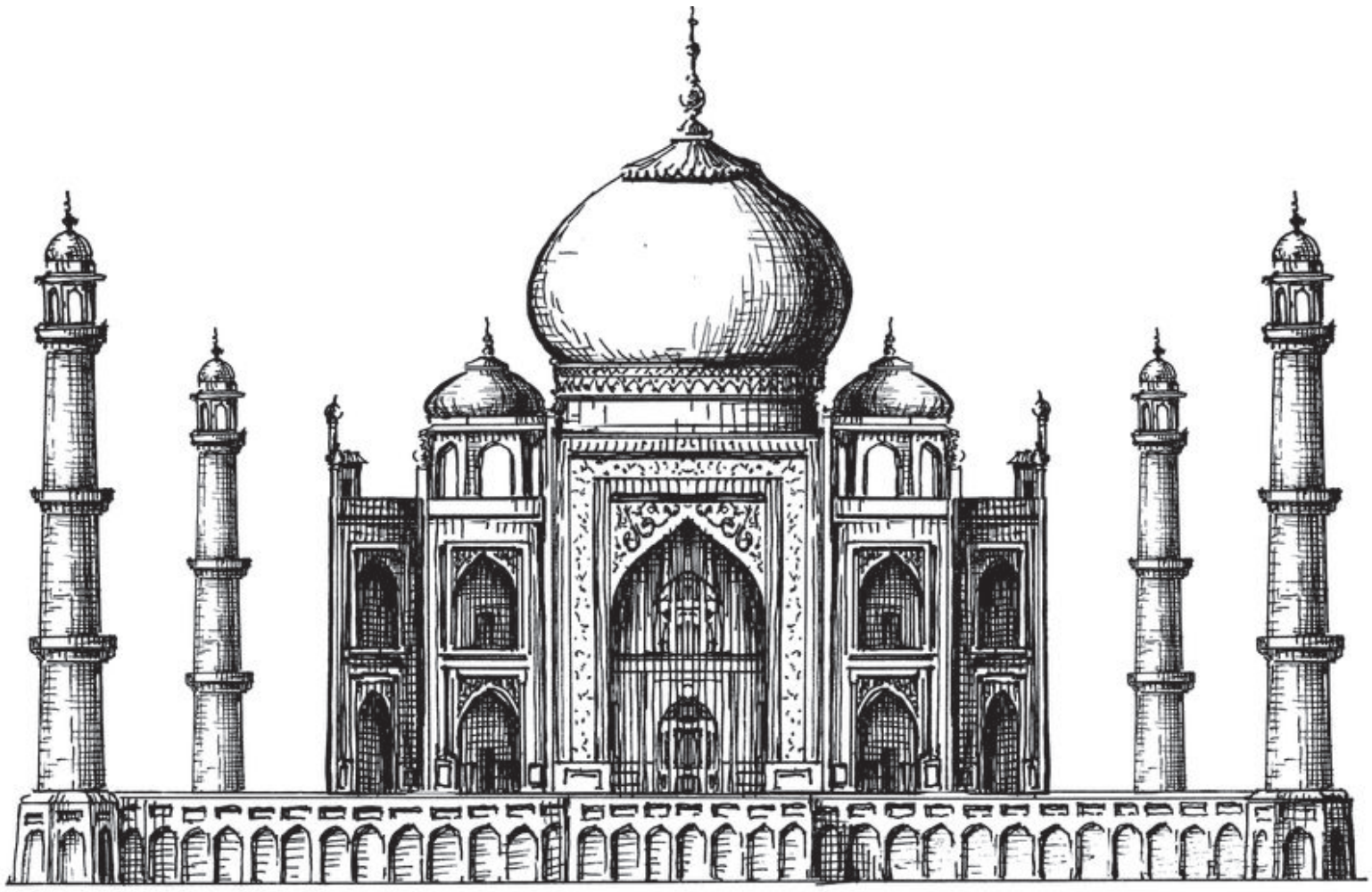
In this case, the tribunal agreed with the respondent that confiscation risk should be a factor in the discount rate in calculating the compensation. [132] Notably, in another case at ICSID, against Venezuela, the tribunal rejected to use a higher confiscation rate against Venezuela, even in light of similar political climate background. [133] Thus, the occurrence of inconsistent and contradictory awards in the ITAs becomes apparent with proceedings involving Venezuela.

The annulment committee later annulled the USD 1.4 billion out of USD 1.6 billion of the award.[134] The respondent had challenged the award on three grounds.[135] It is to be noted that the annulment committee found fault with the assessment of compensation ordered by the tribunal to the investors, specifically because the tribunal had not considered the underlying provisions of the BIT (Article 6). [136] It criticized the tribunal's holding that general international law, particularly the customary international law, determines the award rather than the BIT.[137] The committee categorically held that the committee is no way determining as to how the 'price cap' or outcome of an ICC arbitration will affect the assessment of compensation but it annulled the tribunal's award as the tribunal had entirely excluded certain essential elements of the BIT from its assessment,[138] like the complete disregard of the limitation on compensation for expropriation, the 'price cap'[139] or the outcome of the ICC arbitration.[140] Thus, demonstrating that BITs are interpreted without catering to the specific provisions of the BIT at the ITAs. The committee says that the decision of the tribunal doesn't tell the reasoning of the decision, is contradictory in parts and doesn't apply the appropriate sources of law.[141] Hence, it gives rise to annulment under Art. 52 (1) of the ICSID Convention. [142] It annulled the tribunal's decision of compensation particularly on the basis of 'manifest excess of power' and 'failure to state reasons' under Art. 52 of the convention.[143]

This case illustrates that the arbitrators are not adhering to the specific provisions of the BIT. This is of special significance as it should not be forgotten that only through BIT and under its provisions that the nations agreed to surrender their sovereignty in the investment regime. The arbitrators are themselves incorporating the customary international law into the BIT without any explicit consent of the states to be bound by them in the investment regime. Like here, the Netherlands – Venezuela BIT Art. 9(5) represents the rules of the law agreed by the parties, which did not include customary international law and still the tribunal applied it. [144]

These factors in turn lead to inevitable expansion of jurisdiction of the tribunal as then the tribunals assess the liabilities of the parties under the general international law, which is extraneous to the provisions of the BIT, which in fact, defines and hence should limit the jurisdiction of the tribunal. [145] This also illustrates how the tribunal are increasingly disregarding the particular circumstances of a case, and are too anxious of states using or manipulating their national laws to override their international obligations under the treaty.[146] Here the committee mentions this anxiety of the tribunals and says that this was responsible for the arbitrators to err on a similar ground of invoking some alternative sources of international obligations while displacing the particular rights and obligations under the treaty.[147]

However, the present ISDS cannot always rely on annulment committee to review the errors of the tribunal. Besides, there are very limited grounds on which the annulment committee can set aside the awards of tribunals. The committee has jurisdiction on the issue of jurisdiction but not on admissibility,[148] the committee can't review an award despite finding the need of more reasons that should have been rendered by the tribunal, like why the tribunal rejects requests



architecture of India | sergeypykhonin

of document production in certain cases:[149] the committee notes that the request of the Respondent to produce more documents was rejected by the tribunal cursorily without explaining the reasons.[150] The committee notes that this as falling under discretion of the tribunal and the exercise of the discretion is beyond the scope of the committee. [151]

Apart from the facts the three are very limited grounds of review which narrows the power of the annulment committee, the time taken in the entire process is very long. As seen here,, the investors filed the claim in 2007, the tribunal award was issued in 2014 and then the annulment committee decision was rendered in 2017, being initiated by Venezuela in 2015.[152] Thus, the annulment committee evidently takes as much time as a standard arbitration proceeding.[153]Further, the annulments are not easy and its rate has been very low, between 3 and 13 percent. [154] The practitioners agree that the annulment standards are very demanding.[155]There is no uniformity amongst the decisions of the annulment committee formed to review the decisions of the ICSID tribunal.

ConocoPhillips v. Bolivarian Republic of Venezuela

In yet another case involving Venezuela, *ConocoPhillips v. Bolivarian Republic of Venezuela*,[156] arising out of the similar nationalization of heavy oil projects, the ICSID tribunal had held in its decision of September 2013 that the respondent had breached its obligation to negotiate in good faith for compensating on the basis of market value, as it owed to the investors under Art. 6 (c) of the Netherlands – Venezuela BIT.[157] Soon after the decision the respondents filed a request for reconsideration against the tribunal's finding of lack of good faith backed by new evidence disclosed by WikiLeaks cables.[158] However, the majority of the tribunal declined the request in March 2014 saying that it doesn't have the power to revise its earlier decision under the ICSID framework, specifically under Art. 44 of the ICSID convention as had been contended by respondent. [159] Further, the decision resolved a particular issue in dispute between the parties and hence it has a *res judicata* effect.[160]

However, a dissenting opinion by Prof. Georges Abi-Saab[161] took a purposive and a rather constructive view of the ICISD framework and arbitration rules. The dissent is quite convincing in its reasoning. The dissent holds that under the ICISD framework, if the tribunal becomes aware of a crucial error of fact or of law or of new evidence or of new finding, then the tribunal may revisit its earlier decision before the final award is rendered. [162] It is convincing as in the earlier decision of September 2013, the tribunal decision was indeed based on an assumption of Venezuela trying to evade its international obligations, as the dissent notes. The assumption of the tribunal is apparent, as despite the prevailing confidentiality agreement against disclosure between the parties, surprisingly the majority held that the respondents were intransigent in negotiations and presumed lack of good faith in negotiations when the respondent did not divulge details any offer it made to the investors even when the respondent gave testimonies that it was always willing to pay just compensaiton to the investors[163] Clearly, the tribunal did not consider the confidentiality agreement between the parties. The dissent makes a pressing point about the temporal mistake regarding the confidentiality agreement; which in turn had led the majority to decide that respondent did not produce any evidence to support their assertion that they were always willing to compensate and did negotiate in good faith.[164]

After years of the tribunal decision having been widely interpreted and understood as Venezuela had not negotiated in good faith, which led Venezuela to request for reconsideration

of the September 2013 award,[165] the tribunal in its decision in January 2017, held that the earlier tribunal did not mean that Venezuela was not acting in good faith and that there is no statement to that effect.[166] It says that the tribunal has always used the word 'good faith' in conjunction with 'negotiations', which does not identify if breach of the respondent's obligation was because of lack of 'sufficient' negotiation or 'good faith' or both.[167] It held that the earlier tribunal's decision could only be held to conclude that the respondent breached its obligation as it failed to negotiate on the basis of market value.[168] It held, hence the Venezuela's request to reconsider the decision is moot as the request of reconsideration was made against the tribunal's decision of Venezuela not negotiating in good faith.[169] The tribunal negated to rely on the WikiLeaks cable as conclusive proof that Venezuela actually made an offer on a market value basis and held that cables are not always easy to understand.[170] However, the harmful reputational impact of the earlier decision on Venezuela was immense.

This proceeding is illustrative of a looming confusion in the investment treaty regime if decisions of the tribunal may be reconsidered by it or not. Moreover, while the confusion remain unsolved, decisions of the tribunals have tremendous effect on the economy of a nation and its global good will as an investment hostile nation, given the image of Venezuela as portrayed by the earlier decision. No wonder discontented states will opt out of the framework and will increasingly become skeptic of investment arbitration.

However, if there is a multinational adjudication mechanism as dealt in the later section, situations like these can be precluded by a readymade procedure in place for quicker revisions or reconsiderations.

It is worth noting that how number of arbitrators had resigned from the tribunal and new tribunal was constituted in this proceeding, which is not an ideal situation. In the proceeding of *ConocoPhillips*[171], Venezuela repeatedly applied for disqualification of arbitrators under Art. 14 of the ICSID Convention on different grounds, such as: conflict of interest, general negative attitude against the country and lack of requisite impartiality against two of the arbitrators in a panel of three arbitrators.[172] Here, the state has made five challenges to the investor's appointed arbitrator,[173] and two against the chair of the tribunal as well. [174] All the proposals to disqualify were rejected by the ICSID tribunal. This example brings the skepticism of the states and the lack of trust in the investment arbitration regime to the surface or the possibility of misuse of certain provisions to delay the proceedings. Apart from giving rise to doubt regarding the independence of the tribunal and hence the equity of the investment arbitration regime, this magnanimously increases the costs and time required in investment arbitrations. For instance in this case itself, the ICSID proceedings commenced in November 2007.[175] Hence, an institutionalized body should decide challenges against the arbitrators to ensure fairness and impartiality of the tribunal and the challenging party should be penalized if the challenge fails and it's apparent that the challenge against the arbitrators was merely a delaying tactic by the challenging party. The penalizing of the challenging party in cases of deliberate delaying tactics would be a deterrent.

IV

Reaction of Countries

Some countries have unequivocally, denounced the ICSID system. Ecuador and Venezuela, in fact, withdrew from the ICISID convention. It is advisable to look at how states have responded to the investment proceedings against them and their reasons for doing this as they are one of the main stakeholders of the system. It provides a meaningful insight towards improvement or the required changes of the present regime.

Smaller countries are learning from their past behavior in arbitration to modify their International Investment Agreements (IIA). This is also referred to as "learning effect" of BIT arbitration.[176] India is a good example to study this phenomenon. There was an upsurge in the ITA proceedings against India and its lone loss in *White Industries*[177] has stimulated India to reform and revise its BITs. [178]

Ecuador

At this point it is important to note how Ecuador reacted to the increasing investment claims and awards made against it. Ecuador formed a commission to comprehensively audit its investment treaties and investment regime. [179] The majority of the people on the commission were neither from the Ecuador government nor from the country. [180] It was a mix of civil society members, investment lawyers and government officials.[181] The report provides useful insight into the assessment of impact of international investment regime.

The findings of the Commission relevant for this paper are: contrary to what was expected, BITs brought more risks and costs to Ecuador than it brought FDI or benefits.[182] The cost for Ecuador has been disproportionate when compared to investors, in terms of damages imposed on the country by the tribunals or the cost of hiring international law firms to defend themselves.[183] Moreover, the principle source of FDI into Ecuador is from countries which do not have a BIT with Ecuador, like Brazil, Mexico or Panama.[184] Additionally, the majority of arbitrators decided cases against Ecuador cannot be considered impartial.[185] The Commission reasoned the second finding given the fact that 64 % of the arbitrators came from developed countries and 58% of a small group of arbitrators had repeated appointments.[186]

Venezuela

In 2012, Venezuela withdrew form ICSID convention, saying that a rather *weak* government had joined the ICSID convention and which was a step for disrupting the national sovereignty under the pressure of transnational economic sectors. [187]

41 claims had been brought against Venezuela at ICSID, one of the largest numbers of claims that a country faces at

ICSID. [188] One of the largest components of dispute against Venezuela is in the energy sector because of nationalization.[189] This is not surprising as Venezuela is a country with the largest oil reserve in the world and that the oil and gas industry gets the highest level of foreign investment.[190]

However, it is notable that out of 26 BITs of Venezuela, only two mentions ICSID as the sole arbitral venue,[191] while others mention other alternatives to ICSID as well. Meaning thereby, investors still has option to arbitrate under UNCITRAL arbitral rules or ICSID's additional facility rules and sue the state outside of its domestic courts. [192]

India

In wake of increased number of claims that India is facing from foreign investors for violation of investment treaties,[193] India has been found to replace the existing BITs with new provisions that balance investor rights along with regulatory space for the Indian government and investor responsibilities.[194] Evidently, India became wary of the ITA proceedings which led it to revise its BIT. The Revised Model BIT of 2015 has circumscribed the scope for which investors can go for international arbitration proceedings, and enhanced the domestic courts' control over the possible disputes.[195] The reforms of India are worth studying as it is not known to be having a disgruntled opinion against the ISDS, yet it brought some major reforms to its investment regime hence giving interesting insights about plausible reforms.

India diluted the protection given to investors. The revised Model BIT did not include a most favored nation clause, fair and equitable treatment provision, or an umbrella clause.[196] It further specifically excluded the application protective clauses to the establishment, acquisition or expansion stages of an investment.[197]

Omission of Most Favored Nation and Fair & Equitable Treatment provisions

In the new BIT, the Most Favored Nation status has been omitted.[198] In many disputes MFN allowed the investor to point out and opt for more favorable provisions from third country BITs[199], while at the same time not being bound by other reciprocal provisions of that another BITs.[200] Even when MFN clause never suggested that it ought to be applied to the dispute settlement procedures.[201] Such broad interpretation resulted in treaty shopping by the investors, which is antithetical to the goal of investment treaty law of fostering sustainable economic relations between states.[202] The phenomenon of treaty shopping is one of the greatest fears for nations. By this exclusion, India hopes to prevent treaty shopping in the future. Similarly, the exclusion of FET provision is to limit the ever increasingly broad interpretations given to the FET provisions by the tribunal.[203] Resultantly, now the Revised Model India BIT has limited the protective measures to customary international law.[204]

These provisions were seen as problematic by the nation as they were used to link the consent of the host state given for

The Golden Temple, city of Amritsar - India | Steve AllenUK

a treaty to totally another unrelated treaty despite the fact that consent are cornerstones to any treaty or agreements.

Exhaustion of local remedies

Another change that India has got is the requirement of exhaustion of local remedies, i.e., investors can initiate the international arbitration proceedings under the Investor-State Dispute Settlement mechanism but only after exhausting local remedies.[205]

Some scholars notes that states grant access to this international remedy of arbitration only through a specific consent otherwise disputes with the state can be resolved only in domestic courts of that state,[206] as states have sovereign immunity.[207] The access to arbitration to an investor against the host state is thus specific and not generalized. Hence some scholars state while consenting to international arbitration may put some conditions to its usage.[208]

Narrow down the terms or make the terms more precise

India changed the definition of 'investments' in its new Model BIT, from a broader to narrower definition after it lost in *White industries.*[209] The 2003 Model had a broad definition of investment.[210] This broad definition, *right[s] to money or to any performance having a financial value,*[211] led the activities of *White Industries* as investment in India.[212] This led India to narrow down the definition of 'investments' in 2015 Model BIT.[213] India did this to contain the overly broad interpretation given to the terms in BIT by the arbitral tribunals and to take account of the socio economic realities of India. [214]

In the Revised Model BIT, India changed the definition of investment and referred Salini criteria in doing the same.[215]

It defines investment with reference to an enterprise[216] as opposed to general asset based definition. This will restrict the scope of applicability of BIT in comparison to previous era. Now the definition is limited to *real and substantial business operations in India.*[217]

Brazil

Another developing country, Brazil, was very adverse to the investment arbitration proceedings. It took the view that direct access for investors to international arbitration places the investors on the equal footing to the Brazilian sovereignty. [218] However, by 2012 Brazil began to change its approach with the prevailing economic structure.[219] The Brazilian's Agreement on Cooperation and Facilitation of Investments seeks to resolve disputes through cooperative and diplomatic process. [220] It seeks to resolve disputes through Joint Committee and Focal Point through consultations, negotiations and mediations. [221] However, there is a possibility of state – state arbitrations to the exclusion of the investors.[222] Thus, it avoids the formal dispute resolution processes like ICSID.[223]

V

Conclusion

The withdrawal of countries from the ICSID convention, like the Ecuador and Venezuela, is testimony of growing loss of faith of countries in the fairness of the present ISDS regime.

As noted, ISDS doesn't harmonize international investment law. The international investment regime is replete with inconsistent awards. The countries fear the unbridled power of international investment arbitral tribunals such as passing injunction against enforcement of a domestic court judgment in the territory of that state[224] and have criticized the tribunals to render disproportionate amount of awards, like the recent USD 8.7 billion against Venezuela in favor of *ConocoPhillips.* The countries have also claimed that the interpretation and adjudication by the tribunals in the regime inevitably leads to expansion of jurisdiction by the tribunals, either in terms of deciding the rights of the parties who are not party to arbitration agreements[225] or assessing the responsibilities of parties under international law going beyond the boundaries of BIT to which states had agreed. [226] Some stakeholders fear espouse that there is no accountability of arbitrators involved in the system and there is conflict of interest owing to arbitrators' multiple roles. Further, arbitral awards having huge reputational consequences for any nation in the investment market, later at times, get annulled by the annulment committee.

The current regime however cannot entirely rely on the annulment committees to review the awards of the tribunals as they have very limited grounds of review.[227] Besides the success rate of the request for annulment is very sleek and it takes too long a time. These all substantiate the need of a more centralized and institutionalized mechanism for review or some reforms to the ISDS to ensure its success. A centralized and institutionalized regime may also reduce the challenges against the appointment of an arbitrator or requests to disqualify arbitrators, which is now a common occurrence in many cases.[228]

What is worthy to note is that the critiques of the present ISDS regime is not only developing or small countries in need of foreign investments but also developed countries, like the countries of European Union. This has provided major political legitimacy to skepticism of the ISDS system on the international legal plane.[229] The skepticism is now leading the countries to opt out of the investment arbitration and rather incorporate their domestic courts as dispute settlement forum in their BITs. This has also led to the trend of invest commercial arbitration. Proceedings in the energy sector has led the countries to be wary of their positions in their BITs as these cases have huge ramifications for a nation state given the arbitral awards in the energy sector has led to some of the maximum compensation awarded against any state. Additionally, the changes in the energy sector, with respect to tax or profit sharing or nationalization certainly have exponential impacts on economy of a state and its intended poverty alleviation programs or development goals. For instance, it is reported that nationalization of oil sector in Venezuela and social ownership led to major poverty reduction from 54 percent to 27.5 percent in the period spanning between 2003 to 2007.[230]

Way forward & recommendations

The paper ends with analyzing different measures that are being discussed to reform the ISDS regime. This part deals with the possible reforms in the system. This part is further divided into to two sections: first, possible reforms in the current regime of *ad hoc* international investment arbitration in place, and the next one is about forming a permanent investment court with tenured judges with entire legal and procedural framework of a court in alternative of the current *ad hoc* investment arbitration regime.

Present system

Some of the measures that can be incorporated in the present system which address the concerns of the stakeholders of the ISDS system are discussed below.

Cautionary drafting of the BITs

As observed in the behavior of the countries, BITs are now increasingly made with caution to prevent broad and ambiguous interpretation, like the 2015 Model India BIT. Such contemplative and cautionary drafting should be carried out to contain the ambiguity in the BITs.

Restrained exercise of power by the arbitrators

The tribunals should act as gatekeepers to ensure that in their development of international investment law and arbitration, other domestic and international laws are not trampled.[231] If they don't act as gatekeepers then the states will become growingly skeptic towards the ISDS which might lead to decrease of its use, like it happened after the *Chevron Corpn*. proceedings in Ecuador.[232]

Miami, Florida | jovannig

Institutionalizing challenges against arbitrators

Institutionalizing the challenges against the individual arbitrators, rather than having it reviewed by the rest of the tribunal. It will give more weight to the proceeding and will foster state's trust. It caters to the need of accountability amongst the arbitrators. Under the present system, it is highly unlikely that a member will hold that one of her or his colleague as not impartial as required under the procedural framework of ICSID convention.[233] However, another concomitant change must be brought for unsuccessful challenges against arbitrators more sternly. One way could be to impose costs on the challenging party of the disqualification proceeding when it is apparent that it was used as a delaying tactic or for any unfair purposes.

Need of exhaustion of local remedies

Some countries are contemplating the requirement of exhaustion of local remedies in their BITs as a pre-requisite for commencing international arbitration. This pre-requisite should be limited by a time period and procedural safe guards. This requirement will put a pressure on the states to adjudicate investment cases quickly and efficiently.[234] The courts will be careful of its adjudication and will give due regard to due process of law knowing that their decision is subject to international arbitral tribunals.[235] This will have ensued positive impacts like: rendering the remedy of injunction feasible [236] and it will also be beneficial for local victims, if any, of the investment projects.

Exclusion clauses

Limited exclusionary clauses could be incorporated into BITs. Government under these clauses can take unilateral action against companies if it relates to national policy, environment or health.[237] This will make states more receptive of BITs and international arbitration as then urgent steps could be taken without having to wait for completion of the arbitration proceedings, making the countries more agreeable to arbitration.

Renegotiation

A provision for renegotiation of bilateral treaties after every fixed number of years can be incorporated in the BITs. This will encourage more states to enter into BITs knowing that they have option of renegotiating rather than having the need to terminating or withdrawing from the system all-together. This will meet the demands of changing times while ensuring the sustainable continuance of the ISDS system.

Different system – A centralized and permanent approach

Though bias remains unproven and there is sufficient number of proceedings in favor of states in investor – state arbitrations, there are other deficiencies in the system that needs to be redressed. Like: unlike in commercial arbitrations, unpredictability as to who the parties are, perceived conflict of interest amongst arbitrators, non-coherent awards, limited grounds of review, etc.

As a means to overhaul the system, some international bodies and major stakeholders of the ISDS espouse that the *ad hoc* arbitration tribunals may be replaced by a centralized and institutionalized body. It can either be a judicial method, especially a multilateral judicial system [238] or a multilateral arbitration system. Below is a cursory view of an alternative system that is being envisaged.

EU envisaged system

The measures being taken by the European Union is worth noting in this aspect EU has espoused a permanent investment court system and moved away from ISDS in its negotiations, like its agreements with Canada and Vietnam already include this which it claims to be a *more transparent, coherent and fair system.*[239] The European Union's factsheet mentions that there is a broad agreement amongst numerous governments across the globe that the present ISDS system needs reforms and it was co-sponsored

by Canada while supported by United Nations Commission on International Trade Law. [240] The guiding principle of the EU factsheet is that highly qualified, permanent and full time judges should constitute courts.[241] The factsheet also serves as a good comparison point to study the features of ISDS v. Multilateral Investment Courts. For brevity purposes, the main contrasts drawn are[242]: *Ad hoc* v. permanent; risk of partiality v. independent; unpredictable v. predictable; limited grounds of appeal against the ICSID decision v. comprehensive appeal mechanism; costly v. cost effective; and opaque v. transparent.

Other recommendations

Some research and advisory groups think that the multilateral investment court as espoused by the European Union or the one being discussed at the UNCITRAL should be broadened. It should be implemented to mean reforms with respect to substantive coverage,[243] in terms of environment or human rights protections, involve more stakeholders,[244] and different methods,[245] which should be formal and binding. Another important aspect is with respect to composition of tribunals. The new system should have tenured judges or panelists. [246] The new system could also include obligations of investors from the inception.[247]

There were several meetings conducted by IISD towards the same. The recommendations are worth noting for. The group of experts at IISD espouses the need of giving access to disputes to people who are negatively impacted by the investment project.[248]

Experts also point out the need of other alternative mechanisms to resolve disputes such as mediation or a mandatory mediation involving all the stakeholders, with a permanent secretariat and staff, as a precondition to arbitration. [249] Another suggested reform is that of fact – finding mechanism, which should be independent of the multilateral body, like the ones used by World Bank.[250] It should be an improvement from the ones present in the ICSID Fact-Finding (Additional Facility) Rules, which can only be constituted on request by either party.[251] Mechanism like this can certainly prevent the temporal mistakes which were observed by the dissent in the *ConocoPhillips*[252] case and enable the tribunal to utilize even the complicated evidence, like the WikiLeaks cable in the *ConocoPhillips*[253] case.

Composition and independence was another aspect discussed by the IISD experts.[254] They stressed the need of diversity and legitimacy of the chosen arbitrators or the adjudicators, apart from the independence and impartiality.[255] IISD has also pointed out the need of a multi layered dispute settlement procedure having instances of review or appeal.[256] Each of these recommendations can be can be appreciated in the light of the facts of mentioned cases and the previous.

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PATENT LITIGATION IN TRANSNATIONAL INVESTMENT ARBITRATION

The Houses of Parliament, London | Jaroslaw Grudzinski

[PART I]

Case Note: Eli Lilly & Company V the Government of Canada

By Parita Goyal

1. Introduction and Factual Background to the case

The International Centre for Settlement of Disputes (“**ICSID**”) Tribunal took a unique approach while dealing with the protection of Intellectual Property Rights in an arbitration concerning patents and international disputes in the case of *Eli Lilly & Company v The Government of Canada*. Furthermore, it has created significant controversy over the inclusion and recognition of intellectual property rights as ‘investments’ within the scope of international investment agreements. On March 16, 2017, the Tribunal rendered its final award for litigating patents in an Investor-State Dispute Settlement (“**ISDS**”) which was governed by the arbitral rules of the United Nations Commission on International Trade (“**UNCITRAL**”). Eli Lilly (“**Claimant**” or “**Lilly**”), a USA based multinational pharmaceutical corporation, bought claims on its own behalf and on behalf of its indirectly owned subsidiary corporation, Eli Lilly Canada Inc. The claimant alleged that in the year 2010 and 2011, the Canadian Government (“**Respondent**” or “**Canada**”) had wrongfully terminated rights for Strattera (“**Strattera Patent**”) and Zyprexa (“**Zyprexa Patent**”), collectively “**Lilly Patents**”, by applying “**Promise Utility Doctrine**” under Canadian patent law (“**Patent Act**”). The claimant was represented by Gowling Lafleur Henderson LLP (Canada) and Covington & Burling LLP (USA) and the respondents were represented by Trade Law Bureau of Canada. The claimant and respondent are collectively referred to “**Parties**”.

The Promise Utility Doctrine states, “if a patent fails to deliver the utility promised at the time of registration, it would be declared as invalid.” This doctrine comprises three elements: first, the identification of a ‘promise’ in the patent disclosure, against which utility is measured; second, when the utility of patent is under question, the use of patent is prohibited post filing evidence to prove utility; and last, the requirement that pre-filing evidence to support a sound prediction of utility must be included in the patent.

Even before the arbitration took place, both the Federal Court of Appeal and the Supreme Court of Canada held that the Lilly patents did not meet the utility standards, as they lacked the patent specifications on the factual basis of the inventor's sound prediction of utility.

The Tribunal noted "that a North American Free Trade Agreement ("**NAFTA**") Chapter Eleven Tribunal is not an appellate tier in respect of the decisions of the national judiciary" and it will "only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA Chapter Eleven Tribunal to assess such conduct against the obligations of the Respondent State."

It was claimed that Lilly Patents medicines were useful to cure the Attention Deficit Hyperactivity Disorder ("**ADHD**"). Lilly contended that the doctrine is "radically new, arbitrary and discriminatory against pharmaceutical companies and products" and that Lilly had "legitimate expectations that its Zyprexa and Strattera patents would not be invalidated on the basis of a radically new utility requirement." The Claimant sued the Canadian Government for 500 million U.S. dollars for taking away their anticipated market monopoly and prospective returns.

2. Procedural History of the case

The Claimant had initially filed a Notice of Intent ("**NoI**") on November 7, 2012 to submit a claim to arbitration but subsequently it withdrew and resubmitted a second NoI dated June 13, 2013. Later during that year, Lilly filed a Notice of Arbitration ("**NoA**") against the Government of Canada on September 12, 2013, under the NAFTA Chapter Eleven. The Tribunal consisted a total of three arbitrators. The Claimants appointed Mr. Gary Born, who accepted the appointment through letter dated November 18, 2013. Sir Daniel Bethlehem accepted the appointed on behalf of the Respondents through letter dated December 17, 2013. As per the agreement of the Parties, the third presiding arbitrator (pursuant to NAFTA Article 1128) was appointment by the Secretary-General of ICSID by letter dated March 6, 2014 through a strike-and-rank list of seven candidates. Consequently, Professor Albert Jan van den Berg was appointed as the President of the Tribunal by the Secretary-General. The Tribunal was constituted in accordance with the UNCITRAL Arbitration Rules 1976 and NAFTA Chapter Eleven. In consultation with the Tribunal, the Parties agreed that ICSID would serve as administering authority for the arbitration. On April 10, 2014, the Secretary-General confirmed that Ms. Lindsay Gastrell, ICSID Counsel, would serve as Secretary to the Tribunal. Due to non-consensus of the Parties on a number of issues, each of the Parties submitted its observation on the unresolved disputes. The President of the Tribunal along with the Parties attended the procedural hearing in person, which was held on May 10, 2014, at the World Bank Headquarters at Washington D.C. (seat of arbitration), while the co-arbitrators were video-conferencing from the World Bank office in London.

On June 30, 2014, respondent filed its Statement of Defence. On September 29, 2014, Claimant submitted its Memorial with witness statements and seven expert reports. On January 27, 2015, the Respondent submitted Counter-Memorial with three witness statements and five expert reports. On September 11, 2015, the Claimant lodged its Reply Memorial, a witness statement and ten expert reports. Meanwhile, by letter of October 29, 2015, ICSID notified Mexico and the United States of the deadline for written submissions by the non-disputing NAFTA Parties pursuant to NAFTA Article 1128. In addition, an announcement was posted on the ICSID website stating the deadline and instructions for submitting an application for leave to file a non-disputing party (amicus) submission. On December 8, 2015, Respondent submitted its Rejoinder Memorial including two witness statements and five expert reports.

In a letter to Respondent dated December 17, 2015, copied to the Tribunal, Claimant requested that Respondent unilaterally withdraw its objection to jurisdiction *ratione temporis* raised for the first time in the Rejoinder. In response, by letter dated December 18, 2015, Respondent declined to withdraw its jurisdictional objection. The hearing on jurisdiction and merits was held at Washington, D.C. from May 30, 2016, to June 8, 2016. Between July 25, 2015, and August 22, 2016, the parties filed post-hearing submissions, including on costs.

3. Position of the Parties

A. Arguments of the Claimant

(i) Article 1105 and 1110 of NAFTA Chapter Eleven

During the arbitration proceedings, the Claimant alleged that the revocation of the Lilly Patents was an unfair and inequitable treatment (Article 1105) in addition to expropriation (Article 1110) as per NAFTA Chapter Eleven.

(ii) Withdrawal from Traditional Utility Standards

The Claimant further argued in this respect that the 'Promise Utility Doctrine' was a withdrawal from Canada's traditional utility standard and the utility standards applied by other NAFTA countries – the US and Mexico. It claimed that "for decades Canada had applied the traditional utility test for which a '*mere scintilla*' of utility applied, and under that test, pharmaceutical patents were never found to lack utility until the advent of the 'Promise Utility Doctrine' in the mid-2000s". Lilly alleged that the interpretation given by the Canadian courts for the term "useful" under Patent Act and the Supreme court of Canada (2002- 2008) violated the obligation of Canada under NAFTA.

(iii) Untimely objection to jurisdiction *ratione temporis*

a. The claimant argues, as per UNCITRAL Article 21(3) and other NAFTA awards, Tribunals have consistently found untimely jurisdictional objections to be procedurally improper and declined to entertain them on that basis, even where a party had attempted to reserve its right to raise an objection later than the Statement of Defence. Respondent had expressly declined to

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object to the jurisdiction on several occasions, namely, during the First Procedural Hearing, in the Statement of Defence and in the Counter-Memorial.

b. According to Claimant, Respondent's interpretation of UNCITRAL Article 21(3) is inconsistent. The Claimant mentions that NAFTA itself specifies that Chapter Eleven proceedings may be governed by the UNCITRAL Rules, and thus rejects the Respondent's position that UNCITRAL Article 21(3) is pre-empted by NAFTA.

c. As the Respondents were not sending a response to the Reply, the Claimant additionally brought to the notice of the Tribunal that the Respondents were contradicting with Section 10.2 of the Procedural Order No. 1 (which governs the scope of written submissions). The Claimant claimed that the Respondent's objection on jurisdiction *ratione temporis* was incorrect and invalid. This delay increased the entire cost and hampered the efficiency of the proceeding. The Claimants clarified that it only brought the Promise Utility Doctrine in the factual background section of the Reply, to support its arguments in Respondent's Counter-Memorial.

(iv) NoA within prescribed time limit

The claimant has made NoA on September 12, 2013, which was within three years from the dates of the final judgments. The Supreme Court had rejected Claimant's request to appeal the annulment of the Strattera Patent on December 8, 2011 and Zyprexa Patent on May 16, 2013. It was in accordance with NAFTA Articles 1116(2) and 1117(2), but Respondent failed to object jurisdiction otherwise.

(v) UNCITRAL Article 21(3) and NAFTA Articles 1116 and 1117 operate together

Lilly further contended that the disputing party cannot waive the objection made in pursuant to NAFTA Article 1116(2) and 1117(2), as these provisions set a temporal limit on a Tribunal's jurisdiction. With this reasoning, the Tribunal is bound to address the objection to jurisdiction, under any circumstances. Although NAFTA can modify the UNCITRAL Rules, "there is nothing in Articles 1116 and 1117 that indicates an intent to modify Article 21(3). Instead, without any conflict between them, Article 21(3) and Articles 1116 and 1117 operate together in a coherent fashion".

(vi) Invalidation of Raloxifene Patent

It was consistently contended by the Claimant that the invalidation of the Lilly patents and the Respondent's jurisdiction objection erroneously emphasized on a third patent, the **Raloxifene Patent**, which was not the subject matter of the arbitration.

B. Arguments made by Respondent

(i) It was contended by the Respondent that the Canadian Patent law did not define the term "useful" and thus lacks the required jurisprudence. Respondent opposes the interpretations of claimant that domestic courts are arbitrary or discriminatory. It claims that the interpretations are completely consistent with the NAFTA Chapter Eleven and the Patent Act.

(ii) The respondent disagreed with the submission made by Claimant that the domestic court decisions can be expropriatory (Article 1110), because if so, "NAFTA Chapter Eleven tribunals will be transformed both into tribunals with plenary jurisdiction over all international treaties and supranational courts of appeal in domestic property law issues". Canada requested the tribunal to dismiss the claim and that Lilly be ordered to bear

all of Canada's costs in the arbitration. Respondent relies upon *Mondev v United States* and argues that the burden of proof lies on the claimant for establishing that there is denial of justice due to lack of minimum standard of treatment (Article 1105).

(iii) *Timeliness objection to jurisdiction*

The Respondent claims that it had made a timely and prompt objection to jurisdiction. The Respondent argued that until the Reply was filed by the Claimant, the Respondent was unsure about the challenge to 'Promise Utility Doctrine'. Respondent objected the jurisdiction at the earliest in the next written statement i.e. the Rejoinder.

According to the Respondent, Claimant suffered no prejudice in relation to the from the timing of the objection and thus Article 21(3) cannot be considered as a Defence by the Claimant, because when the Claimant submitted an additional statement of claims, Article 21(3) cannot be used to bar a jurisdictional objection arising from the new version of the claim. However, the Respondent argued that even if according to the Tribunal the Respondent objected the jurisdiction sooner, the Claimant still had a time period of six months to respond in writing.

(iv) *Respondent's Submissions with NAFTA Articles 1116(2) and 1117(2)*

On February 5, 2008, when Claimant's third patent Raloxifene suffered a loss, the Claimant failed to bring timely objections within the limitation period of three years. Similarly, in the present case, Canada contended that Lilly failed to put forward its claims as stated in the NAFTA Articles 1116(2) and 1117(2). The Respondent submits that the limitation period started no later than October 22, 2009 because on the same date, Supreme Court of Canada denied the appeal of Raloxifene patent. Thus Claimant's contention of acquiring knowledge of Promise Utility Doctrine and a loss as a result of the doctrine later this, is incorrect.

According to Respondent, "given the lack of data supporting those patents when they were filed, Claimant knew of at least some loss of value after the decision in Raloxifene". Canada argued that claimant's claims are beyond the jurisdiction of the Tribunal and lack merit as a matter of both fact and law.

4. Analysis and Award decided by the Tribunal

The Tribunal unanimously granted that the Claimant's contentions were correct and dismissed the Respondent's arguments brought forward for the objection on jurisdiction *ratione temporis.* The Tribunal pointed out that the Respondent was not able to indicate how the treatment of the Raloxifene patent can trigger the limitations clock for claims concerning two other investments, which are legally and factually distinct. On the other hand, the Claimant was uncertain on how to attain "knowledge [of] loss or damage" to Lilly Patents in 2009, even before the courts had issued any decision nullifying them.

The tribunal in its findings suggested that the Promise Utility Doctrine did not violate the rights of the claimant under Articles 1105 and 1110 of the NAFTA as the Doctrine has developed over the years. This evolution cannot be categorized as a sudden change. Thus, the Tribunal rejected Lilly's plea as it failed to demonstrate legitimate expectations which were violated by the application of the patent law to the Lilly Patents.

The Tribunal further directed the Claimant to bear the costs of the said arbitration USD 749,697.97 in total as well as pay seventy-five percent of Canada's cost of legal representation (CAD 4,448,625.32).

5. Remarks and Summary

In the present case, that Promise Utility Doctrine was held as applicable by the Tribunal offering Canada an edge to the rest of the jurisdictions and demonstrating how the advantage cannot be misused in an international trade agreement. The case has magnificently set the benchmark for contesting disputes relating to patent arising under Chapter Eleven of the NAFTA in future. The foremost purpose of Promise Utility Doctrine is to benefit the public at large by ensuring that the invention is useful and fulfills its promise. The revocation of the Lilly patents from the 20-year monopoly was on similar grounds. Numerous pharmaceutical companies in Canada questioned the validity of the Lilly patents owned by the Claimant. Before commencing arbitration, the Canadian Courts had affirmed that the Lilly Patents lack the Utility and the Claimant cannot sell its drug at prices higher than the affordable generic drugs. Chapter Eleven provides direct access to the investors to proceed with an International Arbitration Tribunal. Thus, the Claimant sued the Canadian Government under the NAFTA Chapter Eleven before an ICSID Tribunal. Eli Lilly's claim was an innovative attempt to employ an international investment agreement to claim compensation for the invalidation of its patents.

During Tribunal's analysis, the tribunal did not clarify upon the legal standards for the protection of Intellectual Property Rights, but it did establish a platform for their resolution through Investment Arbitration. The arbitral Tribunal made a distinction between the national judiciary and the investment Tribunal, where the latter does not have the authority to review the prior findings of a national court.

Chapter Eleven has prospered and its highlights includes, one, there has been no challenge enforcement of the awards, and two, the parties have remained committed to the concept of international investor-state arbitration. It can be correctly stated that the invalidation of the Lilly Patents did not lead to a denial of justice because the factual ground necessary to sustain Lilly's claim was not established. Persuasively, the allegation of violation in relation to NAFTA Chapter Eleven Articles 1105 and 1110 are correctly categorized as invalid due to the evolution of the Canadian legal framework and a denial would require an act which is "sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."

United Kingdom | David Martyn Hughes

[PART II]

Scope of *Ratione Temporis* in an Icsid Arbitration

By Parita Goyal

1. Introduction

Ratione temporis or temporal jurisdiction simply means jurisdiction of a court of law over a proposed action in relation to passage of time.[1] International Investment Law was facing problems relating to transparency and legal uncertainty due to lack of proper perceptive and perceived overreach by investment tribunals, whose jurisdictional competence is based completely on the consent of the states and private investors.[2]

In a general sense, jurisdiction might be defined as 'the power of the tribunal to hear the case'.[3] In international arbitration, where the term of 'competence' is often used synonymously with the notion of jurisdiction,[4]the jurisdiction of a tribunal is generally based on the consent of the disputing parties.[5] Objections to jurisdiction might be described as relating to the 'conditions affecting the parties' consent to have the tribunal decide the case at all'.[6]

North American Free Trade Agreement ("**NAFTA**") Chapter Eleven has been a subject of great interest for many scholars. It provides for investor – state disputes to be referred to arbitration pursuant to International Centre For Settlement Of Investment Disputes ("**ICSID**") or United Nations Commission on International Trade Law ("**UNCITRAL**") Rules.[7]A survey of more than a hundred treaties was done by the Organization for Economic Co-operation and Development ("**OECD**") in the year 2012. About seven percent of those sample treaties with Investor-State Dispute Settlement ("**ISDS**") sections contained a number of statutes relating to limitation. As a result, the limitation would apply and prohibit the parties to access the international arbitration because the claim was not brought within the specified time frame.[8] Article 1116(2) provides that:

"An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[9]

It means that the challenge must be made within a period of three years, when the investor first acquired knowledge of the measure or there is an economic cost associated to it. However, the exact quantum of economic cost is not required. It is important to note that the above article is the limitation on the right of the investor and not the competence of the tribunal.[10] Timely actions on claims are fundamental to law's role in furthering the stability of our political economy, particularly in the area of international investment law.[11]

Whilst a number of international investment treaties (notably, *NAFTA*) contain limitation periods, tribunals have not often addressed this topic in detail, and there is no uniform jurisprudence on how limitation periods should apply. Ultimately, each case has to be analyzed in its own context.[12] The Treaty draws a noteworthy distinction between claims that are brought by the investor on its own behalf and claims that are brought by the investor on behalf of its investment.[13]Articles 1116 and 1117 grants the investor access to NAFTA arbitration. According to Articles 1116(2) and 1117(2) of NAFTA, a claim may not be brought to arbitration if more than three years have elapsed from the date on which the investor or its investment first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor or its investment incurred loss or damage. The case of *Mondev*[14] supports the argument that there should be no exceptions to the ISDS as it would provide a platform to *de facto* appeals and would only delay the process of arbitration process.[15]A NAFTA Chapter Eleven tribunal is not a tribunal of general jurisdiction with competence to adjudicate claims for a breach of other provisions of NAFTA.[16]

There are a few interesting legal questions that arose in the case of *Eli Lilly v the Government of Canada.*[17] One of the key legal issue raised by the parties in the arbitration was to establish the scope *ratione temporis* jurisdiction under NAFTA in an ICSID arbitral proceedings.

2. Importance of Jurisdiction

All the agreements contracted by an investor who is investing in a foreign country are often protected by a Bilateral Investment Treaty (**"BIT"**). The BIT provides the parties a right to initiate arbitral proceedings in case of violation between the parties to a treaty. These treaties are carefully formulated so that all the parties are completely aware about what they are indulging into and the jurisdictional aspects related to it. Jurisdiction plays a vital role in international investment treaty and thus has to be implemented with greater care and responsibility. There are three kinds of jurisdiction - first, jurisdiction *rationae materiea* i.e. the terms of material scope of the jurisdiction. Second, jurisdiction *ratione personae* which means the personal reach of an agreement. And finally, jurisdiction *ratione temporis* which means the temporary scope of an agreement. NAFTA Article 1116(2) is appropriately categorized as jurisdiction *ratione temporis* where the limitation period for filing the claim is three years.

3. The 'Time Bar Regime' as per NAFTA's Chapter Eleven: Continuing violations in international law

a) The Doctrine of Extinctive Prescription and Periods of Limitation

The Doctrine of Extinctive Prescription means failure to exercise a right or the extinction of a title, due to lack of implementing it within the time limit prescribed. In such a scenario, the burden of proof lies upon the claimant to prove that it was prevented by a sufficient cause to file the claim in time. The time at which the objection is raised, plays an important role for deciding the issue.

Allowing a claim filed by the claimant beyond the prescribed limit may put the defendant in a difficult situation because of loss of evidence over the passage of time. It would be considered wrong on part of the claimant, if the respondent has to suffer due to the negligence on part of the claimant for delayed filing and establishment of facts.[18]

b) Exemption from Extinctive Prescription and Periods of Limitation

In certain circumstances, the tribunals of international law have accepted delay in filing of claim where the claimant has been able to prove that there was an appropriate reason for act of delay.[19]Thus this is an exception to the rule of limitation period. According to International Human rights law, a principle has been recognized that a period of limitation does not begin until a breach has ended.[20]There are valid exceptions to this doctrine, but they arise for breach of obligation '*erga onmes*' and not in relation to NAFTA. Bin Cheng's classic study established the existence of the said Doctrine – one, delay in the presentation of a claim and two, imputability of the delay to the negligence of the claimant.[21]

c) Continuing Violations and the Period of Limitation in Investment Arbitration

Over the years, there have been multiple cases which involved and raised the question of three-year limitation period under NAFTA Chapter Eleven Articles 1116 and 1117. However, this is a strict limitation period, whereby the investor cannot bring a claim on his behalf or on behalf of an enterprise if a period of more than three years has elapsed from the date on which the investor first acquired or should have first acquired, the knowledge of the alleged breach and knowledge that the investor or the enterprise has incurred a loss or damage.[22]The tribunal has to consider three aspects while determining whether the claim in within the limitation period of three years or not. Firstly, the date of the alleged breach on which the investor first acquired the knowledge. Secondly, despite the date of actual knowledge is found to be within the period, it is important for the tribunal to determine if there was another possible date or time when the investor could have acquired the desired knowledge. Thirdly, the investor suffered loss or damage as a result of the acquired or desired knowledge.

In the case of *Feldman v. Mexico,*[23] the tribunal considered the meaning of Articles 1116 and 1117 during its Interim decision on Preliminary Jurisdictional Issues and its final awards. The main purpose was to eliminate the date for the limitation period.[24] The applicability of the three-year limitation period was supported by the tribunal but it did not interfere with the continuing acts.[25] In two other cases *Merrill &Ring Forestry v Canada*[26] and *UPS v Canada*[27], it was wrongly mentioned that *Feldman*[28] supports the proposition of continuing acts overriding NAFTA's three-year limitation

period.[29] But in reality, *Feldman* clearly states that NAFTA Article 1116 (2) and 1117 (2) are rigid in nature.

d) Whether NAFTA limitation period can be defeated

There has been no explicit logic given by the investment tribunals on the issue of borrowing continuing circumstances to overcome NAFTA's period of limitation. It can be observed that the tribunals have taken reasoning from the awards where the question in front of the tribunal was to determine if the pre treaty circumstance would fall within the framework of jurisdiction. This reasoning was then applied to different issues for the acts which were outside the ambit of period of limitation. It would be best to digress from the period of limitation, as it would give the claimant an extended chance of acquiring its lost rights. However, it is equally essential that the tribunal considers the main purpose of the NAFTA limitation period and deviate only when justifiable reasons are given for the said purposes.

4. Conclusion

NAFTA is looked upon as a forward looking treaty which recognizes importance link between the timing and the subject matter of a case.[30]The treaty has be formulated after considering the needs of the States and thus the interpretations should be respected by the general principle of extinctive prescription in International. Law. Interestingly, there is no concept of precedents under NAFTA.[31]The 'context' and 'object and purpose' of NAFTA does not provide any exceptions to the limitation period of three years and is strictly enforceable. Inclusion of exception would only hamper with the Doctrine of Extinctive Prescription. Generally, an alleged 'continuing breach' to NAFTA cannot amount to exception of Article 1116(2) time limitation.

There have been five awards relating to 'time bar regime' under Article 1116(2) and 1117(2) of NAFTA, namely, *Feldman v United Mexico States*[32], *Mondev International Limited v USA*[33], *Glamis v United Mexico States*[34], *Grand River Enterprises v USA*[35]and *UPS v Canada.*[36] Except the last case, all the cases have affirmed to the three year limitation period. I support the tribunal's analytical power and majority decisions in favor of imposing the three year limitation period. I strongly believe that in case the parties exceed the given time period of three years it would amount to abuse of power. The jurisdiction in an investment arbitral tribunal are either based on the Vienna Convention on the Law of Treaties, the ICSID Convention or by individual BIT to look outside the origin of international law.[37] Since the jurisdiction under ICSID are based on consent, tribunal overreach jeopardizes the legitimacy of the protection of investment regime. As the regime's characterization is facing problems of transparency and legal uncertainty, it has increased the importance of preserving and reestablishing the investment tribunal's alleged proficiency and fairness. Arbitrators' sole motive is to identify the intention of the parties and precedents should be taken into consideration based on their strength and reasoning.

Parita Goyal

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Curitiba, Parana, Brazil | Diego Grandi

THE DIFFICULT BALANCE BETWEEN FLEXIBILITY AND NEUTRALITY WHILE TAKING EVIDENCE IN INTERNATIONAL ARBITRATION

By Mariana de Araújo M. Lima Di Pietro

ABSTRACT

Arbitration is an adjudicatory method of dispute settlement that is based on party's autonomy. Thus, independence and impartiality, as well as neutrality are essential for its development. Flexibility, another outcome from party's autonomy, which is considered to be one of the major advantages of arbitration, sometimes seems to enter into conflict with neutrality, raising questions related to a supposed dichotomy between flexibility and certainty.

However, it is possible to point out criteria to be observed by Arbitral Tribunals which are related to the very own fundaments of flexibility which may serve as guidelines to mitigate possible conflicts between flexibility and certainty, namely in cases where parties' expectations do not meet.

INTRODUCTION

Arbitration can be defined as an alternative method of dispute resolution in which the parties appoint a third-party to rule their case. Since arbitration requires adjudication by someone who is not invested by jurisdictional power - which is granted to judges - the authority of the arbitrator arises from the reliance of parties upon the arbitrator they chose.

In this scenario, it is certain that the arbitrator must inspire trust to all the parties in dispute. Arbitration provides several mechanisms in the pursuit of this specific purpose, such as independence and impartiality. Despite the fact that independence and impartiality are not synonyms to neutrality, those concepts are usually related.

However, there is another aspect of arbitration which differs it from State Courts: its flexibility. Even though several instruments provide rules applicable to the arbitration proceeding, including international treaties, softlaw, national laws and rules issued by arbitral institutions, they bring simple outlines when it comes to the conduction of the proceeding by Arbitral Tribunals[1]. In short, their major concern is the measures to be taken before the arbitral tribunal is set or after the award is delivered.

The reason why arbitration rules do not provide a specific procedure for the taken of evidence is the necessity of granting a margin for the arbitrators to decide the means they consider more appropriate for them to reach a conclusion.

Procedural flexibility brings several benefits. It reduces costs, saves time and provides the opportunity for arbitrators to solve any punctual doubt that may have been settled by the evidences brought by the parties.

According to international researches, flexibility is the most widely recognized advantage of arbitration[2] and currents attempts to restrain it are considered to be the greatest danger faced by arbitration[3].

The importance of flexibility to arbitration is undisputable. While explaining the advantages of arbitration in relation to litigation in State Courts, BORN focuses on the importance of tailored solutions for complex international business controversies:

"Equally, the litigation procedures used in national courts are often ill-suited for both the resolution of international commercial disputes and the tailoring of procedures to particular parties and disputes, while decision-makers often lack the experience and expertise demanded by complex international business controversies. In all of these respects, international arbitration typically offers a simpler, more effective and more competent means of dispute resolution, tailored to the needs of business users and modern commercial communities."[4]

There are no doubts, thus, that flexibility is, at least, as important to arbitration as neutrality, independence and impartiality. Also, even though procedural flexibility and neutrality are not intrinsically contradictory, occasionally decisions taken by arbitral tribunals may lead to unbalance between parties in an arbitration, mostly when taken in more advanced stages in the taken of evidences.

Such unbalance is especially common in taken of evidence, as explained by MARGHITOLA:

"Among the principles of procedural nature, the most mentioned is that the arbitral tribunal should respect the common expectations of the parties. This principle is in tension with another fundamental principle of international arbitration, namely, the discretion of the arbitral tribunal."[5]

Cases in which the discretion of the arbitral tribunal may meet the expectations of only one of the parties, however, may cause the uncomfortable sensation that neutrality may has been violated.

This article aims, at first to further explain concepts involved in the analysis, departing from the idea that arbitration is an adjudicatory mean of dispute settlement based on party's autonomy. Then, it is purposed to analyze the meaning of party's expectations, independence, impartiality and neutrality, explaining the differences between them. Next, it is intended further investigate the principle of flexibility in order to understand its full content and possible self-imposed limits. Finally, the article will analyze a hypothetical case in order to suggest possible solutions for the Arbitral Tribunal in case of conflicts of parties' expectations.

The purpose of this article is to propose possible criteria to be taken into consideration in cases of conflicts of parties' expectations, enhancing the quality of the relationship with the parties as well as the certainty of the award to be rendered.

ALTERNATIVE DISPUTE SETTLEMENT AND ARBITRATION

Disputes are natural to human's relationships. Some disputes are irrelevant for domestic or international legal framework. However, some disputes concern legal instruments and provisions.

Thus, parties have two options when facing a legal dispute. On one hand, it is possible to settle the matter by a mutual agreement – which can be spontaneously achieved or through the support of third parties. On the other hand, it is common for parties to request a neutral third party to adjudicate it for them.

In most cases, such neutral third party is a State Judge, who is invested with Jurisdiction – the power granted to the State for it to rule their disputes in order to maintain social peace and order.

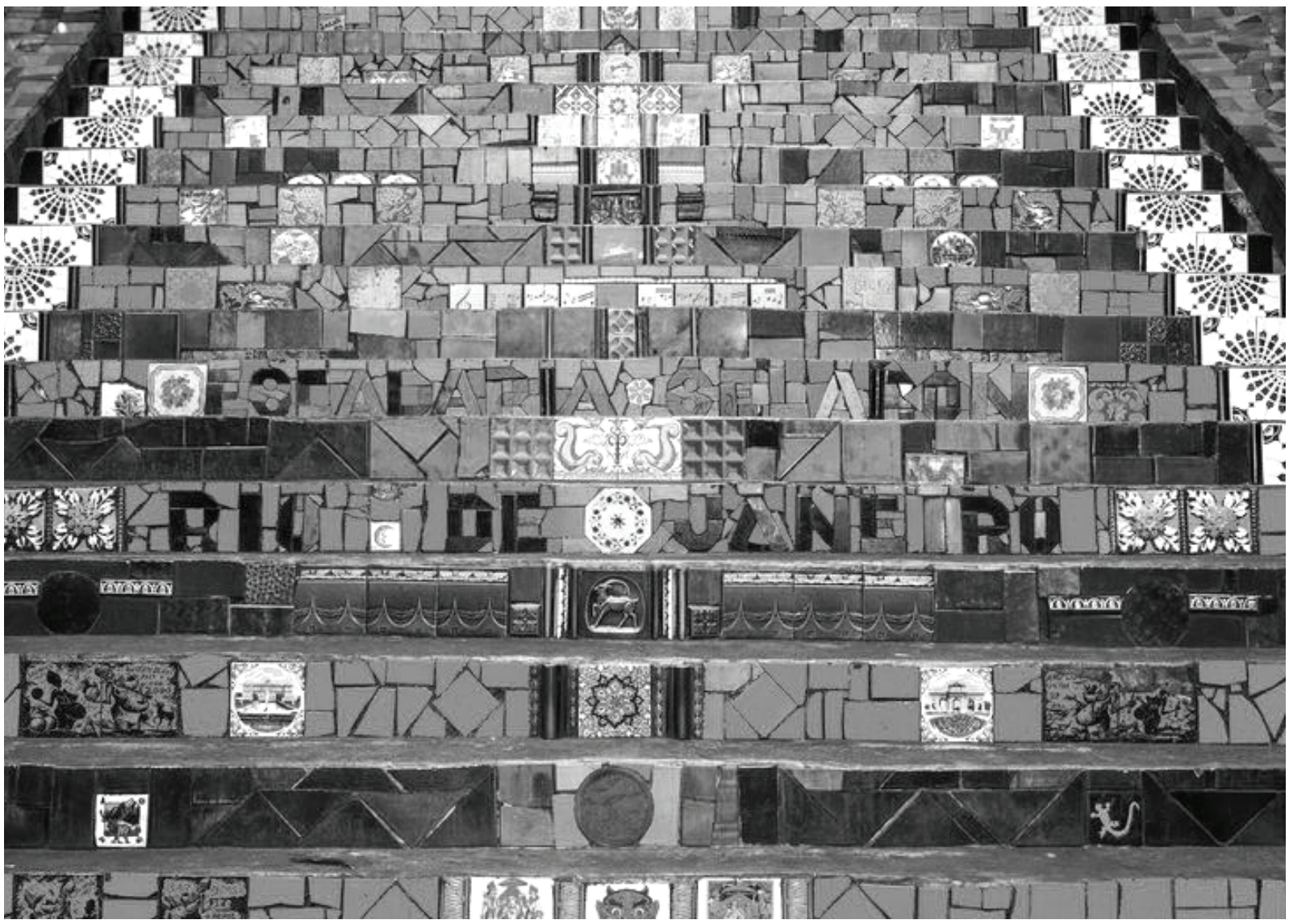
There are situations in which the parties, nonetheless, decide to submit their dispute for a third party who is not a State Judge to adjudicate the matter for them. The reason that may lead the parties to choose not to submit their case to the Judiciary may vary. Sometimes the key issue is the interest in obtaining a final decision within a shorter time frame; in other occasions, the lack of confidence of the parties in the capacity of the State to keep confidential information leads them to seek a private arbitrator, among other reasons.

However, their reliance in the arbitrator's capacity to adjudicate their dispute in a satisfactory manner in accordance to the rule applicable to the case is essential for them to submit their case to an arbitration.

This is the reason why the common expectation of the parties, regarded as a shade of the party's autonomy, is generally recognized as the rule underlying each procedural decision taken by the Arbitral Tribunal:

"The taking into account of the common expectations of the parties is an autonomous concept of international arbitration. In litigation, the procedure is not adapted to the expectations of the parties, but is conducted in accordance with the provisions of national codes of civil procedure. Therefore, the same concept cannot apply to litigation. Hence, only sources of international arbitration are relevant for the concept of common expectations of the parties.

The common expectations of the parties must be seen against the background of party autonomy. Party autonomy is one of the most



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important principles in international arbitration. It guarantees that the parties can determine the arbitration procedure. The common expectations of the parties can be considered a smaller counterpart of party autonomy. This concept creates the duty of the arbitrators to take into account the common expectations of the parties when the parties do not agree on procedural issues."[6]

There are occasions in which the expectations of parties in dispute are similar. For instance, when the negotiators of the agreement whose interpretation is in dispute are from civil law countries, it is presumable that both parties' expectation is that discovery rules will not apply to the proceeding.

But there are occasions in which procedural expectations of the parties are mutually opposed. In such situations, the Arbitral Tribunal should, under its discretion, take a decision which is deemed the most appropriate to the case.

Under the circumstances of conflicts of party's expectations, the Arbitral Tribunal is not bound to the duty to follow the middle path, unless there are legal provisions setting forth such an obligation[7].

PARTY'S AUTONOMY

As mentioned, the legitimacy of State Courts is based on State's sovereignty while in arbitration it resides on the collective recognition by the international community of an adjudication process based solely on party's autonomy[8].

In other words, arbitration is a dispute settlement method entirely designed by parties, who decide not only the adjudicator. Of their case, but also the applicable substantial and procedural law.It is certain, however, that while defining their dispute settlement mechanisms, the parties may expressly agree on several aspects of said procedure and, on the other hand, leave some of their expectations aside of the arbitration clause or agreement.

The expectations which have not been expressly mentioned in the arbitration clause or agreement, nevertheless, still integrate party's autonomy and should be considered by arbitrators.

It is important to mention that party's expectation, as a spectrum of party's autonomy, is not a synonym to the perspectives of arbitration users – which can be defined as the outcome parties imagine to obtain when submitting their disputes to arbitration.

The first concerns rules applicable to the procedure that the parties legitimately presume to govern their dispute; the second relates to the features of the proceeding. As an example, international surveys point out that one of the major problems that bother arbitration users is when the arbitrator is overly flexible, losing control of the proceedings[9]. In this case, the criticism does not rely on supposed violation of party's expectations, but in their perspective that the arbitrator should limit the requests brought by parties in order to organize the arbitration proceeding.

That being said, it is essential to recognize that, while drafting arbitration clauses or agreements, parties have expectations on the possible proceeding to be initiated in case they need to settle their disputes. Some of these expectations will necessarily be provided in the arbitration clause – namely the seat of the arbitration, number of arbitrators, the language

of the proceeding, the rules applicable to the proceeding, the rules applicable to the dispute… However, it is often that some expectations are not expressed by negotiators.

The Arbitral Tribunal, in this scenario, is supposed to follow, as long as possible, parties' expectations, which are bound to party's autonomy.

NEUTRALITY

Arbitration is, thus, entirely based upon party's autonomy. In opposition to States Courts, which follow a strict set of rules applicable to every dispute, the parties have the flexibility of choosing not only the professional who will adjudicate their case, but also the material and procedural rules applicable to the case, the language of the proceeding, the number of arbitrators, among other aspects of the proceeding.

In short, when it comes to arbitration, parties have freedom to specify any aspect relevant for the settlement of their disputes. Even if parties do not expressly provide for some of those aspects in the arbitration agreement, they still have expectations on them.

There are cases in which parties' expectations meet and there are cases in which they collide. Arbitral Tribunals, however, must issue procedural decisions in cases of opposed expectations by parties and, in many cases, it is not possible to simply follow the middle path (to apply the rules of discovery or civil law rules for the taken of evidences, for example).

The question that arises is how to guarantee that the decision taken by the Arbitral Tribunal in cases of conflicts of party's expectations is neutral. This question is particularly interesting taking into consideration the fact that the expectation of one of the parties will prevail as soon as the Arbitral Tribunal renders the decision.

In order to answer the question, it is important to bear in mind the fact that the arbitrator's central obligation is to settle the dispute in an adjudicatory manner[10].

In addition to this central obligation, it is certain that the arbitrator must perform his role in an impartial and independent manner. In this sense, it is remarkable that almost every national arbitration act or institutional rule[11] establishes the obligation of arbitrators to conduct the dispute accordingly to those duties.

The Brazilian Arbitration Act, for instance, provides the following duties:

"§6 The arbitrator must follow the duties of impartiality, independence, competence, diligence and discretion while performing his function." [12]

As a result, it is certain that arbitrators must act in an impartial and independent manner while adjudicating[13]. However, neither independence, nor impartiality meet the exact sense of neutrality.

Independence and impartiality can be defined by the inexistence of conflicts on interests[14], resulting on the arbitrator's obligation of disclosure[15]. Neutrality goes beyond, meaning equality between the parties in dispute[16]. Therefore, neutrality relates more to the principle of due process than to party's autonomy.

Even though neutrality does not correspond to independence and impartiality, it is still a fundamental principle of arbitration. For this reason, important instruments expressly provide the obligation of arbitrators to treat parties in an equal manner.

For instance, article 17 (1) of 2013 UNCITRAL Rules brings neutrality as one of the first principles to be followed by arbitrators:

"Section III. Arbitral proceedings - General provisions
Article 17
Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case."[17]

There are no doubts, in this context, that arbitrators must treat the parties with equality, even though neutrality is not necessarily related to party's autonomy. In view of this principle, one may have the following question: how to guarantee that the decision taken by the Arbitral Tribunal in cases of conflicts of party's expectations is neutral?

FLEXIBILITY

As already mentioned, flexibility is another important principle of international arbitration. As a matter of fact, it is one of the key elements that, together with party's autonomy, differs arbitration from litigation in State Courts.

The concept of flexibility implies, on one side, leaving the parties free to devise procedures tailored to a particular dispute and legal or cultural setting; and, on the other side, providing discretion for arbitrators to do the same.

The 2013 UNCITRAL Rules, for instance, provide for flexibility, regarded as the discretion granted to the Arbitral Tribunal while conducting the proceedings, with the same importance of neutrality:

"Section III. Arbitral proceedings - General provisions
Article 17
(…)
The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."[18]

At this point, reference is made to the importance of tailored solutions for complex international disputes, pointed out by BORN[19]. It is possible to state that flexibility in arbitration is

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essential in order to enable arbitration to reach its main purposes, namely, providing greater efficiency and better results to disputes[20].

It is also important to bear in mind that procedural flexibility in arbitration must not be regarded as an isolated principle. It must – as any principle – be interpreted in view of its purposes. As a result, when it comes to the discretion of arbitrators, flexibility is limited to the extent it leads to a fair and efficient process for resolving parties' dispute.

In other words, flexibility does not mean that arbitrators should allow the parties to conduct the process solely in the manner they desire. During the proceeding, there are timetables to be followed and rules that must be observed by parties. It is, though, necessary to establish rules for the proceeding in order to pursuit efficiency and fairness[21]. The difference between arbitration and litigation in State Courts is the fact that, in arbitration, it will be possible for arbitrators and parties to set rules made specially for their dispute[22].

An excessive elasticity of proceedings, on the other hand, results in loss of control of the procedure by the Arbitral Tribunal and, consequently, unnecessary delay and expenses[23]. Therefore, when dealing with flexibility, it is important to truly understand the concept, otherwise it may be regarded as anarchy – leading to unfairness and inefficiency.

Finally, in view of the actual meaning of "discretion of arbitrators", it is possible to answer the question as how to guarantee neutrality in cases where parties' expectations collide.

Taking into consideration that arbitrators must exercise their discretion in order to avoid unnecessary delays and expenses, and also to provide a fair and efficient guidance to the proceeding, it is possible to claim that the expectation which better meets those requirements should prevail.

HYPOTHETICAL CASE

Considering that parties to an arbitration may have different expectations regarding the conduct of the proceeding by the Arbitral Tribunal and that, in these cases, it is expected that the Arbitral Tribunal decides the manner that meets better the purpose of avoiding unnecessary delays and expenses - but granting both the opportunity to present their cases - it is important to verify if this criterium is potentially applicable in real arbitrations.

In this context, it is suggested an exercise of applying the proposed criterium to a hypothetical case in order to verify its possible outcomes.

Supposing that a company ("Claimant") files a request for arbitration claiming the reimbursement of additional costs it was obliged to pay within an Agreement entered into with COMPANY B ("Respondent"). Claimant alleges not having undertaken the responsibility for those additional costs in the Agreement and, as proof of the amounts supposedly paid, it files several spreadsheets it prepared stating the values and payment dates.

After the appointment of three arbitrators, the Arbitral Tribunal establishes a provisional timetable providing the dates for the parties to file the Statement of Claim, Statement of Defense, Claimant's Rejoinder and Defendant's Rejoinder. After Defendant's Rejoinder, the Arbitral Tribunal issues a

procedural order to start taking the evidences, providing the application of the IBA Rules.

In this context, Claimant requests the Arbitral Tribunal to appoint an accountant expert in order to verify the total amount to be reimbursed. Defendant objects to the request for an expertise, claiming that the core of the dispute lies on which party is obliged to pay the supposedly additional costs and that Claimant has not proved having paid any amount, since the only documents filed were spreadsheets unilaterally produced, which are not actual proves of payment.

Despite the Defendant's objection, the Arbitral Tribunal allows the production of the expertise. After such decision, it takes about 1 (one) year for the expert to present its report. In the report, the expert calculates, based solely on the spreadsheets, the amounts supposedly paid by Claimant, disclosing the information that it was not possible to verify the accuracy of the values, since Claimant did not provide any actual proof of payment.

The Arbitral Tribunal, then, provides a 30 days term for the parties to file reports prepared by their technical assistants. Within such term, Claimant files a report prepared by its technical assistant together with all the proves of payment, which had never been presented to Respondent, Expert or Arbitral Tribunal until that moment.

In view of the documents filed by Claimant, Respondent files an objection to the acceptance of the new documents by the Arbitral Tribunal.

In this scenario, it is possible to verify a conflict of party's expectation. Considering that neither the arbitration clause, institutional rules, the IBA Rules on the Taking of Evidences in International Arbitration, nor the Terms of Reference provide a deadline for parties to file new evidences and that both parties have their seats in civil law countries, it is understandable that Claimant had the expectation of being allowed to file the evidences in any moment of the proceeding while Respondent had the expectation that Claimant would not be allowed to file new evidences after the beginning of the expertise.

It is certain that the Arbitral Tribunal would need to resume a new phase of the expertise in order to grant equal opportunity for the Respondent[24] to analyze each of the new documents presented in order to verify, for instance, their applicability to the case, and then to be able to follow the new calculations to be made by the Tribunal appointed expert.

It is true that possibly accepting the Claimant's Technical Assistant Report would avoid delays and expenses, but it would violate arbitrators' obligation to allow both parties to present their cases. The reason for that is the fact that Respondent would not be granted with the opportunity to duly analyze the new documents or to have any sort of influence in the report taken into account by the Arbitral Tribunal.

Therefore, considering the necessity of the Arbitral Tribunal to avoid unnecessary delays and expenses, a good solution would be, under its discretion, to analyze the legal aspect of the dispute prior to the material one, issuing an award rejecting the claim or a partial award accepting it.

As an outcome of an award rejecting the claim, for instance, with grounds on the understanding by the Arbitral Award that the payment of the additional costs is due by Claimant due to the nature of the Agreement, it will not be necessary to impose additional delays and costs to the parties.

On the other hand, a partial award accepting the claim could bring provisions as to the conditions for Claimant to obtain the reimbursement of said additional costs, which could be useful guidelines for Respondent as well as for the expert in the analysis of the new documents filed by Claimant, providing greater efficacy to the new phase of the expertise in order to reduce delays and expenses.

CONCLUSION

Potential conflicts between flexibility and neutrality or certainty are commonly pointed out in researches and by academics[25]. It is also often to find criticism on attempts to regulate flexibility, a trend which received the name "judicialization of arbitration"[26].

However, flexibility, as any principle, is not be interpreted alone. It should be regarded as a principle belonging to a juridical regime (arbitration law), which has a purpose. As a result, the limits to flexibility should not be imposed by other means than its own determinations. Said self-imposed limits, on their turn, could work as criteria to be adopted by Arbitral Tribunals, under their discretion, as guidelines for their decision in conflicts of parties' expectations, which would provide greater certainty for arbitration users and, still, maintain flexibility untouched.

The outcome arising from this proposition could be nothing but positive. In fact, it mitigates tension between flexibility and neutrality, reducing costs and delays in arbitrations, enhancing the quality of the relationship between Arbitral Tribunal and the parties and, by the end of the day, assure certainty of the arbitral award and the satisfaction of arbitration users.

Mariana de Araújo M. Lima Di Pietro

1 See Redfern and Hunter. International Arbitration, 6 ed. Kluwer Law International; Oxford University Press, 2015. p. 353.
2 See International Arbitration Surveys, conducted by the School of International Arbitration, Queen Mary University of London, 2006.
3 See International Arbitration Surveys, conducted by the School of International Arbitration, Queen Mary University of London, 2013.
4 See BORN, Gary. International Commercial Arbitration. 2 ed. Kluwer Law International, 2014. p. 2.
5 See MARGHITOLA, Reto. Document Production in International Arbitration *In*: International Arbitration Law Library. v.33. p. 129.
6 See MARGHITOLA, Reto.Idem. p. 130.
7 See MARGHITOLA, Reto.Idem. pp. 137-138.
8 See GAILLARD, Emmanuel. The Present – Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice'. In: VAN DEN BERG, Albert Jan. Arbitration: The Next Fifty Years, ICCA Congress Series. v. 16. p.68. There are actually three different perspectives as to the source of legitimacy of international arbitration. For the purpose of this paper, the adoption of a transnational representation is due in view of attempt to reach as many judicial orders as possible. See also Redfern and Hunter. International Arbitration, 6 ed. Kluwer Law International; Oxford University Press, 2015. p. 355
9 See International Arbitration Surveys, conducted by the School of International Arbitration, Queen Mary University of London, 2010.
10 BORN, Gary. International Commercial Arbitration. 2 ed. Kluwer Law International, 2014. p. 1986.
11 BORN, Gary. Idem. P. 1987.
12 Brazilian Arbitration Act. Article 13, §6: "§ 6º No desempenho de sua função, o árbitro deverá proceder com imparcialidade, independência, competência, diligência e discrição."
13 The IBA Guidelines on Conflicts of Interests provides as its fundamental principle that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator. See the IBA Guidelines on Conflicts of Interests, 2014.
14 See the IBA Guidelines on Conflicts of Interests, 2014; MOURRE, Alexis. ¿El Sistema actual de la revelación de conflictos funciona? ¿Se debe reformar? In: Anuario Latino Americano de Arbitraje. n. 3, 2014. p. IX.
15 See BORN, Gary. International Commercial Arbitration. 2 ed. Kluwer Law International, 2014. p. 1991.
16 See GAILLARD, Emmanuel. Aspectos Filosóficos del Derecho del Arbitraje Internacional. Bogotá: Pontificia Universidad Javeriana, 2012. p. 135; BAPTISTA, Luiz Olavo. Constituição e arbitragem: dever de revelação, devido processo legal. *In*: Revista do Advogado. v. 119. pp. 108-109.
17 2013 UNCITRAL Rules.
18 2013 UNCITRAL Rules.
19 See again BORN, Gary. International Commercial Arbitration. 2 ed. Kluwer Law International, 2014. p. 2
20 See again BORN, Gary. Idem. p. 62
21 See 2013 UNCITRAL Rules and the IBA Guidelines on the Taking of Evidences in International Arbitration, 2010.
22 See again BORN, Gary. International Commercial Arbitration. 2 ed. Kluwer Law International, 2014. p. 62
23 See HANEFELD, Inka; HOMBECK, Jörn. International arbitration between standardization and flexibility – Predictability and flexibility seen from a client's perspective. *In*: German Arbitration Review. Kluwer Law International, 2015, v. 13. i.1. p. 23.
24 See Redfern and Hunter. International Arbitration, 6 ed. Kluwer Law International; Oxford University Press, 2015. pp. 356-357.
25 See WAINCYMER Jeffrey. Procedure and Evidence in International Arbitration. Kluwer Law International, 2012. p. 756. See also HANEFELD, Inka; HOMBECK, Jörn. International arbitration between standardization and flexibility – Predictability and flexibility seen from a client's perspective. *In*: German Arbitration Review. Kluwer Law International, 2015, v. 13. i.1. p. 24.
26 See HANEFELD, Inka; HOMBECK, Jörn. International arbitration between standardization and flexibility – Predictability and flexibility seen from a client's perspective. *In*: German Arbitration Review. Kluwer Law International, 2015, v. 13. i.1. p. 23.

[BIOGRAPHIES]

The Founders

PEDRO SOUSA UVA

Pedro Sousa Uva is an international dispute resolution lawyer focused in international arbitration and cross-border disputes. He is Of-Counsel at the Lisbon based full service law firm pbbr. Pedro headed the arbitration and litigation department of the firm until October 2018.

As to date, Pedro has gathered over 15 years of work experience in Dispute Resolution. Before joining pbbr, he handled at Miranda law firm international disputes, often based in former Portuguese colonies in Africa or Asia. Seconded to the London office of Wilmer Hale in 2009/2010, Pedro worked on international arbitration matters alongside a worldwide team of lawyers. He started his career at Abreu Advogados, where he represented foreign and national clients in court and arbitral proceedings for nearly a decade.

Pedro holds a LL.M degree in Comparative and International Dispute Resolution from the School of International Arbitration (Queen Mary University of London). Before graduating in Law at the Lisbon Law School of the Portuguese Catholic University (2003), he studied as a scholarship student International Arbitration at the Katolieke Universiteit Leuven in Belgium in 2001/2002. Pedro is a regular speaker on arbitration events and hosts conferences, including São Paulo, Vienna and Lisbon. He was one of the invited lecturers for the 7th Post Graduation Course of Arbitration at the University Nova, in Lisbon (2018).

Pedro co-chaired the Sub40 Committee of the Portuguese Association of Arbitration (APA) from 2013 to 2018, being an active member of the Co-Chairs Circle (CCC). He was a member of APA's Ethics Committee. Pedro co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA).

During the last years, Pedro authored several articles on international and national arbitration topics, notably "*International Arbitration Shifting East*", published in Iberian Lawyer in December, 2017, "*Getting the Deal Through - Arbitration 2016*" (co-author, Portugal; 11th Edition), "*World Arbitration Reporter -2nd Edition*" (co-author, Jurisnet 2014), "*Interim Measures in International Arbitration* - Chapter 30 (Portugal)" (co-author, Jurisnet 2014) and "*Portugal finally approves its new arbitration law*" (co-author, Revue de Droit Des Affaires Internationales / International Business Law, no. 3, June 2012). His dissertation was published in the American Review of International Arbitration under the title "A *Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*".

Pedro has been recently considered a leading individual in Portugal by *Who's Who Legal (WWL) – Arbitration 2019*.

The idea for YAR was born in London and put into practice by the co-founders Pedro Sousa Uva and Gonçalo Malheiro in January, 2011. It is a pioneer project as it was the first under40 international arbitration review ever made.

[BIOGRAPHIES]

The Founders

GONÇALO MALHEIRO

Gonçalo Malheiro is an associated partner of Abreu Advogados. He focuses his work on Arbitration and Litigation.

With around 20 years of experience, Gonçalo has a broad expertise in handling arbitration, civil, commercial and criminal litigation. He has represented foreign and national clients before Tribunals and Courts.

He has also handled numerous contract disputes including claims arising out of sales of goods agreements, distribution arrangements, unfair competition matters, banking and insurance, real estate, franchising disputes and corporate matters.

Gonçalo completed his LLM at Queen Mary – University of London (School of International Arbitration) and published his dissertation about interim injunctions in Portuguese Arbitration Law and a compared analysis with different jurisdictions.

Before, he already had attended a Summer Course at Cambridge University.

Between 2012 and 2015 he was Chairman of the Young Member Group of the Chartered Institute of Arbitrators and is currently member of the Chartered Institute of Arbitrators.

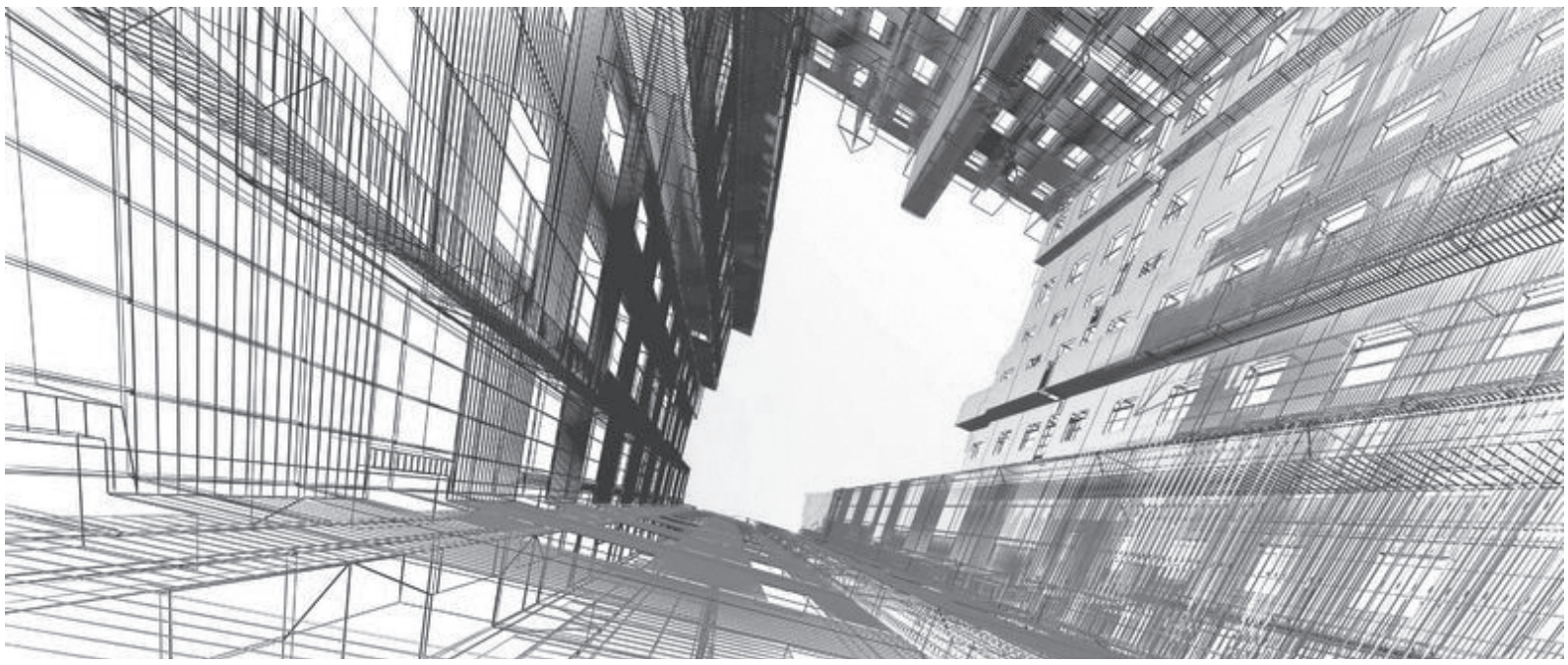
Gonçalo attended the 1st Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry in April 2015.

He has been a speaker in several national and international conferences focused on arbitration.

Besides publishing in English and Portuguese regarding various arbitration matters, Gonçalo is also Co-Founder of *YAR* - Young Arbitration Review,.

Gonçalo also co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA), of which he is a member.

Gonçalo published recently articles about arbitration in Portuguese speaking countries and recently about rules of evidence in arbitration for the book “La prueba en el procedimiento arbitral”.



[BIOGRAPHIES]

KIRAN NASIR GORE

Kiran Nasir Gore focuses her practice on U.S. and transnational dispute resolution. She specializes in complex civil and commercial litigation, international commercial arbitration, investor-state dispute resolution, litigation in aid of arbitration, and global investigations. Her experience spans a variety of industries, including non-profits, luxury goods, medical devices and pharmaceuticals, natural resources, energy, shipping, and transport. Kiran obtained her J.D. at Brooklyn Law School and her B.A. magna cum laude at New York University's Gallatin School of Individualized Study.

Kiran has previously served as a Senior Associate in the Washington, DC office of Three Crowns LLP (2014-2017) and as an Associate in the New York office of DLA Piper LLP (2010-2014). She currently serves as an Independent Counsel and Legal Consultant (2017-Present), Professorial Lecturer in Law at The George Washington University Law School (2018-Present), and Lecturer at New York University's Global Study Center in Washington, DC (2019-Present). She can be contacted at kiran.gore@gmail.com

JOÃO LAMY DA FONTOURA

João Lamy da Fontoura's practice focuses on Public Law and Dispute Resolution. João has steadily worked on cases concerning markedly the judicial review of administrative action, public procurement disputes, breach of contract or disputes on the marketing of generic medicinal products.

He has also taken part in international arbitration proceedings under the rules of the International Chamber of Commerce and the OHADA.

João is post-graduated in Administrative Litigation and in Arbitration and has published a number of articles on Constitutional Law, European Union Law and Public Procurement.

He is a member of the Portuguese Arbitration Association and of several young arbitration practitioners' fora and of the panel of arbitrators of the Centre for Administrative Arbitration since 2015.

DR. BENJAMIN LISSNER

Benjamin Lissner is a Partner in the dispute resolution practice group of CMS Germany. He specializes in national and international arbitration as well as in other types of alternative dispute resolution. He acts as counsel and arbitrator, in particular in post-M&A disputes as well as in commercial disputes and disputes relating to plant construction and involving technical matters. He is experienced in all major arbitration and ADR rules (e.g. DIS, ICC, Swiss Rules, VIAC, SIAC, UNCITRAL and KCAB). Clients are large- and medium-sized companies, including Asian and in particular South Korean enterprises. Benjamin joined CMS in 2009 and became Partner in 2018. In 2015, he was also seconded to the leading international arbitration team of the law firm Bae, Kim & Lee in Seoul, South Korea.

DERMOT FLANAGAN

Dermot Flanagan S.C. was called to the Bar of Ireland in 1987 and appointed Senior Counsel in 2000. Mr. Flanagan is a Fellow of the Chartered Institute of Arbitrators and acts as mediator, arbitrator and in expert determinations. He practices from the Law Library, Dublin & as an arbitrator/mediator from 33 Bedford Row, London. Mr. Flanagan has particular experience in public and private infrastructure disputes. His practice experience covers road schemes, landfill, marine and wastewater/water; metro; airport and strategic development zones. Mr. Flanagan is a member of the panel of Arbitrators of the Law Society of Ireland and the Dispute Resolution Authority of the Gaelic Athletic Association. He has recently been appointed as Judicial Chair to Sport Dispute Solutions Ireland (SDSI).

BERNARDO CARTONI

Bernardo Cartoni is a double qualified lawyer (Italy and Poland), Founder and Managing Partner of Kancelaria Prawnicza Bernardo Cartoni i Wspólnicy, boutique law firm based in Warsaw and Rome. Bernardo is a Fellow of the Chartered Institute of Arbitrators and he is listed in the SHIAC Panel of Arbitrators, in the HKIAC List of Arbitrators and he is also member of several arbitral institutions spanned all over the world (LCIA, SAC, AIA, AtlAS, ASA, Delos, MCN, Lewiatan, etc.).

Bernardo has also written some papers on arbitration-related issues (the latest ones are about: a) Third Party Funding in Hong Kong and Singapore and b) Witness Preparation). He focuses in international disputes (arbitration and litigation both) regarding commercial trade, M&A, IP rights, construction and maritime law. He assists in contracts negotiations, too. Bernardo regularly serves as volunteer arbitrator in the Vis Moot and in the FDI Moot. Currently, he is studying in order to be qualified as Solicitor in England and Wales.

ARRAN DOWLING-HUSSEY

Arran Dowling-Hussey was called to the Bar of Ireland in 2003. Mr. Dowling-Hussey is a Fellow of the Chartered Institute of Arbitrators ('CIArb') and holds a Diploma In Arbitration Law and International Commercial Arbitration.

He acts as an adjudicator, arbitrator and mediator practising from the Law Library, Dublin and 33 Bedford Row, London. Mr.Dowling-Hussey has a broad background in civil and commercial law but his work often involves construction law. He is co-editor of the Construction, Engineering and Energy Law Journal of Ireland and the co-author of three editions of Arbitration Law the leading Irish textbook on the subject published in 2008, 2014 and 2018. Mr. Dowling-Hussey is a member of the CIArb Board of Trustees and a former member of their Board of Management.

YASHASVI TRIPATHI

Yashasvi Tripathi received Master of Laws (LL.M.) from New York University School of Law in May 2018. Based in New York, she is an enthusiast of international commercial and investment arbitration. She pursued courses in international arbitration and litigation in LL.M. She authored three research papers in the field of international arbitration and commercial litigation during the program.

She has contributed to Kluwer Arbitration Blog as an author. She has cleared the New York Bar Examination, February 2019 and is a registered advocate in India since July 2017.

She completed B.A.LL.B (Hons.) from National Law University, Delhi in June,2017. During the program, she interned at the top law chambers and law firms of India, including Shardul Amarchand & Mangaldas, AZB & Partners, Trilegal and Khaitan. She also interned with a judge at the Supreme Court of India, with the former Additional Solicitor General of India, and a Senior Advocate at the Supreme Court of India, where she extensively worked on commercial law and arbitration matters at the High Court of Delhi and the Supreme Court of India.

Further, during the B.A.LL.B program, she was appointed as student editor of two international publications, viz, *Indian Yearbook of Comparative Law,* pub. by Oxford University Press and *International Journal of Transparency and Accountability in Governance, 2015*. She is the recipient of "The Best Memorial Award" at *13th Henry Dunant Moot Court Competition.*

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Parita Goyal is a qualified lawyer from India. She is currently pursuing her LLM from Queen Mary, University of London (Russel Group).

Her specialism is Comparative and International Dispute Resolution. Prior to this she did her Bachelors' in Law and her undergraduate degree from Symbiosis International University (India) and University of Delhi (India) respectively.

She has been an active member of NGO's and voluntary work, and has also taken up various duties of responsibility at University level. She aims at working at an international law firm for more exposure and experience which will help her diversify her profession in the field of dispute resolution.

MARIANA DE ARAÚJO M. LIMA DI PIETRO

Mariana obtained her bachelor's degree in Law in the University of São Paulo (USP – Brazil). She is specialist in IP Law (IICS – São Paulo, Brazil) and European Law (Universidad Alcalá de Henares – Spain).

She has also obtained a master's degree in international law in the University of São Paulo (USP – Brazil). She is an experience attorney, acting in complex litigation and arbitration cases, involving IP rights, investment law, corporate law, infrastructure, contract law, civil liability and international trade.

She is complex litigation and arbitration partner in the law firm Fuchs & Lima Di Pietro Advogados.

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