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Commercial and Investment Arbitration: How Different are they Today?

The Lalive Lecture 2012*

by KARL-HEINZ BÖCKSTIEGEL**

ABSTRACT

This text of the Lalive Lecture 2012, as adapted for publication, examines the common denominators and differences regarding the major aspects of commercial and investment arbitration. It does so in identifying those issues and criticisms mostly discussed in recent years and provides the author’s views based on his practical experiences as an arbitrator in many cases of both commercial and investment arbitration under rules such as the ICC, LCIA, SCC and others created for commercial arbitration and such as ICSID, the ECT, NAFTA and CAFTA created for investment arbitration. In particular, the following issues are discussed:

The Legal Culture, the Legal Framework and the Applicable Law, the Selection of Arbitrators, Jurisdiction, Case Management, Confidentiality or Transparency, Predictability and Consistency of Decisions, and Perspectives for the Future.

I. INTRODUCTION

Commercial arbitration has, of course, a tradition of many centuries, both at the domestic, but also at the international level. Investment arbitrations have also existed to some extent for quite some time as we know from older cases. But it became a widely used general field of international dispute settlement only when the first bilateral investment treaties (BITs) were concluded starting in 1958 and when the
World Bank initiated the ICID-Convention in 1965. And even then, I remember, Aaron Broches, as the ‘father’ of the ICSID Convention, was very disappointed when ICSID for quite some time only had about one case per year. Since then, the scenario has changed completely. Investment arbitration is by now chosen as the dispute settlement mechanism in thousands of treaties and investment contracts and leads to hundreds of cases per year in practice between states and foreign enterprises.

This development has obviously had its impact on the practitioners of arbitration. Many have stayed in commercial arbitration exclusively. Other colleagues have come from public international law as academics or diplomats and became active only in investment arbitration. But many of us find ourselves now practicing both in commercial and investment arbitration. In my observations today, I will try to highlight some legal issues and practical experiences that appear to me when comparing these two fields of arbitration.

Distinguishing between commercial and investment arbitration may sometimes already be difficult or misleading. Quite often disputes concern a contract between a corporation created by a foreign investor in a state on one side and on the other side a state enterprise. Such a contract will contain what one would consider a ‘normal’ arbitration clause referring to an institution of commercial arbitration. However, a closer look shows that it is really an investment dispute. A recent example from my own practice is our ICC award of last December between daughter companies of Exxon Mobil and PDVSA in Venezuela which was published immediately. I might add that in that case, we had a scenario which is also found frequently nowadays, namely that the investor starts additionally a parallel BIT arbitration to be on the safe side.

II. THE LEGAL CULTURE

When observing a global system of dispute settlement, before even looking at the legal framework, one has to realize that the national and international environment as provided by the political system, the involved sections of society, the professional background of the entities and persons involved, has a strong impact on the legal framework and its implementation.

Those of us who have done arbitrations with parties and counsel and arbitrators from many regions outside Europe such as Asia, the Middle East or Latin America, will remember that quite often one encountered predispositions, evaluations, and solutions which one had not thought of before, were rather surprising, and forced one to rethink and change the approach to a problem. On the other hand, a divergence in ethical standards in international arbitration remains and does cause some difficulties.

In my own practice, I noticed that particularly during my time at the Iran-United States Claims Tribunal at The Hague involving some 4,000 cases from the two states that were and still are bitter enemies and had and have no diplomatic relations. The difficulties stemming from this political background appeared in these cases similarly both in those many that were commercial arbitrations and those that
were investment arbitrations. Perhaps this is due to the fact that they were all processed under the same adapted UNCITRAL Rules.

In the practice of today’s arbitrations, the most obvious differentiation is that between the common law system and what is normally called the ‘civil law’ system of continental Europe, both systems adopted by many other states throughout the world. In commercial arbitration at the national level, I see that the traditional particularities of both systems are widely maintained by counsel and arbitral tribunals. At the international level, I see less of a divide and more of a convergence between common law and civil law resulting from the recent years, though perhaps slightly more in investment arbitration.

In commercial arbitration, differences in the legal culture become particularly relevant, because most institutional arbitration rules provide – as Article 21.2 of the new ICC Rules – that the tribunal has to take into account the relevant trade usages which may turn out to be quite different between countries and regions of the world. On the other hand, major differences in the legal culture have an impact in investment arbitration due to the very different role that governments and other state institutions have, either due to the constitutional framework or due to their application in practice, in a range of states between what some might consider a democracy western style at one end or dictatorial systems at the other.

III. LEGAL FRAMEWORK AND APPLICABLE LAW

An easily recognized difference between commercial and investment arbitration are the legal frameworks in which they function.

As far as public international law is concerned, for commercial arbitration, the only really relevant treaty is the New York Convention which ‘only’ deals with the recognition and enforcement of foreign arbitral awards, while the other traditional instruments play no major role today. On the other hand, for investment arbitration, treaties of public international law provide the fundamental framework, particularly bilateral instruments as the more than 2,000 BITs, and multilateral instruments as the ICSID Convention, the Energy Charter Treaty, and regional instruments such as NAFTA and CAFTA.

European Law may be relevant both in commercial and investment arbitration though in different ways. For commercial arbitrations, quite frequently the issue of mandatory rules such as antitrust law and their qualification as public policy becomes relevant. For investment arbitration, a wide range of issues and discussions has been initiated by the Lisbon Treaty regarding its conflicts with existing BITs and the future competence to conclude new BITs by EU Member States. Since I am presently an arbitrator in three respective cases, I cannot submit any personal views at this stage.

National law plays different roles. In commercial arbitration, procedurally its mandatory provisions rule the arbitrations at the place of arbitration, and a national substantive law is in the great majority of cases what the tribunal has to apply. Exceptions I have seen in practice were contracts excluding any national law and referring to the Unidroit Principles or to various combinations or common
denominators of two or several national laws. These latter choices of law clauses obviously do not make the work of the arbitrators easier, but are understandable where the parties come from very different legal cultures and cannot agree on one domestic law. Here in Geneva I should mention that, in such cases, Swiss law is often the compromise they can agree on.

In investment arbitration, national law plays a different role. Procedurally its mandatory provisions are of relevance if the arbitration is not ruled by treaties such as ICSID or NAFTA, but chosen to be under rules of non-governmental institutions such as the ICC or the LCIA which, in turn, have to respect the mandatory law at the place of arbitration.

As a substantive law, national law may become applicable in several ways: In investment contracts between the state and the foreign investor one will mostly have an express reference that the substantive law of the host state is applicable. However, that is not necessarily the end of the story. Such a choice of law clause will generally have to be interpreted as also meaning that the investor has to accept later changes of the domestic law. But as we know from many cases, such a conclusion will often be rejected by the investor claiming that the state changed its law with the intention to improve its own position and delete or devalue contractual rights of the investor. This is rather obvious when a law expropriates, but less clear where a similar effect is reached by new tax or other economic laws. Similar difficulties appear in contracts with state enterprises when the state changes the law or issues administrative acts which either improve the contractual position of its state enterprise to the detriment of the investor or prevent the state enterprise from fulfilling certain contractual obligations which it then justifies by referring to the state’s acts as force majeure. Some of you know that I have researched and published on this issue and I do not want to repeat that here.

However, in this context I may refer to a decision in a recent arbitration which I chaired. In an investment arbitration under the ICC rules, where our decision is not yet published and which I can only mention in the abstract, we accepted a later change of a telecommunication law which introduced a mandatory majority of nationals of that state in telecommunication companies depriving the investor of its majority, because the law affected all such companies and other states have similar laws for reasons of national security.

But also in investment arbitrations under treaties, national law may have its relevance. For ICSID arbitrations it may suffice to recall Article 42 of the Convention which expressly refers to the law of the host state in addition to the rules of international law. Similar, though varying, provisions are found in most BITs and also in the new Model BIT which the United States have just published in April of this year.

On this basis, the foreign investor will generally have to accept that its investment is ruled by the laws of the host state, and again this will include any later changes of the law. However this is subject to the limitations provided by the treaty. Applications or changes of the law may be breaches of the treaty under certain circumstances. The new Trilateral Agreement between China, Japan, and Korea seems to express a specific concern in this regard. It provides in its Article 3 on
national treatment that ‘treatment granted to an investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made’.

From arbitration practice, let me again give an example from one of my recent cases. In a BIT-case under the SCC rules, our decisions in the Rosinvest Case have been published. Our Award on the merits is the first one in the well known YUKOS-cases. We came to the conclusion that, while recognizing the Russian State’s prerogative to issue, change and implement laws on taxation and insolvency, the cumulative effect of the various measures taken against YUKOS, compared to the treatment afforded to its competitors, could only be interpreted as an expropriation. I should add that we went on to only grant a rather small amount of damages because we considered the purchase of the shares by the hedge fund owning Rosinvest as a speculative investment. Rosinvest then decided not to defend the award before the Swedish courts.

Now, within the legal framework, turning to the arbitration rules chosen by the parties, if such rules are contained in treaties, they are only applicable to investment arbitration. However, the rules of non-governmental institutions originally created and used only for commercial arbitration are today also chosen by the respective parties, states as well as investors, for investment arbitration. For some time, only the UNCITRAL Rules were frequently included as an alternative in treaties. But now we find investment arbitrations under the rules of the ICC, the LCIA, the SCC and other national arbitration institutions originally created and intended only for commercial arbitrations. And indeed, if states turn away from ICSID, as Venezuela has done by its denunciation of the ICSID Convention on 24 January 2012, they will have to select other arbitration rules for their disputes with foreign investors. In fact, Venezuela had already done so earlier. A recent example is our ICC Award of last December in the Exxon Mobil case which was published immediately and granted damages against Venezuela based on a choice of the ICC Rules in 1997. As you will know, traditionally about 10% of all ICC cases involve state parties. The new ICC Rules of 2012 take this into account. And, in the last two years an ICC Task Force on Arbitration Involving States and State Enterprises has examined the respective specific issues in detail and a Report is just being published.

IV. SELECTION OF ARBITRATORS

I now turn to the selection of arbitrators. The parties consider that as one of the most important decisions in their arbitration cases, and it is certainly one of the most discussed topics.

One of the generally mentioned major reasons for choosing commercial arbitration over the national court system is indeed that, in arbitration, the parties can select judges of their own choice and confidence. In view of the very wide variety of fields of commerce such as trade, manufacturing, construction, service, finance, insurance or transport, it is obviously important for the parties to be able to select arbitrators well acquainted with such fields.
In *investment arbitration*, the situation is somewhat different. The usual issues in such disputes are more limited, since the bilateral as well as multilateral investment protection treaties contain very similar protective provisions dealing with expropriation, fair and equitable treatment, discrimination and sometimes contracts by umbrella clauses. In view of this, the typical expertise required from arbitrators is one of public international law and particularly its application to such protection.

In practice, the result is that many arbitrators of commercial arbitration do not feel comfortable or are not chosen by the parties in investment arbitrations, and vice versa, many experts of international law selected for investment arbitration are not active in commercial arbitration. Generally, the number of arbitrators active in investment arbitration is much smaller than that in commercial arbitration. However, as you know, there is quite a group of arbitrators who do both kinds of arbitration.

One word on conflicts of interest and challenges of arbitrators. Both in commercial and in investment arbitration, their number has grown considerably. The IBA Conflict Guidelines, which are presently under study for an updating, are helpful for both areas of arbitration. The typical conflict and challenge in commercial arbitration will be based on former or present contacts of the arbitrator’s law firm with one of the enterprises participating as a party. While such reasons may also play a role in investment arbitration, there more often the challenge will be based on former arbitral appointments. In this context, it must be noticed that in recent years some parties or their counsel seem to have focused on candidates who have been appointed frequently by the same party, be it private or state, or more generally either by investors or by states, and whom they consider as having developed a profile favorable to one side. As far as I can see, challenges based on such multiple appointments have so far not been accepted.

Some have suggested that, in view of such difficulties, all three arbitrators should be appointed by an institution. I do not agree with that proposal. One of the major reasons for the parties to agree on arbitration is that they have an influence to select judges of their own confidence. This cannot be replaced by an institution which cannot have the same detailed knowledge of all relevant circumstances of the particular case at hand at the beginning of the procedure.

If the parties or the party-appointed arbitrators cannot agree on the choice of a chairperson of the tribunal, this appointment is the task of the arbitral institutions. Both in commercial and investment arbitration, the respective procedures differ per institution. There is no need to describe them in our context. Normally in commercial arbitration, the pool from which the chairperson can be selected is not limited by any specific list and is wide in practice. In investment arbitration, for reasons already discussed, the pool of realistic candidates to chair is smaller. Within that more limited number, specific difficulties have come up in recent years for ICSID to appoint chairpersons for its growing number of cases, because they have to be appointed from the ICSID list of arbitrators. The Member States often fill their slots for this list on the basis of political considerations rather than qualification for that function. The result is that ICSID considers that many of the
persons on its list cannot be considered to have the experience to be entrusted the
difficult and responsible function of chairing an arbitral procedure. I can
personally appreciate this approach from my own involvements in appointing
chairpersons in my functions as president of the LCIA and of DIS and as
appointing authority for the PCA where we always felt we owe the parties an
appointment of a person with sufficient proven experience. In practice this means
that ICSID has frequently difficulties to find suitable candidates to chair who can
still accept another case beyond their already existing case load.

V. JURISDICTION

Jurisdiction is an issue which plays quite different roles in commercial and
investment arbitration.

In commercial arbitration, jurisdictional disputes are less frequent. They mostly
concern the scope of the contractual arbitration clause, particularly whether it
covers also non-signatories within a group of companies or behind a general
contractor or after an assignment of the contract.

In investment arbitration, there is a much wider scope of jurisdictional issues and we
have much more frequently jurisdictional objections which may result in a
bifurcation of the procedure.

There, the consent of the parties to arbitration is mostly expressed in a treaty of
public international law such as a BIT or the ICSID Convention. Thereby, general
principles of treaty interpretation, particularly the Vienna Convention, will
become relevant in much detail. The state’s consent to arbitration may depend on
the interpretation of:

- whether an ‘investment’ existed;
- or whether the Claimant is a national of the alleged home state, often as a
  company which has been created there by the mother company for the
  only reason that this new home state has a BIT with the respondent state;
- or whether a national of that home state really owns and/or controls the
  allegedly expropriated company.

A particular and much discussed question is whether a MFN-clause in a BIT can
provide jurisdiction, if the BIT between the home state and the host state contains
no or no sufficient express consent to arbitration, but contains an MFN clause. If
that link leads to another BIT which does contain a wider consent to arbitration,
could that provide jurisdiction for the dispute at hand? While we have no time to
go into detail in this regard, let me at least say that in my view there is no generally
valid answer. As we have elaborated in our first Rosinvest Award on Jurisdiction,
one has to take into account the particular circumstances of the two relevant BITs.
In our case, this examination leads us to accept that the MFN clause could indeed
be a basis for our jurisdiction.
Let me also mention a rather unusual dispute in which we had to examine jurisdiction under a BIT versus the New York Convention. This was the ICC arbitration in the Kaliningrad Case that became public through the challenge procedure before the French courts which resulted in the court confirming our award and dismissing the challenge. The investor had argued that, by recognizing and enforcing an LCIA award, the courts of the respondent state in our case had expropriated property of the investor for which it claimed damages under the BIT. Again I cannot go into the details of this interesting and complex case. But we concluded that it was the clear intention and result of the New York Convention that no further appeals should be available against court decisions recognizing and enforcing a foreign arbitral award other than those expressly mentioned in the Convention itself. Accepting such court decisions as possible expropriations under a BIT would be in conflict with that intention and result and even an examination on the merits would open Pandora’s Box for such a further and unwarranted appeal mechanism against such court decisions. In so far as thereby a conflict arises between the BIT and the Convention, by using the tools of interpretation of public international law on conflicts between treaties, we came to the conclusion that the New York Convention must prevail over the BIT. Therefore, we refused to accept our jurisdiction under the BIT.

VI. CASE MANAGEMENT

Case management has, for good reason, received great attention in recent years in publications and conferences, but also in practical implementation by rules as can be seen in the revision of the ICC Rules effective from 1 January 2012.

The practical conduct of arbitral proceedings is of course first of all subject to any mandatory provisions in the applicable arbitration law, be it a national law at the seat of arbitration for commercial arbitration, or applicable treaties for investment arbitrations. However, these normally contain very few and only rather fundamental rules regarding the procedure such as the due process principle.

More details are provided in the applicable arbitration rules. These differ in the depth they address regarding the conduct of the proceeding irrespective of whether used for commercial or investment arbitration. All provide shortly for the necessary procedural steps. But some provide further details such as Article 22 of the LCIA Rules defining a list of additional powers of the tribunal. Recent revisions seem to go into further details such as the 2010 version of the UNCITRAL Rules which are the product of an UNCITRAL Working Group efficiently chaired by Michael Schneider.

But both the applicable law and arbitration rules leave a wide discretion to the tribunal on how to conduct the proceeding. And indeed this is where arbitration can play to its specific advantages giving the tribunal the opportunity, and also the task, to shape the procedure in a specific way best fit to the dispute at hand.

Looking at the practice in commercial and investment arbitration in recent years, I notice a strong trend of harmonization. Using this discretion for case management, arbitrators seem to take into account the wide experience gathered
in international commercial arbitrations over many years and use them to manage both new commercial and investment arbitration proceedings in rather similar fashion. However, some differences can be noticed in practice:

- It is not surprising that arbitrators coming from commercial arbitration tend to involve the parties and their counsel more in a less formal dialogue before deciding on various questions of case management.

- On the other hand, arbitrators in investment arbitration who have no experience in commercial arbitration may sometimes not be aware of certain procedural options not used at the International Court of Justice, but well established in commercial arbitration.

- The involvement of states, even if represented not only by a ministry but also by a law firm, tend to make the proceeding more formal.

- State parties will often request longer periods for submitting their memorials and evidence, because the decision process between counsel and the various state agencies involved may be more complex and time consuming.

- For the same reason, longer periods may also have to be granted for comments on procedural questions raised by the tribunal.

- Lack of familiarity with the usual conduct of international arbitration proceedings may raise difficulties. For a private party in commercial arbitration this may occur if it chooses not to hire outside counsel but be represented by its in-house counsel. In investment arbitration, this may occur if the state party decides to be represented only by relevant ministries and not by a law firm. In both situations, if I chair, I normally try to find a way to tell the parties that saving the expenses for an experienced law firm may not be a good idea in their own interest.

- There are exceptions: When I was at the Iran-US Claims Tribunal, Iran was mostly represented by the Bureau it had set up at The Hague. As our almost 4,000 cases were processed over time, the members of that Bureau gathered a wider experience in the process than many of the American law firms for whom, at that time in the 1980s, international arbitration was by no means a familiar process. And more recently, I have noticed that Argentina, due to its many investment arbitration cases, has gathered an impressive expertise in its ministerial team in the process.

- Collection and production of evidence may also show some differences between commercial and investment arbitration. For commercial arbitration, the well known IBA Evidence Rules, particularly their revised edition of 2010, provide help for most upcoming questions. In investment arbitration, though here as well a reference to the IBA Rules is commendable, and in fact is often found in the procedural order no. 1 at the beginning on the conduct of the proceedings, specific difficulties may arise. The reference in IBA Rule 9(f) to ‘evidence that has been classified as secret by a government’ does not always solve the problem. As an example from practice, documents or other evidence is sometimes seized by the
government in what it declares as criminal investigations and which the investor calls an intimidation and manipulation of the evidence.

This list may be sufficient to show that, while case management tasks and options are rather similar between commercial and investment arbitration, many differences remain.

VII. CONFIDENTIALITY OR TRANSPARENCY

A traditional reason often mentioned for the choice of commercial arbitration over court procedures is that arbitration is confidential. And this seems still to be an important consideration for many private enterprises today.

For investment arbitration, we have a mixed picture in that context. The traditional instruments such as the ICSID Convention and most BITs say little or nothing on whether the proceedings and awards shall be treated as confidential. But in practice, today, little confidentiality is left in investment arbitration.

While ICSID still needs and regularly asks for the agreement of the parties for a publication of the award in a case, irrespective of the answer of the parties, almost all awards are published. The same is true for awards in investment arbitrations under the other rules I have mentioned such as those of the ICC, the LCIA or national arbitral institutions. They are published in one of the many sources of information we now have on the internet mostly without an identification of the source. One can only speculate that parties, law firms or persons provide the information, because they consider that this serves their interests in some way. And, of course, I admit personally that I do not refrain from looking at these publications.

Irrespective of the legal situation, good reasons can be and have been submitted for a greater transparency in investment arbitration, because it concerns interests of a state who in turn represents a people and society. The claims of their constituency and non-governmental groups to be informed and be able to provide an input is thus understandable.

For these reasons, many of the modern instruments either expressly provide for much greater transparency or the parties agree at the beginning of the proceeding in this regard. I remember when I chaired the very first NAFTA arbitration many years ago, it was still conducted in a rather confidential manner though the media reported on the case and later on our award. In my most recent NAFTA procedure, the Canadian Cattlemen Case, the hearing in Washington was open to the public and indeed transmitted live to Canada.

Later instruments such as the CAFTA Treaty provide expressly on such transparency. And, even beyond investment arbitration proper, the Softwood Lumber Treaty between Canada and the US which deals with one of the largest trade product between these two states and under which I chaired three cases between the two governments under the LCIA Rules, provides expressly that all memorials, the hearings, and procedural orders and awards of the tribunal shall be
open to the public. The most recent step in this direction is the new US Model BIT just published in April of this year. While it gives the parties of the arbitration the choice between ICSID, its Additional Facility Rules, and the UNCITRAL Rules or the rules of any other arbitral institution on which the parties agree, for all of these it provides in its Article 29 that all memorials, minutes, orders, hearings, and awards of the tribunal shall be open to the public.

Thus, regarding confidentiality and transparency, we have what is probably the most striking difference between commercial and investment arbitration. Permit me one personal comment in this context: While I do understand the good reasons for the increased transparency, in my experience it does not make the procedure more efficient. If they are open to the public, the parties’ written submissions, and perhaps even more their oral presentations in the hearing, tend to be less focused on the professional exchange with the tribunal, but rather tend to be become public statements. And also as an arbitrator in such public hearings, I noticed that my remarks would go beyond what I would normally say in addressing counsel, just to make sure that those in the audience less familiar with the details of the case and the media would not misunderstand.

VIII. PREDICTABILITY AND CONSISTENCY OF DECISIONS

Closely connected with the issue of transparency are the issues of predictability and consistency of arbitral decisions.

In commercial arbitration, the traditional confidentiality of not only proceedings, but also of awards, has often resulted in the complaint that no real knowledge of jurisprudence can be established by the legal community on how arbitral tribunals have decided on issues appearing in disputes. Indeed, it is obvious that parties and their lawyers, before starting a dispute, would like to have some idea how the disputed issues may be decided and thus how their chances are to prevail. In domestic court procedures, the legal community has a long tradition in collecting judgments and organizing the relevant information. This is so though their relevance may be different in the common law system with its precedents and in the civil law system where earlier judgments are considered but normally without any binding effect.

Institutions of commercial arbitration like the ICC have tried to improve the situation by publishing or permitting publications on procedural decisions and on awards without identifying the parties and identifiable details of the case. And the LCIA has recently even enabled a publication on its decisions on conflicts and challenges of arbitrators. But beyond that, publications on concrete cases and awards in commercial arbitration remain the exception and some kind of insider knowledge.

In investment arbitration, the situation is quite different. The practice I described of having almost all awards published either with or without authorization of the parties and the institution provides a vast volume of jurisprudence available to the
parties and their lawyers on which they can rely in preparing and evaluating their chances in new cases. Memorials of the parties will regularly refer the tribunal in the new case to earlier decisions of other tribunals on similar factual and legal issues.

And the arbitrators themselves will take up such references with great care and, if appropriate, look for further decisions of relevance. In this context there have been a number of publications on the question whether a system of precedent has by now developed in international arbitration. In fact, Gilbert Guillaume’s Lalive Lecture in 2010 addressed that issue. My own view is that, though arbitral tribunals should and do take into account earlier decisions on similar issues, there is clearly no system of precedent, not even within the ICSID system. But as a practical matter, I would feel that, if a tribunal finds out that an earlier tribunal or perhaps even several earlier tribunals have come to a certain conclusion, the new tribunal should only come to a different conclusion after very careful consideration of the earlier arguments and by explaining why it considers these as not convincing.

In this context, let me also recall the wide discussion we had at last year’s ICCA Conference here in Geneva on the question how investment arbitration should and does contribute to the further development of international law. Some will remember that esteemed colleagues like Emanuel Gaillard feel strongly that arbitral tribunals should make efforts in this regard when writing their awards. But some may also remember that I expressed the opinion, which I still hold today, that we should be very much aware that arbitral tribunals receive their authority and mandate from the parties and institutions which appoint them for the case at hand. And that mandate is to decide on the relief sought, and to consider all factual and legal issues relevant for that decision, no less, but also no more. When I ventured to simplify this approach by saying: ‘There are too many professors in arbitration’, I did not make friends with everybody in the audience. And I must admit that this simplification was not quite accurate, because I see not only arbitrators who are professors as I am, but also eminent partners of law firms falling for the temptation to write treatises on international law into their awards though their relevance for the decision reached is hard to understand.

To avoid misunderstanding: Of course, I accept that arbitral awards contribute to the further development of the law by being considered by the parties, their lawyers and later tribunals. And I would hope that my own awards are persuasive enough to convince later tribunals to go on a similar path. But that effect should come from arguments which the tribunal had to consider for its decision on the relief sought in its specific case, and not by obiter dicta for which it had no mandate.

Finally, a short note on the suggestions sometimes seen in publications, that more predictability and consistency of the jurisprudence could be reached, at least in the field of investment arbitration, by establishing either permanent tribunals or a second instance for appeal. Both ideas were floated, when some years ago, ICID had a general consultation with its Member States on possible improvements of its system. There, the vast majority of states were not in favor of either one of these ideas. I share that opinion.
In international arbitration, the parties, their counsel, and the institutions make many efforts to find the best candidates for their selection of arbitrators. It is hard to see, how a permanent tribunal could be composed of even better judges. Probably those who would find it attractive to accept to spend all their work time on such a permanent appointment would be those who are not in the first row of candidates considered by the parties and institutions.

The institution of an appeal mechanism has for good reason not been accepted either in practice. First of all, for the same reasons mentioned above, after the parties’ and the institutions’ efforts to select the very best arbitrators, it is hard to see how better persons could be found for such an appeal body. And second, one of the reasons to choose arbitration is that it leads to a decision as fast as possible contrary to the domestic court procedures with their two or three instances resulting in delaying a decision for years. This consideration is still valid, though today’s arbitration proceedings often do last too long for reasons we cannot discuss here. To avoid really major faults of a tribunal in procedure or substance, for commercial arbitration, national arbitration laws and the New York Convention provide options for corrective action. In investment arbitration we have similar options such as the Annulment Procedures in the ICSID Convention. But, though there may be room for improvement in detail, that very limited approach with very few grounds for revision is all we need and should have. And even there, as we know, many feel the scope of review has been widened too much in practice by some Annulment Committees.

IX. PERSPECTIVES FOR THE FUTURE

If we look forward from today’s situation as I have tried to describe it, the dynamic development of both commercial and investment arbitration in the recent past makes any prediction speculative.

Regarding commercial arbitration, I would think that domestic arbitration laws in many countries, be they industrial, emerging and third world countries, still offer much room for improvement. This may particularly be so for those countries which only in recent years have become major players in international trade. Developing the law, however, is not enough. As we see form the practice in many jurisdictions, the much more difficult task will be to make the national court systems fit for implementing the New York Convention and dealing with modern arbitration. The institutional rules used for commercial arbitration have, in regular intervals, been re-examined and revised in order to take into account new experiences from their practical implementation. This process will and will have to continue. Finally, I would expect that also in commercial arbitration, whether we like it or not, we will have more transparency by the modern online media.

Regarding investment arbitration, I expect that some of the criticism in recent years will continue and change the scenario. Presently, one of the forums in this regard is the OECD Roundtable on Freedom of Investment with a specific focus on investor-state dispute settlement. This field is much more exposed to the national and international political environment which changes frequently. Changes of government...
or of the political structures in states will, for understandable reasons, lead to conflicts with foreign investors and then to disputes and arbitrations. States will continue to need and try to attract foreign investment. They will only be successful in such efforts if they provide some legal security for such investments including the option for the settlement of disputes. But, on the other hand, as in commercial arbitration, parties who have been on the losing side in a number of arbitrations will see the fault in the system rather than in their own conduct. Nevertheless, as a result of the continuing growth of world-wide investments, I would expect investment arbitration to grow as well, but perhaps going to a greater variety of arbitration rules and institutions.

Finally, one safe expectation is that law firms and arbitrators will be kept rather busy in the future as well both in commercial and investment arbitration.
Mandatory Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability through Proper Procedural Choices

by S.I. STRONG *

ABSTRACT

Trusts and their civil law equivalents, often known as foundations or associations, play a large and increasing role in the global economy, holding trillions of dollars worth of assets and generating billions of dollars worth of revenue and trustees’ fees annually. Once considered nothing more than ‘mere’ estate planning devices, trusts are now more often seen in commercial rather than in private contexts, and often feature sophisticated financial institutions as professional trustees. With favorable tax laws in various off-shore jurisdictions making international trusts increasingly popular and hostile trust litigation reaching epidemic proportions, arbitration would seem to be many parties’ dispute resolution mechanism of choice.

To some extent, this is very much the case, with arbitration often being used to resolve conflicts between trusts and external third parties. However, arbitration of internal trust disputes – by far the more common type of concern in this area of law – is much more controversial and has been the subject of extensive and vigorous debate in the trust industry.

Although trust experts have written extensively on mandatory trust arbitration, the arbitration community has been strangely silent in these discussions, and this Article is among the first to consider the unique challenges facing future arbitration of internal trust disputes from the arbitral perspective. In so doing, this Article provides new insights on the types of procedures that are necessary to ensure procedural fairness in what is often a complex, multiparty proceeding. This Article also considers what steps settlors can take to improve the enforceability of an arbitration provision located in the trust itself and analyzes the only set of institutional

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rules targeted specifically toward trust disputes – the AAA Trust Arbitration Rules – by comparing the AAA approach to the newly identified best practices in this field and to certain related initiatives from the ICC and the DIS.

I. INTRODUCTION

Contemporary commercial practice often views trusts and their civil law equivalents, typically referred to as foundations or associations,1 as the functional equivalents of corporations and other business associations, at least in a number of important regards.2 As a result, many lawyers consider trust arbitration to be just another variant of commercial arbitration, a belief that is strengthened by the number of trusts that regularly appear as parties in arbitrations all over the world.3 Indeed, some of the most highly publicized cases to arise in international commercial arbitration in recent years have involved trusts.4

Although these matters gained a great deal of notoriety, none of the issues turned on the fact that one of the parties was a trust. Indeed, the irrelevance of the trust form to the arbitral proceedings would seem to reinforce the notion that trust-related arbitration is not in any way special.

Such a conclusion would be deeply misguided. In fact, the reason that these proceedings did not appear to be significantly different than standard commercial arbitrations is that they did not really constitute ‘trust disputes’ per se, arising, as they did, out of contractual relationships between trusts and unrelated third parties, and thus involving matters entirely external to the trusts themselves.


Mandatory Arbitration of Internal Trust Disputes

However, external third party disputes are not the only kind of trust-related controversy to arise, nor indeed are they the most common. Instead, ‘[m]ost trust disputes are internal disputes’ that address matters relating to the inner workings of the trust and involve conflicts between some or all of the various parties to the trust, including trustees, protectors and/or beneficiaries. These types of proceedings are much more problematic as a matter of arbitration law and procedure, and it is these types of disputes that are the subject of this Article.

One of the major difficulties associated with arbitration of internal trust disputes involves the mechanism by which such matters may be made subject to a pre-dispute arbitration agreement. Thus far, the only plausible means of doing so has been to place an arbitration provision in the trust itself. However, a number of objections have been raised in response to this practice. While matters relating to the jurisprudential propriety of mandatory trust arbitration have been discussed at length in the legal literature, one issue that has been largely ignored involves the

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6 See David Hayton et al., Underhill and Hayton Law Relating to Trusts and Trustees, 8.157–8.167 (18th ed. 2010); Langhem, Contractarazzi, supra n. 1, at 664; Wustermann, supra n. 5, at 36.

7 Pre-dispute agreements in the trust context are preferable to post-dispute agreements for the same reasons that

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8 Interestingly, efforts to include arbitration provisions in trusts are somewhat analogous to efforts to include arbitration provisions in the charter or by-laws of corporations as a means of requiring the arbitration of internal shareholder disputes. See Christian Norris, Underrooning en ADR, 55 (C.J.M. Klaassen et al., eds., 2011); Olivier Caprasse, Underrooning en ADR, supra, at 79; Gerard Meijer & Josefin Guzman, Underrooning en ADR, supra, at 117; S.I. Strong, Arbitration of Trust Law Disputes: Two Bodies of Law Collide, 45 Vand. Transnat’l L. Rev. (forthcoming 2012) [hereinafter Strong, Two Bodies Collide].

9 For example, some states require an arbitration provision to either be or be contained within a contract, and a trust may not be considered a contract per se. See Rachal v. Reitz, 347 S.W.3d 305, 309 (Tex. Ct. App. 2011), rev’d granted, 2012 Tex. LEXIS 487 (Tex. June 8, 2012); Duax v. Bueh, 125 Cal. Rptr. 3d 610, 612-13 (Cal. Ct. App. 2011), petition for review granted, 257 P.3d 1129 (2011). But see: New South Federal Savings Bank v. Andino, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2006) (noting “[m]utuality of obligations is not required for a contract to be enforceable under Mississippi law. Accordingly, this court is not persuaded that the agreement to arbitrate contained in the Deed of Trust is deficient’); see Strong, Two Bodies Collide, supra n. 8.

question of whether arbitration can provide the kind of procedures that are necessary to the proper resolution of internal trust disputes.

This lack of attention is problematic given that internal trust controversies give rise to a multitude of procedural challenges that are seldom, if ever, seen in other contexts. For example, trust disputes not only proceed in rem, such that an award will be binding on ‘all persons having adequate notice, whether or not they actually participate in the proceeding’,11 but can also involve parties who are unascertained, unborn or legally incompetent at the time the dispute arises.12 Parties to trusts may also require assistance with certain trust-related procedures known as judicial instruction and accounting that bear little resemblance to ‘normal’ types of arbitration.13

It is unclear why the arbitral community has not yet considered these issues in any detail.14 To some extent, it may be that the traditional isolation of trust law has meant that few specialists in arbitration were experienced enough in trust law to undertake this kind of analysis.15 Alternatively, it may be because the arbitral community does not believe that existing arbitral procedures need any amendment. Indeed, that was the conclusion reached several years ago by a working group formed by the International Chamber of Commerce (ICC) to consider whether the ICC should adopt any new procedures for use in trust disputes.16 However, the American Arbitration Association (AAA) has arrived at precisely the opposite conclusion, creating a dedicated set of rules – the AAA Wills and Trusts Arbitration Rules (AAA Trust Arbitration Rules) – especially for use in trust disputes.17

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12 See Langbein, supra n. 1, at 55–56.
13 For examples of how these issues might arise in practice, see infra nn. 206–208, 211 and accompanying text.
14 Virtually all analysis of trust arbitration has been conducted by experts in trust law and published in specialty journals for the trust industry.
15 See William M. McGovern et al., Wills, Trusts and Estates: Including Taxation and Future Interests, 626 (2010).
17 See AAA Wills and Trusts Arbitration Rules, effective 1 June 2009 [hereinafter AAA Trust Arbitration Rules], available at http://www.adr.org. The AAA Trust Arbitration Rules are in the process of revision, with a new version due out about the time this Article comes out in print. Unfortunately, the final language was unavailable at the time this Article went into production, so only general comments can be made about the expected direction of the new rules.
This lack of consensus regarding the possible need for special procedures for trust disputes suggests that an in-depth analysis of trust arbitration is long overdue. This Article therefore aims to fill this gap in the legal literature by identifying the unique attributes of trust disputes that create difficulties in arbitration; considering whether those difficulties require the adoption of any special procedural mechanisms; describing what those procedures might entail; and evaluating the extent to which the AAA Trust Arbitration Rules incorporate any of the procedural innovations suggested in the course of the discussion.

The discussion proceeds as follows. First, Section 2 provides a basic introduction to trusts and outlines the importance of this area of law to commercial lawyers and arbitral specialists. This discussion is necessary to set later analyses in context.

Next, Section 3 describes some of the more unique types of disputes arising out of the inner workings of trusts. While this discussion has the benefit of familiarizing non-specialists with some of the unique challenges associated with trust law, this section also begins to grapple with a number of the more salient legal issues by considering the extent to which these various types of internal trust disputes are arbitrable. This section also introduces the various ways that states deal with trust arbitration, ranging from explicit and precisely drawn legislation to statutory silence.

Section 4 considers various procedural problems associated with mandatory trust arbitration and the extent to which those issues can be resolved through adoption of specific arbitral procedures. The discussion here focuses on three basic concerns – arbitrability, impermissible ouster of the courts and proper representation of the parties – that seem particularly sensitive to changes in arbitral procedure.

Next, Section 5 introduces the AAA Trust Arbitration Rules and analyzes their effectiveness in light of the procedural issues raised in Section 4. This section also considers a second set of specialized arbitral rules — the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit or DIS) Supplementary Rules for Corporate Law Disputes (DIS Supplementary Rules) – to see whether any of those procedures would be applicable to trust arbitration. Although the DIS Supplementary Rules do not apply to trusts, there are a number of similarities between arbitration of internal trust disputes and arbitration of internal shareholder disputes that make the DIS Supplementary Rules relevant to this discussion. Furthermore, the approach used by the DIS varies significantly from that adopted by the AAA, which allows for productive comparative analysis.

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18 Interestingly, although the AAA Trust Arbitration Rules have been in existence since 2003 and are the only set of procedures targeted specifically toward trust disputes, they are not very well known in either the trust industry or the arbitral community. Indeed, only a few references have ever been made to the AAA Trust Arbitration Rules in the legal literature, and then only in passing. See Horton, supra n. 10, at 1031; Erin Katzen, Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts, 24 Quinnipiac Prob. L. J. 118, 130–132 (2011).

Finally, Section 6 pulls the various strands of discussion together and concludes the Article with some closing observations. In so doing, the text offers some practical advice to those involved in drafting procedures in this area of practice.

Before beginning, it is important to describe the parameters of the current analysis. First, this discussion will not, for the most part, attempt to differentiate between commercial and other types of trusts. This is not because these distinctions are not important, for they very well may be. Indeed, some jurisdictions treat business trusts as more akin to corporations than to trusts, at least in certain contexts, and it may be that commercial trusts could or should be considered more amenable to mandatory trust arbitration than other kinds of trusts. However, scholarly and judicial analysis has not yet begun to distinguish between the two devices, and proper consideration of this matter would be beyond the scope of the current Article. Therefore, these distinctions are for the most part excluded, although some relevant observations are made from time to time.

Second, trusts operate in an increasingly globalized context, requiring this Article to adopt a similarly international and comparative approach to the issues presented herein. Particular emphasis is placed on English and U.S. law as they relate to both trusts and arbitration. However, this Article is not intended to present a comprehensive comparative analysis of the two jurisdictions. Instead, the aim is simply to use the two legal systems as exemplars of the various issues that can arise in this area of law. Thus, legal developments from several other countries will also be discussed as appropriate.

Having laid the foundation for further discussion, the analysis begins with an introduction to the various types of trusts used today.

II. WHAT IS A TRUST?

Trusts play a large and growing role in the international economy, making trust arbitration a matter of increasing relevance to commercial practitioners. Not only do trust vehicles hold trillions of dollars worth of assets and generate billions of dollars worth of annual income, but administrators and trustees earn similarly

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21 See Christensen, supra n. 1, ¶ 2 (noting that in the U.S., “[b]usiness trusts, although trusts for property law purposes, are taxed as corporations because they conduct a business”); see also Hayton et al., supra note 6, ¶ 1.133 (noting that beneficiaries of commercial trusts in England may be treated differently than beneficiaries of private family trusts).

22 See Strong, Two Bodies Collide, supra n. 8.

23 These two countries have been chosen for several reasons. First, England and the United States are leaders in both trust and arbitration law. As such, the principles developed in these two nations have persuasive effect elsewhere in the world. Second, much of the most probing scholarly analysis of mandatory trust arbitration comes from England, although some of the best judicial discussions of mandatory trust arbitration come from the United States. Since lessons can be learned from both sources, both are included. Finally, the author is qualified as a solicitor in England as well as an attorney in the United States and has first-hand practical experience in both jurisdictions.
massive amounts in fees each year. 24 Indeed, the vast majority of trusts operating today are commercial rather than personal in nature, putting to rest the notion that trusts are primarily used as ‘mere’ estate planning devices. 25 Furthermore, trusts can no longer be considered purely domestic mechanisms, since favourable tax laws in various off-shore jurisdictions are making international trusts increasingly attractive and popular. 26

As the use of trusts has grown, so, too, has the amount of hostile trust litigation proceeding around the world, so much so that such suits are said to be reaching ‘near epidemic’ levels. 27 Unsurprisingly, this level of litigation has led many settlors and trustees 28 to express an interest in arbitration as a means of limiting extensive litigation costs. 29

However, arbitration of internal trust disputes is not as simple as arbitration of other sorts of commercial matters, since trust law retains a variety of substantive and procedural characteristics not seen in other areas of law. 30 Notably, many arbitration or commercial practitioners may not even be aware of these special attributes, since most lawyers’ only exposure to trusts was in law school (and then solely in the context of testamentary or estate planning), 31 if they even studied it at all. 32 Given this likely lack of familiarity with trusts, it is useful to provide a very brief introduction to the device so as to lay a foundation for discussions regarding arbitration of these unique legal mechanisms. 33

(a) Definition of a Trust and Trust-Related Terms

The device now known as a trust originally developed in medieval England as a means of safeguarding and transferring wealth. 34 Although trusts have changed

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24 See Horton, supra note 10, at 1070 (noting irrevocable trusts in the United States ‘generated $142.5 billion in income and $3.7 billion in trustees’ fees’ in 2008 alone); Langbein, Commercial Trusts, supra n. 1, at 177–178 (estimating in 1997 that commercial trusts held assets in the range of $11.6 trillion, with non-commercial trusts holding an additional $672 billion in assets, conservatively estimated).

25 See Langbein, Commercial Trusts, supra n. 1, at 160.

26 See Wustemann, supra n. 5, at 33–34.

27 Cohen & Staff, supra n. 10, at 203; see also Georg von Segesser, Papers of the International Academy of Estate and Trust Law – 2000, 21 (Rosalind F. Atherton ed., 2001); Wustemann, supra n. 5, at 33–34.

28 Many settlers and trustees are often sophisticated commercial actors in their own right, since numerous trusts rely on professional trustees drawn from the ranks of national and international financial institutions. See Wustemann, supra n. 5, at 41.


30 This is due in part to the historic allocation of trust-related matters to special probate or chancery courts, a distinction which continues in some jurisdictions to this day. See McGovern et al., supra n. 15, at 626.

31 See Langbein, Commercial Trusts, supra n. 1, at 163.

32 Most civil law lawyers never had the opportunity to study trusts, since trusts developed as creatures of the common law and are still primarily associated with that legal tradition. See supra n. 1.

33 More detailed reading on trusts and their civil law equivalents exists elsewhere. See Hayton et al., supra n. 6 (discussing English trusts); McGovern et al., supra n. 15 (discussing U.S. trusts); Christensen et al., supra n. 1 (discussing civil law equivalents of trusts).

34 See Langbein, Contractarian, supra n. 1, at 632–643, 669–671.
greatly over the years in both their uses and forms, some factors have remained constant, including the elements necessary to establish a trust.³⁵

Precise requirements associated with establishing a trust vary according to national law. However, one internationally recognized set of criteria can be found in the Hague Convention on the Law Applicable to Trusts and on Their Recognition (Hague Convention on Trusts), which states that:

the term ‘trust’ refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics –

a) the assets constitute a separate fund and are not a part of the trustee’s own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.³⁶

Thus, the three most important persons in a trust relationship are the settlor (also called the donor), who creates and funds the trust; the trustee, who holds legal title to the property, though only for the benefit of the beneficiary; and the beneficiary, who holds equitable title to the property and receive the benefits of the trust.³⁷

There may be more than one person in each role (for example, there may be multiple settlors, multiple trustees and/or multiple beneficiaries), and in some cases, the same person may act in multiple roles (for example, a settlor may also be a trustee, and a trustee may also be a beneficiary). The variety of potential parties means that most internal trust disputes can or will involve more than two participants, which has led some trust law practitioners to question whether arbitration is capable of handling the special procedural challenges that are sure to arise in this area of law.³⁸

Historically, trusts were typically established to protect property from creditors, a use which continues to this day.³⁹

Trusts were also created as a means of ensuring

³⁵ See id.; see also Hayton et al., supra n. 6, ¶ 1.95; McGovern et al., supra n. 15, at 369 (noting that ‘[t]he word “trust” is used for many property arrangements which have little in common with each other apart from the fact that they were historically enforced in . . . the court of Equity’).

³⁶ See Convention on the Law Applicable to Trusts and on Their Recognition, art. 2, July 1, 1985, 23 I.L.M. 1389 (1984) [hereinafter Hague Convention on Trusts]; see also Hayton et al., supra n. 6, ¶ 8.1; McGovern et al., supra n. 15, at 374–381; Perrin, supra n. 1, at 634–636.

³⁷ See McGovern et al., supra n. 15, at 370; Langbein, Contractarian, supra n. 1, at 632. Some trusts also provide for ‘protectors’ (also known as ‘enforcers’), though typically only in situations where the settlor wishes to establish an extra layer of protection regarding the administration of the trust. See Hayton et al., supra n. 6, ¶¶ 8.157–8.167; Langbein, Contractarian, supra n. 1, at 664; Wüstemann, supra n. 5, at 36.

³⁸ See Horton, supra n. 10, at 1036; Janin, supra n. 11, at 529; Wüstemann, supra n. 5, at 53–54.

³⁹ See Langbein, Contractarian, supra n. 1, at 640–643. However, creditors of the settlor may be able to reach trust funds if the settlor has attempted to use the trust form to defraud creditors or cheat a spouse or child of a statutory share at death. See Hayton et al., supra n. 6, ¶ 7.1(2); 6.252–6.339; McGovern et al., supra n. 15, at
competent administration of funds in cases where the beneficiary might be incapable of acting on his or her own behalf (as in cases involving a legal impediment, such as minority) or might lack the necessary qualities to act prudently (as in cases involving persons who were financially unsophisticated or had a tendency toward profligacy).

(b) Types of Trusts

Trusts exist in a wide variety of forms. All express trusts can be categorized as (1) either a living trust (also known as an *inter vivos* trust) or a testamentary trust, and (2) either a revocable trust or an irrevocable trust. Beyond that, trusts are typically defined by their purpose. Many trusts (such as dynasty trusts, marital trusts or family trusts) are meant to pass on wealth within a family, with the quintessential example being a trust created by a parent to benefit a child either before or after the parent’s death. However, trusts serve other purposes as well. For example, some trusts are created entirely for charitable purposes while others, such as asset protection trusts or credit shelter trusts, appear to focus primarily on deterring potential creditors from reaching trust assets or garnering various tax savings.

Although most trusts are created intentionally (express trusts), trusts may also be created by statute or by operation of law.

Although family planning trusts are perhaps the most well-known type of trust in existence today, they are not the most common. Instead, ‘well over 90% of the money held in trust in the United States’ in recent years has been held ‘in commercial trusts as opposed to personal trusts’. Commercial trusts are not limited to the United States, but have become increasingly popular in other jurisdictions as well.

Indeed, numerous commentators have noted that ‘the role of trusts in intrafamily wealth transfers is today “relatively trivial”, particularly when compared to the “enormously important” role of trusts in the business context.’

A commercial trust (also known as a business trust) can be defined as ‘a trust that implements bargained-for exchange, in contrast to a donative transfer’, which

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40 See Hayton et al., supra n. 6, ¶¶ 11.1, 11.77-11.78; McGovern et al., supra n. 15, at 389, 417–420.
41 A living or *inter vivos* trust comes into effect during the lifetime of the settlor, whereas a testamentary trust comes into effect only after the death of the settlor. Revocable trusts may be changed or terminated by the settlor, whereas irrevocable trusts may not. Thus, only living trusts may be revocable.
42 See McGovern et al., supra n. 15, at 369–370; Langbein, Commercial Trusts, supra n. 1, at 165.
43 Charitable trusts are often subject to slightly different rules than private trusts. See McGovern et al., supra n. 15, at 436–450.
44 See id. at 369–370.
45 Trusts created as a matter of law include resulting trusts, constructive trusts and trusts created through bankruptcy. See Hayton et al., supra n. 6, ¶¶ 3.1–3.11; McGovern et al., supra n. 15, at 369–370. These trusts are not amenable to arbitration for various reasons and therefore are not discussed in the current Article.
46 Langbein, Commercial Trusts, supra n. 1, at 166–167, 178 (citing figures from mid- to late-1990s).
47 See id. at 166; see also Hayton et al., supra n. 6, ¶ 1.97–1.138; Figueroa, supra n. 1, at 740–751; Flannigan, supra n. 20, at 630–631; Hansmann & Mattei, supra n. 1, at 434; Langbein, Contractarian, supra n. 1, at 630–631.
48 Christensen, supra n. 1, ¶ 1 (quoting Hansmann and Mattei).
49 Langbein, Commercial Trusts, supra n. 1, at 166–167; see Hayton et al., supra n. 6, ¶¶ 1.100–1.138.
would be the primary motivation for a trust created to pass on family wealth. Some, but not all, commercial or business trusts are created by statute.  

Commercial trusts are created for a variety of reasons. Some of these rationales are largely similar to those involving trusts in other contexts and thus suggest that commercial and non-commercial trusts should be treated similarly in most, if not all, regards. For example, both business and non-business trusts provide protection from insolvency and some forms of taxation while also creating a fiduciary regime that requires the application of fiduciary duties such as loyalty and prudence.

However, business trusts also have purposes that are entirely unique to the commercial realm. For example, parties to commercial trusts often take advantage of the structural flexibility inherent in trusts and create relationships or procedures that might be difficult or impossible to achieve as a matter of corporate law, particularly with respect to 'matters of internal governance and...the creation of beneficial interests'. Transaction planners designing asset securitization trusts especially welcome the freedom to carve beneficial interests without regard to traditional classes of corporate shares, creating a wide range of ‘so-called tranches, each embodied in its own class of trust security.’

Interest in commercial trusts has grown exponentially in recent years due to the increased liberalization of laws regarding the use and creation of such devices as a matter of national and international law. However, commercial trusts ‘are a woefully under-analyzed and underappreciated form of business organization’.

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51 See Langbein, Commercial Trusts, supra n. 1, at 179–183, 189.

52 For this reason, some authorities exclude commercial trusts from standard trust law analyses. For example, the U.S. Restatement of Trusts excludes business trusts from consideration and focuses solely on trusts as donative devices. See Restatement (Second) of Trusts, §1 cmt. B (stating that ‘[a]lthough many of the rules applicable to trusts are applied to business trusts, yet many of the rules are not applied . . . . The business trust is a special kind of business association and can best be dealt with in connection with other business associations’); see also David M. English, Representing Trust and Estate Beneficiaries and Fiduciaries: The Uniform Trust Code, SK089 ALI-ABA 191 IV (Feb. 10–11, 2005) (noting the Uniform Trust Code is not directed at commercial trusts but does not exclude them from consideration, either). However, ‘[n]either the text of the Restatement’s official comment, nor the reporter’s note, supplies any authority for [the Restatement’s] claim that ‘many of the rules’ of trust law do not apply to business uses of the trust’. Langbein, Commercial Trusts, supra n. 1, at 166 n. 6. Furthermore, courts often do not distinguish between the two. Indeed, no known judicial opinions or statutes dealing with mandatory trust arbitration differentiate between personal and commercial trusts. Therefore, this Article will not attempt to distinguish between the two types of trusts.

53 Langbein, Commercial Trusts, supra n. 1, at 183; see also Hayton et al., supra n. 6, ¶ 1.99; Langbein, Contractarian, supra n. 1, at 659–663.

54 Langbein, Commercial Trusts, supra n. 1, at 183 (citation omitted); ‘A tranche is simply a slice of a deal, a payment stream whose expected return increases with its riskiness.’ Id. at 183 n. 109.

despite their being ‘critically important’ to various capital markets.⁵⁶ Indeed, many lawyers may be unaware of what constitutes a commercial trust per se. As such, it is useful to summarize some of the more common types of business trusts so as to be better able to consider the types of procedures that might be appropriate in arbitrations involving such devices. Notably, a number of commercial trusts have already resolved certain internal disputes pursuant to an arbitration provision found in the trust itself.⁵⁷

Several basic types of trusts are routinely used in commercial practice, although the precise shape of these devices varies according to national law.⁵⁸ Indeed, new forms of trusts are being developed for use in business settings all the time.⁵⁹ The following discussion does not attempt to identify all of these types of trusts, but simply provides an introduction to some of the various forms currently used in commercial practice.

The first and perhaps most important is the pension trust, which is a major commercial device in the United States and elsewhere.⁶⁰ These plans hold trillions of dollars worth of assets in the United States,⁶¹ with similarly significant amounts held in trust in other nations. Pension trusts arise out of contracts of employment and provide employees with the ability to defer some of their compensation until retirement.⁶² Although such trusts include a private contribution element, the trusts themselves often reflect a statutory element. For example, in the United States, the Employee Retirement Income Security Act (ERISA) indicates that ‘all assets of an employee benefit plan shall be held in trust’.⁶³ The United Kingdom recognizes a related type of statutory trust known as the employee trust, which is not tied to retirement but which instead provides certain tax-related and other

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⁵⁶ Miller, supra n. 2, at 444.
⁵⁸ See Hayton et al., supra n. 6, ¶ 1.135, 1.138; Miller, supra n. 2, at 447. For list of the various types of trusts recognized by the U.S. Internal Revenue Code, see Christensen, supra n. 1, ¶§ listing nineteen separate categories of trust).
⁶⁰ See Hayton et al., supra n. 6, ¶ 1.127; Bosques-Hernández, supra n. 55, at 20; Langbein, Commercial Trusts, supra n. 1, at 168–169.
⁶¹ See Langbein, Commercial Trusts, supra n. 1, at 168–169 (noting in 1997 that private pension plans held assets in the realm of USD 3 trillion, with state and federal plans for governmental employees holding an addition $1.6 trillion in assets, primarily in trust form). While recent market vicissitudes have changed the amount held in private and public pension plans since the late 1990s, the amount in question is nevertheless vast. See Employer Benefit Research Institute, 30 Notes 1, 2 (April 2009), available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_04-Apr09_PbckProPlns1.pdf.
⁶² See Langbein, Commercial Trusts, supra n. 1, at 169. Although life insurance company separate accounts do not constitute pension trusts per se, they reflect certain similarities in form. See id. at 168 (noting a further $900 billion held in these accounts in 1997).
benefits to current employees. Notably, there is evidence that internal disputes arising out of statutorily-created trusts in ERISA and related contexts have been made subject to arbitration, at least to a limited degree.

Another kind of commercial trust is the investment or unit trust. These types of devices, which are often international in nature, also hold a staggering amount of assets. Investment or unit trusts fall into several subcategories: mutual funds (known as collective investment schemes in England), real estate investment trusts (REITs), oil and gas royalty trusts and asset securitization trusts. Interestingly, at least one U.S. court has considered mandatory arbitration in the

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66 The term ‘investment trust’ is more common in the United States, with the term ‘unit trust’ being used in England. See Hayton et al., supra n. 6, ¶ 1.122; Bosques-Hernández, supra n. 5, at 20; Langbein, Commercial Trusts, supra n. 1, at 170.
67 See Bosques-Hernández, supra n. 5, at 20.
68 While comprehensive worldwide figures are impossible to compile, it is perhaps sufficient to note that in 1997, U.S.-based REITs held over $80 billion in assets. See Langbein, Commercial Trusts, supra n. 1, at 171.
69 See Hayton et al., supra n. 6, ¶ 1.122. Mutual funds can take the form of an investment company or a trust, with slightly more than half of contemporary mutual funds taking the form of a trust. See Langbein, Commercial Trusts, supra n. 1, at 170–171.
70 REITs are mutual funds that invest in real property and/or in mortgages on real property. See Langbein, Commercial Trusts, supra n. 1, at 171. Interestingly, calls have been made to reduce, rather than increase, the regulation of REITs in the wake of the recent financial crisis, thus showing the level of legislative support for these types of investment vehicles. See Bruce Arthur, Housing and Economic Recovery Act of 2008, 46 Harv. J. Legis. 585, 589 (2009).
71 These types of trusts are often created by oil corporations that want a vehicle to hold legal title to certain oil-producing properties while dispensing beneficial assets to corporate shareholders. See Langbein, Commercial Trusts, supra n. 1, at 171. The trust interests can be sold, and several of the larger oil-royalty trusts are publicly traded. See id. at 171–172. Trusts relating to royalties from intellectual property are also possible. See Hayton et al., supra n. 6, ¶ 1.135.
72 In this form of trust, banks or other financial entities, often called originators or packagers, buy a type of debt (such as credit card receivables), ‘but then transfer[] [the debt] in trust to a separate trustee. Shares in that trust are sold to various participating investors, who, under the new scheme, are not lenders to the bank but share owners in the trust.’ Langbein, Commercial Trusts, supra n. 1, at 172. Changes have been made to the specific rules regarding these types of investment vehicles in the wake of the recent financial crisis, but the concept remains viable. See Giaccomo Rojas Elgueta, Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis, 12 U. Pa. J. Bus. L. 517, 527–554 (2010); Peter A. Furci, U.S. Trade or Business Implications of Distressed-Debt Investing, 63 Tax Law. 527, 537 (2010) (discussing U.S. regulations under the now-repealed Financial Asset Securitization Investment Trust (FAST)); Grace Soyoun Lee, What’s in a Name?: The Role of Danielson in the Taxation of Credit Card Securitization, 62 Baylor L. Rev. 110, 126 n.62 (2010) (noting FASTIs were repealed in 2004 but recognizing the continued use of similar devices).
context of an internal trust dispute involving an investment trust.\textsuperscript{73} Another U.S. court has discussed an important related issue, namely whether certain internal disputes arising out of an investment or unit trust can be arbitrated pursuant to a mandatory arbitration provision found in an insurance policy covering the trust, and has held that arbitration in such circumstances is permissible.\textsuperscript{74}

A third kind of commercial trust involves trusts relating to the issuance of bonds. In the United States, such trusts arise under the Trust Indenture Act,\textsuperscript{75} which requires ‘most debt securities issued in the United States...to provide for the services of a corporate fiduciary to act as trustee for the bondholders or other obligees’.\textsuperscript{76} Trusts created under the ‘Trust Indenture Act reflect certain unusual qualities. For example, trustees under bond indentures have fewer responsibilities for the trust property and typically do not enjoy possession or the right to possession until a default occurs.’\textsuperscript{77} Instead:

> the trustee under a bond indenture acts primarily under the terms of the contract creating the relationship, and acquires actual possession of the particular assets only in the event that the issuer breaches the covenants of the loan agreement. The indenture regime imposes, therefore, a species of contingent or standby trusteeship. What commends the trust form for these corporate and municipal bond transactions is the ability to have a sophisticated financial intermediary – that is, a trust company – act on behalf of numerous and dispersed bondholders in the event that a loan transaction does not work out routinely. The indenture trustee overcomes the coordination problem that inheres in widespread public ownership of debt securities.\textsuperscript{78}

Other countries also recognize the concept of a bond-related trusts, whereby a trust deed gives a trustee both the responsibility and the authority to enforce the terms of the bonds held in the trust.\textsuperscript{79} Notably, at least one English court has held that claims relating to certain bonds may be subject to arbitration under an arbitration provision contained in the trust deed.\textsuperscript{80}

A fourth type of commercial trust involves what could be called the ‘regulatory compliance trust’, [which is] a trust created primarily for the purpose of


\textsuperscript{76} Langbein, Commercial Trusts, supra n. 1, at 173 (estimating that as of 1997, the amount held exceeded $3 trillion).

\textsuperscript{77} Id. at 173–174.

\textsuperscript{78} Id. at 174 (citations omitted). A related type of device involves a trust created to establish a contingent value right (CVR) which requires an acquiring party ‘to pay additional consideration to a Target company’s stockholders following the close of the acquisition contingent on the occurrence of specified payment triggers’ Barbara L. Borden & Henry Gosebruch, Contingent Value Rights Outline, 1902 PLI/Corp. 323, 325 (Sept. 22–23, 2011); see also id. at 340 (noting CVRs can be ‘issued pursuant to a trust agreement’).

\textsuperscript{79} See The Law Debenture Trust Corp. v. Elektrim S.A. [2009] EWHC 1801 ¶¶ 1, 11, 16, 18, 37 (Ch).

\textsuperscript{80} See The Law Debenture Trust Corp. plc v. Elektrim Fin. B.V. [2005] EWHC 1412, ¶¶ 38-47 (Ch) (concluding that the language in the arbitration clause in question provided one party with a unilateral right to choose to litigate instead of arbitrate, but upholding the provision as binding between the parties).
discharging responsibilities imposed by law. These trusts reflect a variety of forms, including nuclear decommissioning trusts, environmental remediation trusts, liquidating trusts, prepaid funeral trusts, foreign insurers’ trusts and law office trust accounts. While no cases have been discovered that specifically discuss mandatory arbitration in any of these contexts, it is easy to see how arbitration could be used to resolve issues relating to regulatory compliance trusts.

While there are numerous other types of business trusts in existence, it is unnecessary to outline them all, since the question for this Article is whether existing arbitral procedures adequately protect the rights of parties involved in arbitration of internal disputes arising under these and other types of trusts. To answer that question, it is necessary to consider what constitutes an internal trust dispute and whether such controversies are even arbitrable. These matters are considered in the next section.

III. TYPES OF TRUST DISPUTES AND ARBITRABILITY OF THOSE DISPUTES

Because trust law and commercial law operate largely in isolation from one another, specialists in arbitration may be unaware of some of the more unique types of controversies that can develop under a trust as well as the various jurisprudential problems that can arise when settlors attempt to mandate arbitration of those disputes through an arbitration provision in a trust. While a comprehensive analysis of these issues is beyond the scope of this Article, it is nevertheless necessary to introduce briefly certain fundamental principles.

When considering arbitration of internal trust disputes, it is useful to distinguish between: (1) states with legislation explicitly permitting arbitration of trust disputes through inclusion of a provision in the trust itself; (2) states with legislation explicitly permitting arbitration of trust disputes but without reference to provisions found in the trust itself; and (3) states without legislation concerning trust arbitration. Each is discussed separately below.

(a) States with Legislation Explicitly Permitting Arbitration through Inclusion of a Provision in the Trust Itself

Analysis regarding the arbitrability of internal trust disputes is easiest in jurisdictions that statutorily recognize the validity of an arbitration provision found in a trust, since the legislation specifically states which types of issues may be made subject to mandatory arbitration. Thus, for example, the U.S. state of...
Arizona passed a law in 2008 indicating that ‘[a] trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust’.\(^\text{86}\) This provision is to be construed broadly to include ‘any matter involving the trust’s administration, including a request for instructions and an action to declare rights’.\(^\text{87}\)

The U.S. state of Florida has also made statutory provision for mandatory trust arbitration, albeit in a smaller range of disputes. That enactment, passed in 2007, indicates that:

1. A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable.
2. Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under s. 44.104.\(^\text{88}\)

While the Florida statute includes a carve-out for challenges to the trust itself,\(^\text{89}\) the range of arbitrable matters nevertheless appears relatively broad. However, the precise scope of this legislation is somewhat unclear, since no cases have yet been decided under this provision.

Legislation concerning mandatory arbitration of internal trust disputes also exists outside the United States. For example, Guernsey, one of the leading jurisdictions for offshore trusts, enacted a statute in 2007 discussing the availability of various alternative dispute resolution mechanisms, including arbitration.\(^\text{90}\) That law states that:

1. Where—
   a. the terms of a trust direct or authorise, or the Court so orders, that any claim against a trustee founded on breach of trust may be referred to alternative dispute resolution (ADR),
   b. such a claim arises and, in accordance with the terms of the trust or the Court’s order, is referred to ADR, and
   c. the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties,


\(^{89}\) Challenges to the trust often involve claims based on undue influence, lack of capacity, fraud, duress, forgery or mistake. Some states bar such disputes from arbitration altogether while other jurisdictions analyze the issue under standard principles of separability. See Spahn v. Sims, 330 F.3d 1266, 1273 (10th Cir. 2003); Regions Bank v. Britt, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 n. 2 (S.D. Miss. Nov. 10, 2009); Weizmann Institute of Science v. Neschis, 421 F. Supp. 2d 634, 680 n.28 (S.D.N.Y. 2005); Strong, Two Bodies Collide, supra n. 8.

the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

(2) Subsection (1) applies in respect of a beneficiary only if-

(a) he was represented in the ADR proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or

(b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard, and only if, in the case of a beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law.

‘Notice’ in paragraph (b) means 14 days’ notice or such other period as the person conducting the ADR proceedings may direct.

(3) A person who represents a beneficiary in the ADR proceedings for the purposes of subsection (2)(a) is under a duty of care to the beneficiary.

(4) For the avoidance of doubt, the ADR proceedings need not be conducted in Guernsey or in accordance with the procedural law of Guernsey.

(5) In this section—

‘ADR’ includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and ‘proceedings’ includes oral and written proceedings.91

Although the statute relates only to a limited range of claims (i.e., claims brought against a trustee for breach of trust), it specifically contemplates the possibility that arbitration can be mandated through a provision included in the trust instrument itself. The statute also expressly indicates that beneficiaries of the trust may be bound by the outcome of the arbitration.

Most recent developments concerning mandatory trust arbitration involve common law jurisdictions, since those states are home to the classic form of the trust. Indeed, a number of common law countries other than the U.S. and Guernsey are currently contemplating legislation in this area of law.92 However, civil law jurisdictions also appear to permit arbitration of trusts or trust-like devices pursuant to legislation. Thus, for example:

Austrian arbitration law recognizes . . . ways of granting arbitrators the authority to decide a dispute by arbitration. Section 581(2) ZPO [Zivilprozessordnung or Code of Civil Procedure] grants such an authority to arbitral tribunals that are set up in a manner permitted by law, either

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91 The Trusts (Guernsey) Law 2007, supra n. 90, §63.
Mandatory Arbitration of Internal Trust Disputes

by testamentary disposition or by other legal transactions that are not based on the agreement of the parties. Authority is also granted to tribunals provided for by articles of incorporation.

The concept of arbitration based on ‘testamentary disposition or by other legal transactions that are not based on the agreement of the parties’ would appear to permit arbitration arising out of a trust. German law appears to take a similar approach, in that:

[Section] 1066 ZPO [Zivilprozessordnung or Code of Civil Procedure] requires arbitral tribunals to be legitimized by a testamentary disposition or other non-contractual dispositions. Thus, [Section] 1066 ZPO encompasses situations in which an arbitration clause has a binding effect on an individual who is not a signatory of an arbitration agreement and did not agree to a contractual arbitration agreement.

Furthermore, it has been said that ‘arbitration clauses in the statute of a foundation [“stiftung”] in Liechtenstein are . . . binding for persons or entities claiming to be beneficiaries of the foundation on the basis of its by-laws, although they have not signed the Charter of the foundation or the arbitration clause contained therein. Although these authorities focus more on the enforceability of an arbitration provision found in a trust than the arbitrability of certain trust-related claims per se, the implicit sense is that at least some internal trust concerns will be arbitrable under these provisions.

(b) States with Legislation Explicitly Permitting Arbitration of Trust Disputes but without Reference to Provisions Found in the Trust Itself

Legislation specifically contemplating an arbitration provision in a trust is relatively rare, particularly in the common law countries where trusts are used most often. However, a number of jurisdictions provide for trust arbitration without making reference to arbitral provisions found in the trust itself. This second type of legislation has been in existence in some states for decades.

The precise language used varies somewhat from jurisdiction to jurisdiction, although one of the more widely adopted approaches is found in the Uniform Trust Code (UTC), a model enactment that has been adopted in whole or in part by twenty-four individual U.S. states. Section 111 of the UTC indicates that ‘interested persons may enter into a binding nonjudicial settlement agreement with

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94 See Strong, Two Bodies Collide, supra n. 8. The reference to arbitration arising out of articles of incorporation also supports the notion of mandatory trust arbitration, since the two procedures arise in similar manners.
95 Christian Dube, Arbitration in Germany: The Model Law in Practice, 957, 1002 (Karl Heinz Böckstiegel et al. eds., 2007); see also Strong, Two Bodies Collide, supra n. 8.
97 See Bruyere & Marino, supra n. 29, at 355–356, 362; Georg von Segesser, supra n. 27, at 11; Horton, supra n. 10, at 1031; Hwang, supra n. 3, at 83; Janin, supra n. 11, at 324–328; Mautner & Orr, supra n. 10, at 139.
98 See UTC, supra n. 7; NCCUSL, UTC Status, available at www.nccusl.org.
respect to any matter involving a trust, so long as they do ‘not violate a material purpose of the trust and include terms and conditions that could be properly approved by the court under this Code or other applicable law’. The scope of arbitrable matters is quite broad, including, among other things:

1. the interpretation or construction of the terms of the trust;
2. the approval of a trustee’s report or accounting;
3. direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
4. the resignation or appointment of a trustee and the determination of a trustee’s compensation;
5. transfer of a trust’s principal place of administration; and
6. liability of a trustee for an action relating to the trust.

A number of these items relate to internal matters of trust construction and administration and thus expand the concept of arbitrability beyond mere contract concerns to key issues of substantive trust law. This is very helpful, since it removes some of the stigma of arbitration by recognizing that arbitrators are capable of resolving complex trust-related controversies.

As useful as this provision is, it nevertheless fails in one important regard, namely in describing the manner in which trust arbitration can be invoked. Indeed, the drafters of the UTC were purposefully vague when it came to identifying who could enter into these sort of non-judicial agreements. As a result, the UTC provides no guidance as to whether the settlor can require non-judicial resolution of disputes arising under the trust through inclusion of an arbitration provision in the trust or whether it is only the trustee who has the power to enter into arbitration agreements at some point after the trust has been created. To some extent, the latter approach would seem to be somewhat in

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99 UTC, supra n. 7, §111(c).
100 Id.
101 Id. §111(d); see also id. cmt.; Mautner & Orr, supra n. 10, at 161. Interestingly, the UTC may make some issues subject to the exclusive jurisdiction of the court. See UTC, supra n. 7, §111, cmt. (stating ‘[a]ny interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved’). This reservation of judicial jurisdiction could give rise to questions about procedural non-arbitrability. See infra nn. 133–165 and accompanying text.
102 See ACTEC, supra n. 10, at 5 (discussing the ‘blinding prejudice’ to arbitration in contemporary trust law).
103 See UTC, supra n. 7, §111, cmt. The term ‘interested persons’ is defined as meaning ‘persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court’. Id. §111(a).
104 The trustee’s specific power to enter into an arbitration agreement is also mentioned in s. 816(23) of the UTC, which states that a trustee may ‘resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution’. Id. §816(23). However, this language does not clear up any of the confusion regarding mandatory trust arbitration, since the provision can be read as suggesting either that only a trustee has the ability to enter into arbitration under s. 111 (since the powers listed in s. 816 are a compilation of specific powers listed elsewhere) or that persons other than the trustee may have the ability to enter into arbitration under s. 111 (since the powers listed in Section 816 are not said to be exclusive to the trustee). See id. §§111, 816(23); see also id. §816, cmt.
tension with the UTC’s broad approach to arbitrability, since internal trust concerns are most effectively addressed through an arbitration provision in the trust itself rather than a post-dispute agreement concluded by the trustee.\textsuperscript{105} Although the UTC constitutes a significant step forward with regard to the arbitrability of internal trust disputes, some individual U.S. state statutes go even further.\textsuperscript{106} For example, the states of Washington and Idaho have both enacted provisions indicating that:

\[\text{[the ‘matters’ that may be addressed and resolved through a nonjudicial procedure are broadly defined and include any issue, question, or dispute involving: (i) the determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death; (ii) the direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity; (iii) the determination of any question arising in the administration of an estate or trust or with respect to any nonprobate assets or any other asset or property interest passing at death, including, without limitation, questions relating to the construction of wills, trusts, community property agreements, or other writings, a change of personal representative or trustee, a change of the situs of a trust, an accounting from a personal representative or trustee, or the determination of fees for a personal representative or trustee; (iv) the grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law; and (v) the amendment, reformation, or conformation of a will or trust instrument to comply with statutes and regulations of the Internal Revenue Code in order to achieve qualification for deductions, elections, and other tax requirements.}\]

These statutes obviously go beyond what the UTC contemplates in terms of arbitrable concerns. However, the Washington and Idaho statutes suffer from the same problem that the UTC did, namely ambiguity with respect to who may invoke arbitration and how.\textsuperscript{108} Although it would again seem incongruous to permit arbitration of such a wide range of internal matters without providing an appropriate mechanism by which to invoke such proceedings, no court has yet considered whether these statutes permit arbitration based on a clause found in the trust itself.

English law takes a somewhat different approach. While U.S. statutes focus on the types of claims that may be settled by arbitration – thus leaving open the question of whether arbitration may be sought only by the trustee after the creation of the trust or can be mandated in the trust itself by the settlor – English

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\textsuperscript{105} One element in favour of the settlor’s ability to mandate arbitration of internal trust disputes is found in the commentary to s. 816, which states that ‘[t]he determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death; (ii) the direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity; (iii) the determination of any question arising in the administration of an estate or trust or with respect to any nonprobate assets or any other asset or property interest passing at death, including, without limitation, questions relating to the construction of wills, trusts, community property agreements, or other writings, a change of personal representative or trustee, a change of the situs of a trust, an accounting from a personal representative or trustee, or the determination of fees for a personal representative or trustee; (iv) the grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law; and (v) the amendment, reformation, or conformation of a will or trust instrument to comply with statutes and regulations of the Internal Revenue Code in order to achieve qualification for deductions, elections, and other tax requirements.\textsuperscript{107}

\textsuperscript{106} Trustees could attempt to enter into individual arbitration agreements with potential parties to an internal dispute after the creation of the trust but before a dispute arises, but that approach is logistically and jurisprudentially difficult. See Strong, Two Bodies Collide, supra n. 8.

\textsuperscript{107} See UTC, supra n. 7, §111.


law explicitly states that powers relating to non-judicial dispute resolution are limited to the trustee. Thus, the Trustee Act 1925 states that:

[a] personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think fit—

... (f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator’s or intestate’s estate or to the trust; and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them if he has or they have discharged the duty of care set out in section 1(1) of the Trustee Act 2000.109

Interestingly, although the English statute is limited as to who may authorize the arbitration, the language is quite broad with respect to the types of claims that can be asserted in arbitration (any debt, account, claim, or thing whatever relating to...the trust).110 This allows parties to claim that most, if not all, trust-related issues are inherently arbitrable, a position that may be very useful if English courts come to recognize that settlors have the power to require arbitration of disputes arising out of or in connection to the trusts that they create.111

(c) States without Legislation Concerning Trust Arbitration

While some states have addressed trust arbitration by statute, the vast majority of jurisdictions have not. To make matters worse, there is no clear judicial consensus regarding which types of internal trust disputes are arbitrable, primarily because most courts considering trust-related arbitration focus their discussions almost entirely on the enforceability of an arbitration provision found in a trust rather than on the arbitrability of particular issues.112 Therefore, while several recent U.S. state court decisions clearly indicate that arbitration clauses in trusts are unenforceable, they do so on grounds other than arbitrability.113 On the other hand, a number of older decisions that once acted as significant stumbling blocks in the United States to both the arbitrability of internal trust disputes and the enforceability of arbitration provisions in trusts have recently been abrogated.

109 Trustee Act 1925, supra n. 7, §15.
110 Id.
111 Although this issue is beyond the scope of this Article, it is addressed elsewhere. See Cohen & Staff, supra n. 10, at 221–223; Fox, supra n. 10, at 25; Lloyd & Pratt, supra n. 10, at 19–20; David Hayton, Future Trends in International Trust Planning, 13 Jordans J. Int’l Tr. & Corp. Plan. 55, 72 (2006); Hayton, supra n. 97, at 17; Strong, Two Bodies Collide, supra n. 8.
112 See Strong, Two Bodies Collide, supra n. 8.
either judicially or legislatively, thus allowing arbitration of internal trust disputes in those states.  

Parties find themselves in a difficult position if they are considering either of these two questions – arbitrability or enforceability – in a jurisdiction without relevant legislation, since there is a widespread perception that precedent in this area of law is ‘thin and underdeveloped’ despite the recent introduction of a number of relevant decisions into the legal literature. This shortage – real or perceived – of controlling case law has led many members of the trust bench and bar to adopt views that are ‘more conservative towards ADR than the law actually is today’, even though the lack of subject-specific precedent would normally suggest ‘that the general principles of arbitration law... should apply equally to trust cases’.

In fact, arbitration law provides courts considering an internal trust dispute as a matter of first impression with a very simple and straightforward method of analysis. For example, arbitration law indicates that judges should begin by referring to the national statute on arbitration to determine whether internal trust disputes comply with basic principles of arbitrability. Some states take such a broad view of arbitrability that few, if any, problems should arise with respect to arbitration of internal trust disputes. Thus, for example:

Switzerland has adopted an independent substantive rule for the determination of arbitrability, according to which any dispute involving an economic/financial interest may be settled by arbitration, without any need to consider the possible stricter rules of the law applicable to the merits of the dispute or the national law of one of the parties. Apart from purely non-financial matters, arbitrability can only be denied in an international arbitration with its seat in Switzerland for claims which have exclusively been reserved for the state courts pursuant to foreign mandatory provisions which have to be taken into account under public policy considerations.

As nearly all types of trust disputes ultimately concern the distribution of private wealth, the majority of such disputes can be arbitrated given the liberal definition of arbitrability under Swiss law.

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115 Katzen, supra n. 18, at 118–119.

116 Although the universe of relevant judicial opinions is not vast, commentators have often overlooked a number of pertinent authorities. See Zisman v. Lesner, No. 6:08-cv-1448-Orl-31DAB, 2008 WL 4459029, *3-4 (M.D. Fla. Sept. 29, 2008); Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 576, 385 (Cal. Ct. App. 2001); Masonry and Tile Contractors Assoc. of So. Nevada v. Joly, Unga & Wirth, Ltd., 941 P.2d 406 ( Nev. 1997). These decisions are discussed by the author in more detail in Strong, Two Bodies Collide, supra n. 8. Other relevant but previously undiscussed cases are cited throughout this Article.

117 Cohen & Staff, supra n. 10, at 211.


119 Wiestemann, supra n. 5, at 49 (emphasis omitted); see also von Segesser, supra n. 27, at 23.
Notably, this does not mean that every trust-related dispute is arbitrable under Swiss law. For example, in addition to situations involving statutes conferring courts with exclusive jurisdiction over certain matters (a subject that is discussed further below), Swiss courts may refuse arbitration of issues relating to the provision of information to a beneficiary pursuant to a judicial accounting process, since such disputes might not involve the kind of financial or economic interests contemplated under Swiss provisions on arbitrability.

A number of other jurisdictions also focus on commercial or economic interests when considering arbitrability and thus might come to the same conclusion that Switzerland does regarding arbitration of internal trust disputes. Some states, such as Liechtenstein, even go so far as to make arbitration compulsory in cases involving foreign trust deeds.

Although courts considering the arbitrability of internal trust disputes should refer first to the national statute on arbitration, that approach does not work in all cases. Some countries – including two of the key jurisdictions in this area of law, England and the United States – do not discuss arbitrability in their national arbitration statutes. States whose laws are based on the UNCITRAL Model Law on International Commercial Arbitration (Model Arbitration Law) may find themselves in a similar situation, since the Model Arbitration Law is also silent on arbitrability. In situation such as these, ‘questions whether or not a particular dispute is arbitrable...turn almost entirely on judicial interpretation of other statutes’ or on general case law.

A full discussion regarding the arbitrability of internal trust disputes in the United States, England and other jurisdictions is beyond the scope of this Article. However, commentators have considered that issue at length and have taken the position that internal trust disputes are for the most part arbitrable.

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120 See infra nn. 133–165 and accompanying text.
121 See Wüstemann, supra n. 5, at 50–51.
122 See Bosques-Hernández, supra n. 55, at 22 (discussing Scandinavian law); Caprasse, supra n. 8, at 81–83 (discussing French and Belgian law).
126 Born, supra n. 118, at 781, 786; see also Strong, Two Bodies Collide, supra n. 8.
127 See Cohen & Staff, supra n. 10, at 223–226; Lloyd & Pratt, supra n. 10, at 18; Strong, Two Bodies Collide, supra n. 8; Wüstemann, supra n. 5, at 55–56.
IV. INCREASING THE ENFORCEABILITY OF A MANDATORY ARBITRATION PROVISION IN A TRUST THROUGH ADOPTION OF PARTICULAR PROCEDURAL PROCESSES

The preceding section introduced the various types of disputes that can arise with respect to the inner workings of a trust and outlined the extent to which those matters are considered arbitrable. However, that discussion also demonstrated some of the difficulties associated with establishing arbitration through a clause found in the trust itself, primarily because of inadequate statutory provisions on whether a settlor may require arbitration of internal trust disputes by including an arbitration provision in the trust itself. Although an increasing number of courts and legislatures are addressing this issue, most of the relevant analysis is found in scholarly commentary. These authorities have generally concluded that a court may enforce a mandatory arbitration provision in a trust if:

1. the court’s jurisdiction is not ousted in an unacceptable fashion;
2. the provision purporting to require arbitration is not inoperable, ineffective or incapable of being performed and covers the dispute at issue;
3. the clause is binding on the party seeking to avoid arbitration;
4. all interested parties, including unascertained, unborn and legally incompetent beneficiaries, are properly represented in the proceeding; and
5. the subject matter of the dispute is arbitrable. 128

The enumeration of these five factors is very helpful, since it allows settlors to identify the possible means of affecting a court’s determination about enforceability. Interestingly, settlors appear able to influence judicial determinations regarding two issues – the operability of the arbitral clause purporting to require arbitration and the ability of that clause to bind any party seeking to avoid arbitration – through language used in the arbitration provision itself. 129 Furthermore, settlors might be able to influence how a court analyzes the three remaining concerns – arbitrability, potential ouster of the courts and proper representation of the parties – based on procedures chosen by the settlor to be used in the arbitration itself. Each of these three criteria is discussed individually below.

(a) Arbitrability

In some ways, it may seem strange to consider the extent to which a party can affect a court’s determination regarding questions of arbitrability, given that

128 See Cohen & Staff, supra n. 10, at 209; see also ACTEC, supra n. 10, at 34–42; Buckle & Olsen, supra n. 5, at 655; Fox, supra n. 10, at 23; Horton, supra n. 10, at 1050–1075; Lloyd & Pratt, supra n. 10, at 10; Logestrom, supra n. 10, at 268–269; Mautner & Orr, supra n. 10, at 101; Murphy, supra n. 10, at 630; Spitko, supra n. 10, at 277; Strong, Two Bodies Collide, supra n. 8; Wustemann, supra n. 5, at 55–56. But see Timothy P. O’Sullivan, Family Harmony: An All Too Frequent Casualty of the Estate Planning Process, 8 Marquette Elder’s Advisor 253, 315 (2007).
arbitrability is quintessentially a state concern and thus not usually considered amenable to external influences.\textsuperscript{130} However, judges may be more willing to consider certain matters arbitrable if the parties can demonstrate that the procedures used in the arbitration were or will be fair. This conclusion is based on the observation that the concept of arbitrability in international commercial arbitration has expanded as arbitral procedures have become more demonstrably fair and objective.\textsuperscript{131} While there is no way to establish a causal relationship between the two factors – i.e., that courts and legislatures increased the scope of issues that are considered arbitrable because of an increase in the number and quality of procedural protections for parties – there does seem to be a temporal and hence logical connection between the two developments.\textsuperscript{132} Therefore, it can be supposed that internal trust disputes are more likely to be considered arbitrable if the parties can show that the procedures to be used are fair and adequate as a matter of trust law.

One of the more distinctive types of issues that could arise in mandatory trust arbitration involves what may be called the principle of ‘procedural non-arbitrability’. While procedural non-arbitrability is a somewhat narrow issue, it is nevertheless critical to the development of arbitration of internal trust disputes.

The first thing to do is explain what is meant by the term ‘procedural non-arbitrability’. Traditionally, the core of any arbitrability analysis turns on whether a certain category of claims is or should be reserved to the courts.\textsuperscript{133} For years, this determined focused on entire subject matter areas, with states concluding that all claims in a certain field, such as intellectual property, securities or consumer law, were non-arbitrable.\textsuperscript{134} However, as the general scope of arbitrability has expanded, the number of suspect subject matters has diminished. Few fields of law are currently considered categorically off-limits. Instead, judges are now being asked to undertake more nuanced analyses to determine the arbitrability of certain limited subsets of claims that fall within a field that is generally considered arbitrable.\textsuperscript{135}

One of the best illustrations of the concept of procedural non-arbitrability arises in the context of agency, franchise and exclusive distributor disputes. As a general matter, disputes involving these sorts of commercial relationships can be made subject to arbitration.\textsuperscript{136} However, some courts have refused to enforce pre-dispute arbitration agreements in cases involving termination of the rights of agents, franchisees or exclusive distributors.\textsuperscript{137} Notably, this limitation on arbitrability only

\textsuperscript{131} See Born, supra n. 118, at 787.
\textsuperscript{132} Certainly much of the movement toward increased arbitrability in the United States can be attributed to the landmark decision in \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, in which the U.S. Supreme Court noted that ‘there is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism’. 473 U.S. 614, 636 (1985); see also Born, supra n. 118, at 783, 787.
\textsuperscript{133} See Kroll, supra n. 83, ¶ 16-7.
\textsuperscript{134} See Born, supra n. 118, at 767-69; Kroll, supra n. 83, ¶16-7.
\textsuperscript{135} See Kroll, supra n. 83, ¶ 16-7 to 16-8.
\textsuperscript{136} See id. ¶ 16-5, 16-8 to 16-9.
\textsuperscript{137} See id. ¶ 16-5, 16-12 to 16-63.
affects specific types of claims in this particular field, creating a sub-class of non-arbitrable issues within a subject matter that is generally considered arbitrable.

This phenomenon is relevant to mandatory trust arbitration for two reasons. First, procedural non-arbitrability is applied in the context of agency, franchise and exclusive distribution disputes in order to protect certain vulnerable parties. Trust disputes can also involve potential power disparities, either in situations where beneficiaries to certain types of commercial trusts are considered akin to consumers or in cases involving unborn, unascertained or legally incompetent beneficiaries.

Second, limitations on the arbitrability of certain types of agency, franchise or distribution claims are typically based on statutes that either (1) require the application of certain substantive laws that may rise to the level of 'conflict mandatory rules or ... part of the ordre public' or (2) grant state courts exclusive jurisdiction over that particular issue. Trust law is full of legislation establishing similar types of substantive and procedural rights. Although these types of provisions could on their face seem fatal to the arbitrability of disputes falling within the terms of the statute, there are two different ways of interpreting this type of legislation. A strict reading of these provisions would bar resolution of a particular issue in all other fora, arbitral or judicial. However, these sorts of statutes can also be read merely as prohibitions on foreign forum selection clauses, meaning that if the claim is heard in court, then it must be heard in that particular court. Courts considering claims involving the termination of agency, franchise and exclusive distribution relationships have not come to a consensus on the proper interpretation of these sorts of laws in that field. Such determinations would in any case not be binding on judges considering mandatory trust arbitration, since the two analyses are likely different enough to allow courts considering trust disputes to distinguish precedent regarding commercial relationships. Nevertheless, it is useful to consider how various courts have considered this issue in the commercial context, in case some analogies to trust arbitration exist.

138 See id. ¶ 16-9.
139 Some commentators view participants in certain commercial trusts as akin to consumers, although it might be more appropriate to view such persons as analogous to corporate shareholders or investors, since the typical beneficiary is also acting as a settlor by putting money into the trust. See Alan R. Palmer & Ahmed E. Taha, Mutual Fund Performance Advertising: Inherently and Materially Misleading?, 46 Ga. L. Rev. 289, 319–320 (2012) (discussing Dodd-Frank Wall Street Reform and Consumer Protection Act, which was aimed at mutual fund marketing practices aimed at consumers (albeit not distinguishing between mutual funds formed as trusts and mutual funds formed as investment companies)); see also supra n. 69 (noting more than half of all mutual funds are formed as trusts).
140 See id. ¶ 16-16.
141 See id. ¶ 16-16.
142 See id. ¶ 16-16.
143 See id. ¶ 16-16.
144 See id. ¶ 16-16.
The first notable issue is that courts faced with a potentially non-arbitrable issue in the context of an agency, franchise or exclusive distributorship relationship often consider whether and to what extent a mandatory provision of the forum state’s substantive law will be applied extraterritorially.\textsuperscript{145} Because arbitrators are often seen as either more likely or more able to apply the mandatory laws of a state other than that chosen by the parties to govern the dispute, some courts have been willing to allow arbitration of these suspect issues.\textsuperscript{146} However, courts have appeared less inclined to enforce foreign forum selection clauses in similar circumstances because foreign courts are often perceived as less able or less likely to apply mandatory principles of foreign substantive law.\textsuperscript{147}

This analytical approach does appear to have some relevance to multijurisdictional trust disputes, which can involve similar conflict of laws concerns regarding matters of substantive law.\textsuperscript{148} Indeed, it already appears as if Swiss courts will adopt a strict interpretation of exclusive jurisdiction statutes rather than the alternate reading.\textsuperscript{149}

However, trust arbitration adds a second unique quirk to this line of analysis based on the fact that trust law not only involves special substantive laws, but also certain special procedures relating to the resolution of trust disputes.\textsuperscript{150} Indeed, it is altogether possible that some judges may take the view that some of these procedures constitute a type of mandatory law analogous to the \textit{ordre public},\textsuperscript{151} even though rules of civil procedure – particularly those of a state other than the arbitral seat – are traditionally considered non-applicable in arbitration.\textsuperscript{152} While no cases appear to have discussed this issue yet, parties to trust disputes should nevertheless be aware that some courts might undertake a similar conflict of laws analysis regarding questions of procedural law.\textsuperscript{153}

The conflict of laws approach is only one way to address issues relating to the potentially mandatory nature of certain substantive and procedural laws relating

\textsuperscript{145} See id. ¶¶ 16-18 to 16-20, 16-24 to 16-74.

\textsuperscript{146} See id. ¶¶ 16-10 to 16-14, 16-18 to 16-20 [noting that the courts have the ultimate ability to review the application of substantive law under the ‘second look’ doctrine]; see also Born, supra n. 118, at 796–797.

\textsuperscript{147} See Kroll, supra n. 83, ¶ 16-52 to 16-63.

\textsuperscript{148} These cross-border claims can involve two different countries or two different territories within a federalized state. See Wüstemann, supra n. 5, at 47; see also In re Revocation of Revocable Trust of Fellman, 604 A.2d 263, 269 (Pa. Super. 1992) (Johnson, J., dissenting) (discussing issues involving U.S. interstate analyses); von Segesser, supra n. 27, at 22–28.

\textsuperscript{149} See Wüstemann, supra n. 5, at 49; see also supra n. 119 and accompanying text.

\textsuperscript{150} See Langbein, Contractarian, supra n. 1, at 662; see also infra n. 168 and accompanying text.

\textsuperscript{151} See Kroll, supra n. 83, ¶ 16-14.

\textsuperscript{152} See Born, supra n. 118, at 1763 n. 122 (noting “[i]t is often difficult to identify what precisely constitutes a mandatory procedural requirement of the arbitral seat (or elsewhere?”); S.I. Strong, Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared, 37 N.C. J. Int’l L. & Comm. Reg. 921 (2012); S.I. Strong, From Class to Collective: The De-Americanization of Class Arbitration, 26 Arb. Int’l 493, 546–547 [2010] [hereinafter Strong, De-Americanization]. However, it is also improper for states to impose litigation-like requirements on arbitration, since that infringes on party autonomy. See Born, supra n. 116, at 1766. Interestingly, a similar approach may be developing in the area of class and collective arbitration, where the traditional divide between substantive and procedural law is becoming blurred as a result of the view that some matters of procedure may be necessary in order to give effect to certain substantive rights. See Strong, De-Americanization, supra n. 152, at 546–547; S.I. Strong, Uncertainty and Mass Tort: Causation and Proof [José Ferrer Beltrán ed., forthcoming 2012] [hereinafter Strong, Abaclat].
to trusts. A second method of analysis also exists, based on the unique historical factors that drove the development of trust law and procedure.

Traditionally, trust law has operated as a field apart, not only in terms of its procedural and substantive law, but also in terms of the venue in which trust-related matters are heard. Many jurisdictions still require claims regarding the administration and interpretation of trusts to be brought in a special probate or chancery court, a practice that dates back to medieval England, when trust disputes were heard exclusively in the courts of equity, which were then separate from courts of law. Though the Supreme Court of Judicature Act 1893 eliminated the legal distinctions between law and equity, England’s Chancery Division still retains exclusive jurisdiction over trust-related concerns, a practice followed by a number of other common law countries. Rules regarding venue are found in statutes giving probate and chancery courts sole jurisdiction over trust matters. However, these provisions could not have been originally intended to bar arbitration because arbitration was relatively uncommon at the time these courts first developed in medieval England. Instead, this type of legislation was intended to and did act as a type of internal sorting mechanism within the national judicial system, directing trust disputes to one particular venue. Furthermore, many of the historic rationales supporting the use of specialty courts (i.e., the desire to take trust-related disputes away from the jury and give them to decision-makers with specialized substantive and procedural expertise) would be equally well met by arbitration. As such, it seems inappropriate to conclude that exclusive jurisdiction statutes in the trust context were or are meant to exclude either domestic or international arbitration.

Obviously, there is much more that could be said about procedural non-arbitrability in the context of mandatory trust arbitration, although such discussions are beyond the scope of this Article. At this point, it is enough to note that there are no clear guidelines to determine how a particular court will decide

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154 See McGovern et al., supra n. 15, at 369.
156 See McGovern et al., supra n. 15, at 626.
157 See id.
158 See Langbein, Contractarian, supra n. 1, at 627, 644–650; Strong, Two Bodies Collide, supra n. 8.
159 For example, one of the issues that requires further consideration involves the rationales behind rules of procedural non-arbitrability. This is particularly true with respect to arguments about the purported vulnerability of the parties. For example, in cases involving agents, franchisees and exclusive distributors, the concern is primarily substantive, in that the economic vulnerability of these commercial actors requires the application of certain mandatory laws that are meant to protect the agent, franchisee or exclusive distributor’s substantive rights concerning compensation under the contract. See Kroll, supra n. 83, ¶¶ 16-5, 16-9. In the case of trust disputes, the alleged vulnerability is primarily procedural, in that certain parties (i.e., those akin to consumers or those who are unascertained, unborn or legally incompetent at the time the dispute arises) may be harmed through unfair arbitral practices. However, it is unclear whether these distinctions will or should affect a court’s analysis in any way. Procedural non-arbitrability can also arise in the context of class arbitration or mass arbitration. See S.I. Strong, Mass Procedures as a Form of ‘Regulatory Arbitration’—Abactat v. Argentine Republic and the International Investment Regime, 38 J. Corp. L. (forthcoming 2013).
these sorts of issues. Nevertheless, settlors should keep two points in mind as the law in this area develops.

First, because determinations regarding procedural non-arbitrability are often driven by concerns regarding the application of certain principles of mandatory law, settlors should explicitly adopt procedures that give arbitrators the ability to consider and, if necessary, apply mandatory laws of countries other than that whose law the parties are generally seeking to have apply.160 In so doing, settlors may want to incorporate a conflict of laws approach similar to that reflected in the Hague Convention on Trusts, since that instrument reflects an internationally recognized means of addressing conflict of laws issues relating to trusts.161 While the Hague Convention on Trusts does not provide answers to all possible concerns (such as which rules of law are to be considered non-derogable or are to be given extraterritorial application), it does usefully describe the factors relevant to the determination of the law that is most closely connected with the trust and could be helpful to the extent that it suggests to the court that the settlor did not choose arbitration as a means of escaping mandatory rules of substantive law.162

Second, settlors should be aware that judges may consider procedural laws relating to trust disputes to be as important as substantive laws, with both possibly rising to the level of public policy. Since arbitral procedures that closely resemble judicial procedures cannot be said to be unfair in any way,163 settlors wishing to minimize potential problems arising out of the principle of procedural non-arbitrability may be well-advised to adopt somewhat more formal procedures vis-à-vis trust arbitration, at least until the device is more widely accepted. While it is true that mirroring judicial processes too closely might lead to the charge that settlors are ‘fail[ing] to engage with the possibilities o... arbitration’,164 this sort of approach has the benefit of addressing any judicial concerns about the fairness of the procedures used to resolve trust disputes.

As this discussion has shown, questions regarding procedural non-arbitrability can become quite complicated.165 Nevertheless, even this brief analysis has suggested ways that a settlor can positively affect the arbitrability analysis through adoption of certain arbitral procedures.

160 See Strong, Language, supra n. 16, at 315–316 (noting AAA Model Trust Clause may unwisely bind the hands of the arbitrators in this regard).
161 See Hague Convention on Trusts, supra n. 36, arts. 6–10, 15–18; Dyer, supra n. 1, at II.D.
165 These matters are considered elsewhere in more detail. See Strong, Two Bodies Collide, supra n. 8 (discussing limited non-arbitrability).
The next issue to consider involves the question of whether mandatory arbitration of internal trust disputes impermissibly ousts the jurisdiction of the court.\textsuperscript{166} At first glance, this also appears to be an issue over which settlors have little control. However, closer consideration suggests several ways in which settlors can influence a court’s analysis of this issue.

Discussion regarding the impermissible ouster of the court’s jurisdiction begins with the recognition that courts have traditionally exercised uniquely broad powers over the administration of trusts.\textsuperscript{167} Thus, for example:

\begin{quote}
[t]rust procedure law may be described as a three-tier structure. The routine phase is periodic judicial accounting. The accounting informs the beneficiaries, enabling them to enforce their rights. The accounting also provides closure for trustees on current installments of these long-duration undertakings. Because, however, judicial accounting can be costly and clumsy, drafters sometimes prefer to alter the default regime in favor of nonjudicial accountings.

The second procedural level, for situations of uncertainty or dispute, is judicial instruction. The trust tradition has been precocious in allowing the parties, typically the trustee, early resort to authoritative judicial guidance.

Finally, if litigation arises, it is tried to the judge, sitting without a jury.\textsuperscript{168}
\end{quote}

Several possible rationales can be used to justify the court’s expansive jurisdiction over trusts. One posits that the court assumes broad jurisdictional powers as a means of protecting beneficiaries from overreaching from the trustee.\textsuperscript{169} Thus, for example, it is usually ‘a non-excludable feature of a trust that the trustee’s administration of the fund must be, directly or indirectly, subject to the supervision of the court’.\textsuperscript{170}

The key principle here ‘is that the trustee must be sufficiently accountable so that his status as the non-beneficial owner of the assets vested in him is practically real’.\textsuperscript{171} However, ‘effective accountability does not mean that the trustees can be accountable only to the court rather than to some other body which has power to enquire into the trustees’ administration of the fund and to require them to abide by the terms of the trust instrument’.\textsuperscript{172} Arbitration can be an equally effective means of curbing any abuse by the trustee. In fact, objections from the beneficiaries regarding the procedure adopted ‘would only have weight if the beneficiaries were denied any effective means of enforcing their interests against the trustees. If the ADR procedure had effective machinery for enforcing the

\begin{footnotesize}
\textsuperscript{166} See Cohen & Staff, supra n. 10, at 209.
\textsuperscript{167} See McGovern et al., supra n. 15, at 552–555; Langbein, Contractarian, supra n. 1, at 662.
\textsuperscript{168} Id. at 24.
\textsuperscript{169} See also UTC, supra n. 7, §813; McGovern et al., supra n. 15, at 552–555.
\textsuperscript{169} Concerns about overreaching by the settlor are addressed through principles of arbitrability. See Strong, Two Bodies Collide, supra n. 8.
\textsuperscript{170} My, supra n. 10, at 22.
\textsuperscript{171} Id. at 24.
\textsuperscript{172} Id.
\end{footnotesize}
outcome of the determination against the trustees, then it seems that this objection would not hold.\textsuperscript{173}

Although a number of commentators consider mandatory trust arbitration as a legitimate means of holding trustees accountable to beneficiaries, the trust bench and bar often take a more conservative view based on longstanding precedent that is hostile to arbitration.\textsuperscript{174} However, closer analysis of these decisions shows that many of these cases involved trustees acting as arbitrators.\textsuperscript{175} Naturally courts found this practice problematic, since trustees were acting as judges in their own cause and either limiting or eliminating the court’s ability to review the propriety of the trustee’s decisions and actions.

This is a concern that can easily be addressed by settlors, most notably through the adoption of procedures that underscore the extent to which contemporary forms of arbitration require arbitrators to be both independent and impartial. While most, if not all, arbitral rules currently mention these principles in general terms, settlors might want to include slightly more complete descriptions of the principles of independence and impartiality (for example, inserting a phrase into the arbitral provision noting that independence means that a settlor, trustee, protector or beneficiary cannot serve as an arbitrator) or explicitly referencing more detailed standards such as the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration so as to demonstrate to the court the neutrality and objectivity of the process.\textsuperscript{176}

Another possible technique would be to identify why these procedural protections are being imposed (for example, incorporating a statement noting that arbitrators must be impartial and independent so as to ensure a neutral evaluation of the trustee’s activities). Furthermore, because “[m]any trust practitioners [and judges] have never encountered arbitration,”\textsuperscript{177} settlors might also want to adopt explicit language regarding the means by which the tribunal is selected, again to reinforce notions of independence and eliminate concerns that a trustee would be permitted to act as an arbitrator in a dispute concerning the trust. Finally, settlors might want to describe the extent to which the arbitral tribunal is bound to follow the governing law, since various members of the trust bench and bar have recently raised concerns in this regard.

These types of issues arise with equal vigour in all trust-related disputes. However, two types of trust procedures – judicial accounting and instruction – give rise to additional concerns, since they do not resemble traditional forms of arbitration.\textsuperscript{178} While the mere fact that certain procedures are unusual is not

\textsuperscript{173} Id. at 24–25; see also ACTEC, supra n. 10, at 13–14.
\textsuperscript{174} See ACTEC, supra n. 10, at 5 (discussing the ‘blinding prejudice’ to arbitration in contemporary trust and estates practice).
\textsuperscript{175} See Cohen & Staff, supra n. 10, at 211–215; Fox, supra n. 10, at 24.
\textsuperscript{177} Cohen & Staff, supra n. 10, at 206.
\textsuperscript{178} See Langbein, Contractarian, supra n. 1, at 662; see also UTC, supra n. 7, §813; McGovern et al., supra n. 15, at 532–535.
necessarily fatal to their being considered amenable to arbitration,\footnote{Indeed, arbitration is capable of adopting more diverse procedures than are available in litigation. See \textit{Born}, supra n. 118, at 1232, n. 442.} any form of novelty requires special consideration.

The first procedure – judicial accounting – is distinguishable from ‘normal’ arbitration to the extent that judicial accounting procedures can require routine and continuing oversight to trusts.\footnote{See \textit{UTC}, supra n. 7, §201(b); Estate of Proceeding for the Appointment of a Guardian for Charlotte Radcliffe, N.Y.L.J., at 36 (Sur. Ct. N.Y. County, July 20, 2007) (holding an arbitration provision in an agreement with an external third party advisor unenforceable on the grounds that arbitration would ‘unacceptably divest the court of continuing jurisdiction in this matter’); \textit{see also UTC}, supra n. 7, §201, cmt. (noting the UTC ‘does not create a system of routine or mandatory court supervision’, unlike the law in some U.S. states); \textit{McGovern et al.}, supra n. 15, at 552–553.} (Notably, some states do not contemplate ongoing jurisdiction, since the duty to provide an accounting is only triggered by a request from a beneficiary.\footnote{See \textit{Hayton et al.}, supra n. 6, ¶¶ 56.1, 87.2 to 87.6; \textit{see also id.}, ¶ 56.2.}) Duties of accounting exist with respect to commercial as well as other types of trusts.\footnote{See \textit{Rebecca Golbert}, \textit{The Global Dimension of the Current Economic Crisis and the Benefits of Alternative Dispute Resolution}, 11 Nev. L.J. 502, 517–518 (2011).}

Although this type of continuing involvement in a party’s affairs is unusual in arbitration, it is not unprecedented. For example, some fields – most prominently, the construction industry – use dispute review boards (also known as dispute resolution boards) to resolve issues that may arise between parties to a long-term contract.\footnote{See \textit{ICC}, Standard and Suggested Clauses for Dispute Resolution Services, Dispute Boards, available at http://www.iccwbo.org/court/arbitration/id114/index.html (including three model clauses reflecting varying degrees of finality, including some that approaches are binding); \textit{Born}, supra n. 118, at 243–244.} Dispute review boards allow arbitrators to gain an ongoing familiarity with the parties and the nature of the relationship while also providing a quick and cost-efficient means of resolving small disputes before they escalate into something more serious. Although some dispute review boards only issue non-binding decisions, there is nothing to prohibit the parties from creating a binding mechanism.\footnote{See \textit{Langbein, Contractarian}, supra n. 1, at 631, 653–654.}

Trusts often reflect the same kind of relational characteristic that is seen in long-term commercial contracts,\footnote{See \textit{Michael A. Marra}, \textit{The Construction Industry Guide to Dispute Avoidance and Resolution}, 567 PLI/Real. 525, 541–542 (May 7, 2009).} and a similar type of standing dispute resolution mechanism could be used in the trust context to deal with ongoing issues such as judicial accounting. Because the members of the board would be either appointed by a neutral body (such as an arbitral institution) or by both proponents of the trust or accounting procedure (i.e., the trustee) and those whose interests would be expected to be adverse to the trust or the accounting procedure (i.e., the beneficiaries),\footnote{\textit{See} \textit{UTC}, supra n. 7, §201, cmt. (noting the UTC ‘does not create a system of routine or mandatory court supervision’, unlike the law in some U.S. states); \textit{McGovern et al.}, supra n. 15, at 552–553.} such a process would comply with contemporary requirements for procedural fairness regarding the selection of arbitrators and would allow the trustee to be held accountable to the beneficiaries.

The second procedure – judicial instruction – runs into difficulties because arbitration typically does not involve the granting of advisory opinions. However,
requests for judicial instruction could be considered akin to requests for declarative or injunctive relief, which are arbitrable in many jurisdictions.\textsuperscript{187} This is particularly true to the extent that a request for judicial instruction leads to final resolution of a particular issue, since such a determination would resemble other types of decisions leading to a partial final award.\textsuperscript{188}

Notably, no conceptual problems arise simply because a party might make more than one request for judicial instruction during the life of an individual trust, since there is no requirement that arbitration be used only once by a particular set of parties. In cases where a series of disputes is possible, the parties can provide for the matters to be heard by different tribunals or by the same tribunal, either under the auspices of a standing dispute review board or through the reappointment of the same arbitrators that heard the first matter. However, because some courts might take the view that a second arbitration involves ‘strangers’ to the first proceeding, even if the parties and the arbitrators are the same,\textsuperscript{189} settlors should consider adopting procedural provisions that outline whether and to what extent a later tribunal can consider arguments and evidence presented to an earlier tribunal so as to avoid problems with respect to the confidentiality of previous proceedings and the preclusive value of earlier awards.\textsuperscript{190}

Another way to analyze judicial instruction in arbitration is to view such procedures as constituting a form of interim provisional relief.\textsuperscript{191} Interestingly, this approach could lead to even fewer problems as a matter of arbitral jurisprudence, since courts and arbitral tribunals have long been viewed as holding concurrent jurisdiction over requests for these kinds of relief.\textsuperscript{192} Therefore, allowing either a tribunal or a court to hear matters involving judicial instruction could be seen as consistent with practices elsewhere in arbitration.

Concerns might be raised with respect to arbitration of matters relating to judicial accounting or instruction to the extent that arbitration law only considers final awards to be immediately enforceable and some awards arising out of a judicial accounting or instruction procedure might not be considered ‘final.’\textsuperscript{193} However, this does not appear to be unduly problematic, since some of the issues that are at stake in accounting and instruction procedures are obviously not intended to constitute a final determination of the rights and responsibilities between the parties.\textsuperscript{194}

\textsuperscript{187} See Born, infra n. 118, at 2478–2479.

\textsuperscript{188} Although arbitration is best suited to disputes that address all of the matters outstanding between the parties, arbitral tribunals can render partial final awards that provide binding resolution of some discrete aspect of a larger dispute. See Arbitration Act 1996, supra n. 124, ¶47; Born, supra n. 118, at 2430–2433.


\textsuperscript{191} See Born, infra n. 118, at 1946–1961.

\textsuperscript{192} See id. at 1972–1973, 2050.

\textsuperscript{193} See id. at 2430–2435.

\textsuperscript{194} For example, some types of accountings are expressly meant to be interim in nature.
discrete issue would appear to be adequately covered by existing law regarding partial final awards. The dispute there involved a series of awards rendered by a sole arbitrator pursuant to an arbitration provision contained in a family trust. Although the arbitrator was dealing with ongoing accounting issues, the court demonstrated no conceptual difficulty with allowing such matters to be addressed in arbitration, based on precedent that allowed ‘the utilization of a multiple incremental or successive award process as a means, in an appropriate case, of finally deciding all submitted issues’.

In reaching its conclusion, the court also noted:

‘the ongoing and changing nature of trust administration’ may require ongoing proceedings ‘for instructions, to settle accounts, to fix compensation . . . [and] to allow, compromise or settle claims’. The arbitrator did not abuse his discretion in fashioning a remedy to resolve ongoing matters relating to Trust administration costs and fees.

This suggests that arbitrators may properly address all types of disputes associated with trusts, including those dealing with accounting or judicial instruction. Such procedures will not impermissibly oust the court’s jurisdiction so long as the procedures allow independent scrutiny of the trustee’s decisions.

(c) Proper Representation of the Parties

The third issue to consider involves the need to ensure that all interested parties are properly represented in the proceedings. Here, the biggest problem involves actual or potential beneficiaries who may be unascertained, unborn or legally incompetent at the time the dispute arises. This is quite likely a novel issue for many commercial lawyers, since very few areas of law require judges or arbitrators to consider the rights of persons who are not actually present in the dispute. Although there are some exceptions, most notably the representative class action and its corollary, the class arbitration, which both involve a few named individuals bringing a claim on behalf of a large number of unnamed others, trust disputes are not representative in nature. Instead, trust disputes proceed in rem, with decisions binding ‘all persons having adequate

195. See id.
197. See id.
198. See {\textit{Cohen & Staff}}, supra note 10, at 209.
199. See id.
200. See id.
notice, whether or not they actually participate in the proceeding.\textsuperscript{203} This obviously puts significant pressure on judges and arbitrators to adopt procedural mechanisms that properly ascertain who should have notice of a trust proceeding, how notice should be provided and how the rights of all interested parties, including those who are not present, are to be protected during the hearing phase.\textsuperscript{204}

The first task – identifying who should be given notice of a trust dispute – requires a careful reading of the trust document as well as a detailed knowledge of the context in which the trust is operating, since some beneficiaries may not be identified in the trust by name. Although this practice may seem unusual, it is quite common in trusts and arises out of the desire to provide settlors with maximum flexibility in setting up their trusts.\textsuperscript{205} For example, a settlor contemplating a long-term trust may decide to identify beneficiaries by class so as to ensure that all relevant persons are captured within the trust provisions.\textsuperscript{206} Alternatively, a settlor may want to give the trustee the discretion to determine who a beneficiary is or

\textsuperscript{203} Nevertheless, trust disputes do share some attributes with class claims. For example, trust disputes could grow to rival class suits with respect to size, particularly in cases involving commercial trusts. See Wüstemann, supra n. 5, at 35. However, this characteristic does not create any conceptual problems for either class arbitration or trust arbitration, since the arbitral process is entirely capable of handling multiparty matters and has done so with increasing frequency in recent years. See Lew et al., supra n. 130, ¶ 16-1 (noting the percentage of multiparty arbitrations administered by the ICC rose from 20% to 30% between 1995 and 2001); Martin Platte, \textit{When Should an Arbitrator Join Cases?}, 18 Arb. Int’l L. 67, 67 (2002) (noting more than 50% of LCIA arbitrations reportedly involve more than two parties). Notably, a trust dispute could result in a class claim, including possibly a class arbitration. For example, in \textit{Doctor’s Associates, Inc. v. Hollingsworth}, a number of Subway franchisees brought a class action in state court against various Subway franchising entities, including the trustees of the Subway Franchisee Advertising Fund Trust (SFAFT), alleging various breaches of fiduciary duty and conspiracy claims relating to the alleged mismanagement and misappropriation of contributions to the SFAFT. \textit{Doctor’s Assoc., Inc. v. Hollingsworth}, 949 F. Supp. 77, 79 (D. Conn. 1996). The various franchise agreements included a provision requiring arbitration of ‘[a]ny controversy or claim arising out of or related to this contract or the breach thereof’. Id. Although the SFAFT did not have an arbitration provision itself, the court found that the claims against the SFAFT arose out of or related to the franchise agreement and concluded that the trust claims were arbitrable. See id. at 84–85. As a result, the dispute was ordered into arbitration. See id. at 86. The claims were most likely heard on a bilateral basis, since the dispute arose in 1996, prior to the rapid expansion of class arbitration in the mid- to late 2000s. See \textit{Green Tree Financial Corp. v. Bazzle}, 539 U.S. 444 (2003) (plurality opinion); Strong, \textit{First Principles}, supra n. 163, at 183. Had the dispute arisen today, it might have been heard as a class arbitration. See id. at 269 (noting the class arbitration device has survived recent U.S. Supreme Court decisions); S.I. Strong, \textit{The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?} 30 Mich. J. Int’l L. 1017, 1055–1063 (2009) (discussing how class arbitrations can arise even in cases of contractual silence as to class treatment).

\textsuperscript{204} An example might be a trust for the benefit of ‘my grandchildren’, not all of whom may be born at the time the trust is created. Notably, the reference to a class of beneficiaries in the context of a trust should not be equated with a class of claimants in a U.S.-style class action or arbitration. In trust law, the term ‘class’ simply refers to a group of individuals identified by certain characteristics (‘my grandchildren’ or ‘my employees’) rather than by name, thus allowing membership in the class to expand or contract without requiring an explicit amendment to the trust. Classes in trust law are not therefore associated with representative relief, as is the case with class actions or arbitrations.
whether a disbursement under the trust is necessary. Requiring all these elements to be spelled out in the trust would mean that the document would not only be quite cumbersome but would also have to be constantly amended to take changing circumstances into account. In some cases, it would be impossible to provide the requisite amount of specificity at the time the trust was created. In either event, the flexibility of the trust would be severely curtailed. The trust document is only one source of information about potential parties to a trust dispute. Sometimes people’s interest in the trust and in the dispute arise as a matter of law. Usually these claims are based on certain aspects of either marital or succession law that prohibit property from being distributed in certain ways. Although these types of issues may be perceived as arising most often in the context of private family trusts, questions regarding marital and succession rights can also arise in the context of commercial trusts.

Some potential claimants will be ascertainable as soon as it is determined that a right may arise under the trust or under a statute. For example, the settlor’s spouse can easily be identified by name and can come forward in his or her own capacity once a dispute is filed and notice is given. However, there will be times when a court may be able to identify a potential party by relationship but may not be able to bring any actual, living person into the dispute because the real party in interest is unascertained, unborn or legally incompetent at the time the dispute arises. In litigated disputes, the problem has been resolved by allowing the court ‘to appoint a person to represent the interests of such beneficiaries’, although ‘even then, any compromise of the litigation has to be approved by the court’. In England, the person named to protect the beneficiaries’ claims, called a ‘special representative’,

207 An example of the first type of provision might be a trust for the benefit of ‘any student in the town of Littleton who needs financial assistance to attend university.’ An example of the second type of provision might be a trust indicating disbursements to ‘my son, Jack, if he should need financial assistance.’

208 For example, a trust created for the benefit of ‘those of my grandchildren who are alive ten years after my death’ could not reliably name all such persons in the trust itself, since beneficiaries could enter the class after the settlor’s death (through birth) or depart from the class (through death). There might also be grandchildren who were living at the time the trust was created but who were not known to the settlor.

209 States often restrict dispositions of property that would affect the rights of forced heirs or infringe on a surviving spouse’s elective share. See McGovern et al., supra n. 13, at 27, 160–171; Bosques-Hernández, supra n. 55, 23 (discussing Spain, Bolivia, Peru and Honduras); Perrin, supra n. 1, at 637–639 (discussing clawback possibilities involving inter vivos trusts and testamentary trusts); Wüstemann, supra n. 5, at 45–46.

210 See Regions Bank v. Britt, No. 4:09CV61TSL-LRA, 2009 WL 3766490, at *2 n. 2 (S.D. Miss. Nov. 10, 2009) (involving a husband who argued that a deed of trust signed by his wife was invalid because it encumbered marital property without his consent).

211 For example, a trust provision benefiting ‘those of my grandchildren who are alive ten years after my death’ will be known to affect all of the settlor’s grandchildren who are alive ten years after the settlor’s death. However, if a dispute involving the trust arises three years after the settlor’s death, there may be some potential beneficiaries who are yet unborn (if at least one of the settlor’s children is still alive) or who are minors. Alternatively, a trust that provides a $500 cash award annually to the top student of Littleton Preparatory School for the next twenty years will involve a group of identifiable beneficiaries (since it is known that there will be one top student each year for the remainder of the term of the trust), even though future beneficiaries cannot be specifically ascertained by name if a dispute arises in year three of the trust.

212 Buckle & Olsen, supra n. 3, at 649–650; see also Mautner & Orr, supra n. 10, at 161, 163–164; Wüstemann, supra n. 5, at 47.
cannot have any personal interest in the dispute itself.\footnote{See Mautner & Orr, supra n. 10, at 161, 163–164; Wüstemann, supra n. 5, at 47.} Other jurisdictions, such as the United States, either appoint an independent representative similar to a special representative or allow an existing beneficiary who shares the absent beneficiary’s interests to protect the absent beneficiary’s claims in a practice known as ‘virtual representation’.\footnote{See McGovern et al., supra n. 15, at 613–614; Mautner & Orr, supra n. 10, at 161, 163–164; Wüstemann, supra n. 5, at 47.} Minors and other legally incompetent persons (such as the mentally incapacitated) may have a legal representative, typically referred to as a guardian, appointed if such a person is not already in place.\footnote{See McGovern et al., supra n. 15, at 660–663. Sometimes this person is a natural guardian (i.e., the parent of a child with a legal interest in the dispute) and sometimes this person is specially appointed (i.e., a guardian ad litem). Courts typically appoint a guardian ad litem if there is a chance that the interests of the natural guardian will conflict with the interests of the represented person.} The question therefore becomes whether these sorts of representative mechanisms can be used in arbitration.

The answer may depend on whether the trust instrument or governing procedure specifically describes the representative mechanism that is to be used. For example, it has been said that:

\begin{quote}
[i]t appears to be no reason why the court would not grant a stay [of litigation] to the trustee on the sole ground that the beneficiary is not properly represented in the arbitration. If the arbitration provision is properly drawn to provide for adequate representation, then the child [or other beneficiary] should be bound to take the benefit of it.\footnote{Cohen & Staff, supra n. 10, at 222–223 (suggesting ‘[t]he arbitral tribunal could determine who should be served with notice of the arbitration, in the same way as, in court proceedings, a judge can’); see also Hayton, supra n. 97, at 15–18 (suggesting possible mechanisms for appointing virtual representatives).}
\end{quote}

However, a trust that specifically describes notice and representation procedures in the document itself could become quite lengthy, something that is often not advisable as a matter of arbitration law and procedure.\footnote{See Gary B. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing, 57–38 (2010) [hereinafter Born, Drafting]; Borris, supra n. 8, at 63.} Instead, it may be better to devise special arbitral rules outside of the trust itself describing how unascertained, unborn and legally incompetent beneficiaries can come (or be brought) forward to make their claims.\footnote{See Hayton et al., supra n. 6, ¶ 56.11.} Either way, the arbitral clause or procedural rules should also provide for the payment of special or virtual representatives out of the trust fund.\footnote{See Hayton, supra n. 111, at 72; see also Hayton, supra n. 97, at 17.} Trustees who are not given explicit powers to appoint special or virtual representatives in the trust or governing arbitral rules could attempt to do so based on their residual discretionary powers under the trust. Although this approach has not been frequently discussed by commentators and may therefore be somewhat
open to debate, trustees wishing to take on this task could seek to rely on statutory provisions allowing trustees to pursue non-judicial means of dispute resolution.\textsuperscript{220}

Even if representatives can be used in arbitration, some potential problems still remain. For example, questions exist as to whether the arbitral tribunal would have the ability to approve the settlement of a trust dispute in cases involving appointed representatives or whether that power could be exercised only by a court.\textsuperscript{221} While arbitrators are entirely competent to enter an award on an agreed settlement as a matter of arbitration law,\textsuperscript{222} some courts could oppose similar actions in the trust context on the grounds that the judicial duty to approve the voluntary disposition of a trust dispute is non-derogable.\textsuperscript{223} However, some commentators take the view that the use of representative devices in ‘nonjudicial dispute resolution procedures has simplified the settlement process and made it possible to finalize nonjudicial dispute resolution agreements without having to seek court approval.\textsuperscript{224} Challenges could also arise as to the competency of a particular representative. However, it has been said that ‘[o]ne can leave it to the good sense of the arbitrator to provide for due process and a fair hearing by appointing appropriate skilled independent persons to represent minors and unborn and unascertained beneficiaries’.\textsuperscript{225}

Finally, questions could arise as to whether a representative needs to be appointed in any particular set of circumstances. For example, a representative might not need to be appointed for a minor if the minor is receiving a benefit under the trust, since consent to receiving a benefit is not necessary in some jurisdictions.\textsuperscript{226} However, a representative would be necessary in cases where a conflict of interest existed between a minor beneficiary and his or her natural guardian (i.e., the parent).\textsuperscript{227}

It is notable that although numerous questions exist with respect to the procedures that can or should be used to address the special needs of unborn, unascertained and legally incompetent beneficiaries, none of the issues are conceptually problematic. Instead, adequate solutions appear possible with


\textsuperscript{221} See Hayton, supra n. 97, at 13–15.

\textsuperscript{222} See Born, supra n. 118, at 2437–2438.

\textsuperscript{223} See Hayton, supra n. 97, at 15 (indicating no need for judicial intervention in litigated cases in some U.S. states while acknowledging the need for court involvement in England and certain U.K. dependencies). Interestingly, arbitrators appear to have the right to enter a consent award in the context of class arbitration, even though courts typically have to confirm a settlement in a judicial class action. See Federal Rules of Civil Procedure, Rule 23(e) (U.S.); American Arbitration Association, Supplementary Rules for Class Arbitrations, rule 8, effective Oct. 1, 2003 [hereinafter AAA Supplementary Rules], available at www.adr.org; JAMS Class Action Procedures, rule 6, effective May 1, 2009, available at www.jamsadr.com/rules/class_action.asp. This provides some support for the notion that arbitrators in trust disputes should be able to enter consent awards involving represented parties without the need for judicial intervention. The important point is that a neutral entity – either the court or the arbitral tribunal – has independently reviewed the settlement to ensure that it is fair to all concerned.

\textsuperscript{224} Mautner & Orr, supra n. 10, at 166.

\textsuperscript{225} Hayton, supra n. 111, at 72.

\textsuperscript{226} See Wüstemann, supra n. 6, at 52.

\textsuperscript{227} See id.
sufficient forethought and care. Therefore it appears as if settlors can positively influence determinations about the enforceability of an arbitration provision in a trust by adopting procedures that take the special needs of particularly vulnerable beneficiaries into account.

V. ADOPTING VIVABLE PROCEDURES FOR MANDATORY TRUST ARBITRATION

As the preceding discussion suggests, mandatory trust arbitration gives rise to a number of issues that would benefit from special arbitral procedures. These procedures could be adopted in one of several ways. First, settlors could attempt to address each of these items in an arbitration provision located in the trust itself. However, experts in arbitration do not encourage drafters to adopt these sorts of lengthy, ad hoc provisions, since the use of non-standard language can lead to disputes over the scope and interpretation of the operative terms. This sort of approach would also not permit easy and inexpensive amendment of the procedures to take new legal developments into account, as would be the case if the detailed provisions were found in a separate set of arbitral rules. Furthermore, this type of clause might be difficult to draft at the time of trust creation, since the settlor may not want to pay for a lawyer to draw up an individualized dispute resolution mechanism that the settlor may not believe is necessary.

Second, settlors could leave the nuances of arbitral procedure to the discretion of the arbitral tribunal, although this sort of approach suffers somewhat from a lack of transparency and predictability. Because courts may be more inclined to enforce an arbitration provision in a trust if the judge can be assured of the fairness of the process in advance of any actual proceedings, settlors may be better served by having key procedures set in place before the arbitration begins. A similar sort of benefit can arise retroactively, in that courts considering the enforcement of an arbitral award might look favourably on the fact that certain procedures were known in advance of the arbitration, since parties can thus be said to have been on notice of the procedures to be used to resolve the dispute.

This strongly suggests that the best approach would be to adopt some sort of pre-established rule set in the arbitration provision located in the trust. Of course, in so doing, the settlor is not required to have arbitral procedures that have been drafted especially for use in trust disputes. Indeed, a number of internal trust disputes arising out of mandatory arbitration provisions in a trust instrument have utilized the general rules of the AAA, the ICC and the ICDR. However, none of

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228 See Born, Drafting, supra n. 217, at 37–38.
229 See Borris, supra n. 8, at 65.
230 This is one of the reasons why parties adopt institutional arbitration. See Lew et al., supra n. 130, ¶ 3-20.
these standard rule sets specifically addresses any of the various trust-related concerns outlined in this Article. While this is not fatal to the use of these rules, since the tribunal can always tailor the procedures pursuant to the general grant of discretion contained in each of the rule sets,\textsuperscript{232} this kind of broad reliance on arbitral discretion again robs the court of the opportunity to appreciate independently the extent to which the procedures used in the arbitration safeguard important principles of procedural fairness.

However, settlors do not have to rely on general institutional rules, since the AAA has specifically designed a dedicated set of arbitral procedures – the AAA Trust Arbitration Rules – to address the unique challenges associated with the arbitration of trust disputes.\textsuperscript{233} These rules are analyzed in detail below. However, a second set of specialized procedures – the DIS Supplementary Rules – might also provide useful ideas for proponents of trust arbitration, since the DIS rules address a type of collective arbitration that is in many ways similar to mandatory trust arbitration.\textsuperscript{234} Therefore, the DIS Supplementary Rules are discussed below as well.

\textit{(a) The AAA Trust Arbitration Rules}

The AAA Trust Arbitration Rules were first published in 2003, with various revisions having been made in the intervening years.\textsuperscript{235} Although the title of the rules clearly demonstrates that the AAA meant to address the special challenges associated with trust arbitration, no one has ever analyzed the extent to which the AAA Trust Arbitration Rules achieve that objective. The following discussion aims to fill that analytical gap.\textsuperscript{236}

It should be noted that the AAA Trust Arbitration Rules are currently in the process of revision, with a new version due out at about the time this Article comes out in print. Although the final draft language was unavailable at the time this Article went into production, the following discussion will identify several matters


\textsuperscript{233} See \textit{AAA Trust Arbitration Rules, supra n. 17. In 2005, the American College of Trust and Estate Counsel (ACTEC) was said to be working on a set of Model Rules for Trust and Estate Arbitration, but those rules do not appear to have been published as such. See Bridget A. Logstrom et al., \textit{Resolving Disputes with Ease and Grace}, 31 Am. Coll. Tr. & Estates Couns. J. 235, 243 (2005).

\textsuperscript{234} See \textit{DIS Supplementary Rules, supra note 19. While class arbitration also constitutes a collective arbitral proceeding, class arbitration is not really analogous to trust arbitration given class arbitration’s focus on representative relief. Therefore, the various rules on class arbitration will not be discussed herein.

\textsuperscript{235} See \textit{AAA Trust Arbitration Rules, supra note 17; see also AAA, Archived Rules, available at http://www.adr.org.

\textsuperscript{236} The AAA Trust Arbitration Rules contain a number of standard provisions which are necessary for any arbitration but which do not bear on any trust-related issues. These provisions will not be addressed herein.
that are believed to be covered in the new rule set. However, many of the issues identified in the following analysis will likely remain relevant even under the revised rules. Furthermore, the following discussion will apply to any proceedings governed by the 2009 version of the AAA Trust Arbitration Rules.

(i) Applicability

The first thing to consider is how the AAA Trust Arbitration Rules may be invoked. According to Rule 1, the settlor of a trust can adopt the AAA Trust Arbitration Rules either by mentioning the rules by name in the trust or by invoking institutional arbitration with the AAA without reference to any particular AAA rule set. Reference to the AAA Trust Arbitration Rules may be made in the trust itself, thus triggering the obligation to resolve future disputes involving matters internal to the trust through arbitration, although the rules can also be adopted in existing disputes. The AAA provides a model arbitration clause for inclusion in the trust, although that clause appears to restrict unnecessarily the scope of issues that are considered amenable to arbitration.

Although Rule 1 appears straightforward on its face, implicitly or even explicitly invoking the AAA Trust Arbitration Rules does not necessarily mean that any ensuing arbitration will be governed by those procedures. Instead, the AAA will override the settlor’s choice of procedures if the relationship between the parties appears to be consumer in nature. In those cases, the dispute will proceed under the AAA Supplementary Rules on Consumer-Related Disputes (AAA Consumer Rules). While parties are permitted to bring any concerns about the application of the AAA Consumer Rules to the arbitrator, there is no guarantee that their objections will prevail, since the decision to use the AAA Consumer Rules resides solely with the AAA. Although the intent is obviously to protect small, individual parties from what might be seen as unnecessarily complex procedures, this approach is troubling because it eliminates the application of any special trust-related procedures that are presumably contained in the AAA Trust Arbitration Rules. The provision is also problematic as a matter of trust law, since one of the primary rules of trust construction is to give effect to the intent of the settlor unless to do so would contravene positive law or public policy.

Of course, the immediate response is that the settlor can be said to have agreed to the use of the AAA Consumer Rules in appropriate cases, since the AAA Trust Arbitration Rules explicitly contemplate such a possibility. Use of the AAA Consumer Rules may also be seen as necessary in light of the special public policy

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237 See AAA Trust Arbitration Rules, supra n. 17, rule 1.
238 See id., Introduction, rule 4.
239 See id., Model Clause; Strong, Language, supra n. 16, at 313.
240 See AAA Trust Arbitration Rules, supra n. 17, rule 1; see also AAA Consumer-Related Disputes Supplementary Procedures [hereinafter AAA Consumer Arbitration Rules], available at http://www.adr.org.
241 See AAA Trust Arbitration Rules, supra n. 17, rule 1. Because settlors have no legal interest in any disputes involving the trusts that they have created, settlors have no standing to enforce an arbitration provision in a trust and thus cannot lodge an objection themselves.
242 See Hayton et al., supra n. 5, ¶ 43.1(1); Janin, supra n. 11, at 528.
concerns relating to consumer arbitration. Indeed, some trust commentators approve of the AAA’s approach to consumer-oriented arbitration, based on worries about overreaching on the part of professional trustees involved in overseeing certain commercial trusts, since those trusts are sometimes seen as operating largely at the discretion of the professional trustee rather than at the direction of the settlors.243

However, it is not yet clear whether this default rule is necessary, given that there has been no suggestion that the AAA Trust Arbitration Rules are in any way unfair to small users. Furthermore, there has been no evidence that any purported overreaching on the part of a trustee of a commercial trust is any different than overreaching by any other trustee. Indeed, although some people may view settlor-beneficiaries to commercial trusts as consumers, it may be more apt to view these persons as analogous to corporate shareholders, since they are ‘buying into’ the trust in much the same way that corporate shareholders purchase corporate shares. As such, settlor-beneficiaries of these types of trusts might be seen as more sophisticated than other types of consumers and therefore might be subject to somewhat different rules and presumptions.244 Given these and other questions, it seems inappropriate to assume automatically that the AAA Consumer Rules would be the best means of resolving an internal trust dispute.

The AAA also alters certain aspects of the standard AAA Trust Arbitration Rules in cases involving particularly large disputes, with Rule 8 indicating that the arbitration will proceed under the AAA Supplementary Procedures for Large, Complex Disputes (AAA Complex Dispute Procedures) whenever the claim or counterclaim exceeds $1 million and at least one party has requested use of those procedures.245 Parties may also jointly agree to the application of the AAA Complex Dispute Procedures, regardless of the amount at issue.246 In both instances, application of the AAA’s Complex Dispute Procedures is subject also to the AAA’s discretion.247

The AAA Complex Dispute Procedures are not lengthy and primarily involve slightly different procedures regarding certain administrative concerns, such as those involving the number of arbitrators and the form of the award.248 However, there are some important differences between the standard AAA Trust Arbitration Rules and the AAA Complex Dispute Procedures.249 As such, the AAA’s approach

243 The author is grateful to David Horton for this point.
245 See AAA Trust Arbitration Rules, supra n. 17, rule 8; see also id. rules 46-51. This triggering amount will likely be reached quite often, particularly in cases involving commercial trusts.
246 See id. rule 8.
247 See id.
249 See infra nn. 261–270 and accompanying text.
to the application of these alternative procedures is problematic because it puts procedural decisions in the hands of the AAA and, to a lesser extent, the parties, even though trust law has traditionally given precedence to the intent of the settlor in all matters concerning the trust.

The expected revisions of the AAA Trust Arbitration Rules may alter the applicability of the AAA Consumer Rules to trust disputes. This, of course, has both advantages and disadvantages, depending on the type of trust that is at issue and the extent to which that trust appears to reflect qualities similar to a consumer contract. References to the AAA Complex Dispute Procedures appear likely to remain in the revised AAA Trust Arbitration Rules.

(ii) Multiparty Procedures

One of the primary challenges of trust arbitration involves the possibility of multiparty disputes. Thus, it is not surprising that the AAA Trust Arbitration Rules appear to take this issue into account, most visibly in language stating that ‘[t]he initiating party shall give written notice to all other parties (hereinafter respondent).’

While this language properly recognizes that trust disputes can involve more than two parties, the AAA creates various problems by characterizing anyone who is not initiating the arbitration as a respondent. Certainly there are benefits to the AAA’s approach, including the clear delineation of who should work together for purposes of appointing arbitrators and submitting any responsive documents. However, this particular technique fails to take into account the possibility that not all members of the so-called respondent group may be similarly situated.

This potential for misalignment arises out of the diverse nature of the parties to a trust dispute. For example, trust-related controversies can involve the original or successor trustee(s), the original or successor protector(s), some or all of the beneficiaries (including perhaps some persons who are unborn, unascertained or legally incompetent) and possibly even parties external to the trust, such as advisors, agents or persons with statutory claims hostile to the existence of the trust. Requiring all of these individuals to act together to choose an arbitrator or file a single response would be inappropriate in some cases, since some of these late-joined parties could have interests that align more naturally with those of the claimant.

The AAA Trust Arbitration Rules also run into difficulties to the extent that they fail to mention whether and to what extent claimants must provide statutory notice based on provisions found in any relevant probate or family law statute. The rules are also silent with respect to the appointment of representatives for parties who

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250 See Horton, supra n. 10, at 1036; Janin, supra n. 11, at 529; Wüstemann, supra n. 5, at 53–54.
251 See AAA Trust Arbitration Rules, supra n. 17, rule 5.
252 Although external parties are not usually implicated in internal disputes, exceptions to the general rule do exist. See supra n. 202; see also infra n. 293.
are unascertained, unborn or legally incompetent at the time the dispute arises.\textsuperscript{253} While these issues could be addressed by the arbitral tribunal on an ad hoc, discretionary basis,\textsuperscript{254} such omissions are striking in a rule set that purports to take the special needs of trust disputes into account.

The AAA Trust Arbitration Rules struggle with multiparty issues in other ways as well. For example, the rules indicate that ‘[a]ny person having a direct interest in the arbitration is entitled to attend hearings’.\textsuperscript{255} While this phrase may refer only to persons who have been formally joined in the proceedings, the language could be interpreted to include potential parties who have not yet officially joined the arbitration even though they have an interest in the outcome of the dispute.\textsuperscript{256} However, because the AAA Trust Arbitration Rules do not discuss how notice would be given to these sorts of potentially interested but currently non-participating parties, any right to attend a hearing would likely be in name only.\textsuperscript{257}

This raises a related problem, namely that some parties to a trust dispute may only wish to join or need to be joined at some point late in the proceedings. However, the AAA does not address the issue of late joiner.

The AAA Trust Arbitration Rules have difficulty dealing not only with late-arriving parties but also with late-arising claims. For example, the AAA states that no new or different claim can be submitted by a party without the consent of the arbitrator.\textsuperscript{258} While this may be a standard provision in other types of arbitral rules, the special nature of trust disputes makes such restrictions potentially problematic, since not all parties may be similarly situated toward the dispute. This is particularly true given the mechanical classification of all parties who did not initiate the claim as respondents.

There is opportunity for improvement in individual cases, since AAA Trust Arbitration Rules allow both the parties and the arbitral tribunal to craft suitable procedures that are more narrowly tailored to the dispute at hand.\textsuperscript{259} Other savings mechanisms also exist, such as the rule indicating that if parties joined together in a claimant or respondent group fail to agree on the selection of an arbitrator, the AAA will appoint such a person.\textsuperscript{260} However, the overall impression is that the AAA Trust Arbitration Rules do not make adequate provision for the unique, multiparty nature of trust disputes.

\textsuperscript{253} The introduction to the rules advises parties to consult local law with respect to the need to name a guardian \textit{ad litem} for unborn or legally incompetent parties, but does not mention the issue of unascertained parties.
\textsuperscript{254} See AAA Trust Arbitration Rules, supra n. 17, Introduction.
\textsuperscript{255} Id. rule 21.
\textsuperscript{256} For example, one of several beneficiaries might decide against active participation in a trust dispute, even though that person’s rights will be determined by the outcome of the dispute. See Horton, supra n. 10, at 1036; Janin, supra n. 11, at 529.
\textsuperscript{257} See Horton, supra n. 10, at 1081–1082.
\textsuperscript{258} See AAA Trust Arbitration Rules, supra n. 17, rule 7.
\textsuperscript{259} See id. rules 1, 25. However, the parties may only vary the AAA Trust Arbitration Rules by written agreement. See id. rule 1.
\textsuperscript{260} See id. rule 11.
At this point, it does not appear that the revised version of the AAA Trust Arbitration Rules will make any improvements on the current approach to multiparty proceedings. However, it is possible that late amendments could attempt to resolve some of the problems identified herein.

(iii) Awards

Another area of concern involves awards. In general, the AAA Trust Arbitration Rules appear to consider awards arising out of trust arbitration to be similar to awards in any other context. However, in so doing, the AAA overlooks some significant issues. For example, for an arbitral award to be enforceable under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York Convention], that award must be binding on the parties (i.e., final).261 However, some awards arising out of mandatory trust arbitration, particularly those involving judicial instruction and accounting, could have problems meeting the New York Convention’s test of finality.262 While parties can take steps to increase the enforceability of individual awards by only submitting suitable issues to the arbitrators, it would have been helpful if the AAA had addressed this issue in some way.263

The AAA Trust Arbitration Rules also do not seem to recognize any potential problems with respect to consent awards, instead simply stating that an arbitrator may make such an award, using language that is very similar to that found in other AAA rule sets.264 This could create difficulties, since some judges could take the view that approval of any settlement agreement involving a trust dispute lies within the exclusive jurisdiction of the courts, particularly if the award affects the rights of unascertained, unborn or legally incompetent beneficiaries.265 While it is possible to devise procedures that would help assuage any judicial concerns about coercive settlements,266 the AAA provides no proposals in this regard, suggesting that this was not an issue that the drafters of the AAA Trust Arbitration Rules considered independently in light of the applicable principles of trust law.

Other issues also arise. For example, Rule 37 of the AAA Trust Arbitration Rules requires awards to contain, inter alia, ‘a summary of the issues, the damages

261 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(c), June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention]. There are some questions as to whether the New York Convention would even apply to trust arbitration, but those issues are beyond the scope of this Article. See Strong, Two Bodies Collide, supra n. 8.

262 See New York Convention, supra n. 261, art. V(1)(e); see also supra nn. 178–198 and accompanying text.

263 For example, the rules could distinguish between the types of trust-related issues that might lead to interim (and hence non-enforceable) awards and those that could be considered final, even if the procedure used varied somewhat from what is considered ‘normal’ for arbitration. See supra nn. 178–198 and accompanying text.

264 See AAA Trust Arbitration Rules, supra n. 17, rule 37(d); see also AAA Commercial Rules, supra n. 232, rule R-44.

265 See supra nn. 221–224 and accompanying text.

266 For example, the AAA Trust Arbitration Rules could adopt language similar to that regarding consent awards in the class arbitration context, although some amendments would need to be made to take into account the fact that trust arbitration is an in rem rather than representative proceeding. See AAA Supplementary Rules, supra n. 223, rule 8; JAMS Class Action Procedures, supra n. 225, rule 6.
and/or other relief requested and awarded, a statement of any other issues resolved, [and] a statement regarding the disposition of any statutory claim.\footnote{See AAA Trust Arbitration Rules, supra n. 17, rule 37.} Requiring this type of fully reasoned award appears highly appropriate given the in rem nature of trust proceedings.\footnote{See also Horton, supra n. 10, at 1036; Janin, supra n. 11, at 529.} However, the right to a reasoned award is not guaranteed. Instead, in large cases where the AAA Complex Dispute Procedures apply, a reasoned award is only required if the parties so agree or if one party requests such an award and the arbitrator, in his or her discretion, agrees.\footnote{See AAA Consumer Arbitration Rules, supra n. 240, C-7.} Parties who are ordered to proceed under the AAA Consumer Rules also lose their opportunity for a reasoned award as of right.\footnote{See AAA Trust Arbitration Rules, supra n. 17, rule 40(a).} These procedural distinctions are deeply troubling, not only because they are entirely unpredictable when viewed from the time of trust creation, but because they deny parties of the right to a reasoned award even though that kind of such an award is essential in an in rem type of proceeding.

At this point, it appears that the revised version of the AAA Trust Arbitration Rules will likely eliminate the requirement of a fully reasoned award, except upon the request of the parties. While this approach would make the AAA Trust Arbitration Rules consistent with the AAA Complex Dispute Procedures, it does not address the high need for a reasoned award in internal trust disputes.

\textit{(ii) No Waiver}

One aspect of the AAA Trust Arbitration Rules is quite beneficial to parties to trust disputes. According to Rule 40(a), ‘[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party’s right to arbitrate.’\footnote{See AAA Commercial Rules, supra n. 232, R-48(a).} Although the same language appears in other AAA rule sets and therefore may be somewhat standard,\footnote{For example, a party may need to seek judicial instruction on a particular point of law or need assistance appointing special or virtual representatives. Alternatively, parties may need to seek judicial approval of consent awards.} a non-waiver provision is particularly helpful in the trust context because parties in some jurisdictions may need to apply to the court for assistance with certain trust-related matters.\footnote{This type of non-waiver provision also protects the settlor’s desire to have all proper disputes heard in arbitration, since it stops parties from intentionally initiating litigation simply to eliminate the obligation to arbitrate.} While different jurisdictions will take different views regarding the need for judicial intervention on these various issues, the AAA provides useful protection to parties who want to protect their ability to arbitrate their disputes.\footnote{See AAA Trust Arbitration Rules, supra n. 17, rules 46(a), 50.} This provision will likely remain the same in the upcoming revisions to the AAA Trust Arbitration Rules.
(v) Fees
Although issues regarding fees may not seem ‘procedural’ per se, the AAA Trust Arbitration Rules contain some useful language that may help protect mandatory arbitration from claims that such procedures impermissibly oust the jurisdiction of the court by making access to justice prohibitively expensive.275 This provision, which is found in Rule 41, states that ‘[t]he AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees’ otherwise payable to the AAA.276 While similar language is found in other AAA rules, the fact that the provision is somewhat standard does not make it any less useful in the context of trust disputes.277 This provision appears to have been retained in the revised version of the AAA Trust Arbitration Rules.

(vi) Omissions
Although the preceding subsections identify a few aspects of the AAA Trust Arbitration Rules that seem specifically tailored to trust arbitration, there are a number of issues that the AAA has not addressed at all. Indeed, the overall impression is that the AAA has largely tracked other AAA rule sets without any regard to the unique nature of trust disputes. This, of course, is highly problematic given the many unique challenges associated with mandatory arbitration of internal trust disputes.

Proponents of the AAA Trust Arbitration Rules might claim that a number of these procedural shortcomings could easily be cured by an arbitrator with adequate knowledge of trust issues. However, there is no guarantee that arbitrators named to a AAA trust dispute will have the kind of specialized skill in trust law that would allow them to exercise their discretion in a particularly fruitful manner. For example, while the model clause proposed by the AAA suggests that arbitrators should have a certain level of expertise in trust disputes, arbitration under the AAA Trust Arbitration Rules may be invoked by means other than the model clause.278 The only mention of arbitrator expertise in the AAA Trust Arbitration Rules themselves is a statement indicating that the AAA will rely on its commercial roster for the appointment of arbitrators.279

Parties to commercial trusts may not view the lack of trust-related expertise as problematic, since participants in those kinds of disputes may value general commercial experience more highly than qualifications relating to trusts per se. However, the trust form is fundamentally different than other structural devices regardless of whether the trust is commercial or personal, and the failure to require arbitrators to have significant experience in both the procedural and substantive aspects of trust law puts the credibility of the entire process into doubt. Given that

275 See Cohen & Staff, supra n. 10, at 209.
276 AAA Trust Arbitration Rules, supra n. 17, rule 41.
277 See AAA Commercial Rules, supra n. 232, R-49.
278 See AAA Trust Arbitration Rules, supra n. 17, rules 1, 5; see also id. Model Clause.
279 See id. rule 5.
concerns have been raised on numerous occasions about whether arbitrators are capable of handling the kind of complex substantive and procedural matters associated with trust disputes, the AAA should be trying to minimize worries about the quality of trust arbitration, not exacerbate them.

It appears as if this issue may be addressed in the revised version of the AAA Trust Arbitration Rules. However, other problems may arise as a result of the precise language used in the new rules. These provisions should therefore be analyzed as soon as possible upon publication.

At this point, settlors have no other dedicated rules of procedure that they can adopt in preference to the AAA Trust Arbitration Rules. However, other arbitration rules may provide some useful insights into how to handle certain relevant issues. First among these other rule sets are the DIS Supplementary Rules.

(b) The DIS Supplementary Rules

The DIS Supplementary Rules were developed in 2009 for use in shareholder arbitration following a determination by the German Federal Court of Justice (Bundesgerichtshof or BGH) stating that shareholder disputes were arbitrable. The DIS Supplementary Rules, like the AAA Trust Arbitration Rules, may be invoked by inclusion in the parties’ founding document (i.e., the corporate charter or by-laws in the case of the DIS Supplementary Rules and the trust in the case of the AAA Trust Arbitration Rules) or by subsequent agreement. Because the DIS Supplementary Rules are only applicable to matters involving ‘limited liability companies (GmbH) under German law’ and ‘partnerships (Personegesellschaften)’, they are inapplicable to trust disputes per se.

However, the fact that the DIS Supplementary Rules were not intended for use in trust disputes does not mean that they cannot provide useful insights to those interested in designing trust arbitration procedures, given that arbitration of internal shareholder disputes faces many of the same practical and procedural challenges as arbitration of internal trust disputes. For example, both kinds of proceedings can involve large numbers of parties. Furthermore, both types of controversies reflect an in rem quality, in that the resolution of one party’s claims will often be binding on both the legal entity (i.e., the trust or corporation) as well as individual parties with notice, regardless of whether those other parties participated in the proceedings. These similarities suggest that innovations

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280 See Bosques-Hernández, supra n. 55, at 5, 15; Katzen, supra n. 18, at 127–134; Spitko, supra n. 10, at 307–314; Wüstemann, supra n. 5, at 40–41.
281 See S/e M, Case No. II ZR 255/08 (German Federal Court of Justice, Apr. 6, 2009), Kriendler Digest for ITA Board of Reporters, available at www.kluwerarbitration.com; Borris, supra n. 8, at 56; S.I. Strong, Collective Arbitration under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration? 29 ASA Bull. 45, 47 (2011) [hereinafter Strong, DIS].
282 See AAA Trust Arbitration Rules, supra n. 17, rule 1; DIS Supplementary Rules, supra n. 18, §1.1.
283 DIS Supplementary Rules, supra n. 19, cmt.
284 See Strong, DIS, supra n. 281, at 47; Wüstemann, supra n. 5, at 53–54.
285 See DIS Supplementary Rules, supra n. 19, Model Clause, §11; Borris, supra n. 8, at 55; Horton, supra n. 10, at 1036; Janin, supra n. 11, at 529; Strong, DIS, supra n. 281, at 51–54.
developed by the DIS for use in shareholder arbitration might have some relevance to mandatory trust arbitration.

The following discussion therefore introduces several novel procedures developed by the DIS and considers them in the context of trust arbitration.\textsuperscript{286} In particular, the following subsections discuss notice to and joinder of individuals who have an interest in the outcome of the dispute but who do not actively participate in the arbitration; privacy and confidentiality; substantive amendments to the statement of claim; procedures relating to parallel proceedings; appointment of arbitrators; issues as to costs; and possible means of binding parties to the dispute.

(i) Notice to and Joinder of Individuals Who Have an Interest in the Outcome of the Dispute

DEFINITION OF ‘CONCERNED OTHERS’

The first issue to consider involves notice to and joinder of individuals who have an interest in the outcome of the dispute. Both matters are central to trust disputes, since ‘effective trust or estate arbitration must include a mechanism for providing notice and a fair opportunity to be heard’, particularly ‘to minors and unborn and unascertained persons through their proper representatives’.\textsuperscript{287} Indeed, ‘trustees must take all reasonable practicable [sic] steps to provide notice and accountings to actual and potential beneficiaries, even those who only have a possibility of taking under a discretionary trust’.\textsuperscript{288} Thus it has been said that:

[to avoid a challenge to an award and to enhance its enforcement in relation to all parties concerned, it is important that all relevant persons be parties to the arbitral proceedings. In England, the court – usually on the basis of a proposal of the trustee – notifies the interested parties about an ongoing trust litigation and invites them to join the proceedings. It is recommended therefore that potential beneficiaries should be notified of an arbitration – preferably prior to the constitution of the arbitral tribunal – and that the parties should agree to the intervention of such interested persons during the arbitral proceedings. It should not be the duty of the arbitrators to include all interested parties but rather such burden should be upon the claimant (possibly with a related duty of respondent to inform claimant of any known potential beneficiaries).\textsuperscript{289}]

Collective shareholder disputes involve similar issues regarding the fairness of collective notice and hearing mechanisms, which inspired the DIS to develop the
concept of “Concerned Others.” Notably, this innovation appears to be largely transferable to the trust context.

According to the DIS Supplementary Rules, a Concerned Other has the right but not the obligation to participate in a particular proceeding. Although a Concerned Other in a collective shareholder dispute will have a somewhat different relationship to the various parties than a Concerned Other in a trust dispute will, in that the parties to a trust dispute could be situated somewhat differently and could hold somewhat more diverse interests than the parties to a shareholder dispute, both types of disputes could involve potential parties who may not be actively involved in the controversy at the time the arbitration is filed but who should nevertheless be given notice of a pending arbitration because they hold a legal interest that may be affected by such proceedings. Furthermore, both types of disputes could involve potential parties who have the right to join the dispute but who do not wish to do so, even after they have received notice, either because they believe their interests are adequately represented by an existing party or because they are indifferent as to the outcome of the dispute.

Concerned Others under the DIS Supplementary Rules are defined by their relationship to the dispute. Thus:

[i]n disputes requiring a single decision binding all shareholders, . . . it is mandatory not only to introduce the corporation as a party but all shareholders as Concerned Others to the arbitral proceeding. In case the introduction of any Concerned Other is omitted, current jurisprudence does not recognize the ‘arbitrability’ of such disputes.

Therefore, Concerned Others in the context of shareholder disputes can, in the first instance, be considered to include all shareholders of the corporation as well as the corporation itself. In a trust dispute, a Concerned Other might constitute not only the trust itself but also the original and/or successor trustee(s), the original and/or successor protector(s), and former, current or potential beneficiaries, to the extent that any arbitral award would attempt to affect those persons’ rights in a final and binding manner. External third parties, such as creditors or consultants, would likely not be bound by the arbitration provision in the trust and would therefore not constitute a Concerned Other unless there existed a separate arbitration agreement that contemplated the joinder of the third party dispute with a dispute under the trust. Although such overlapping agreements are not common, they can occasionally arise.

The DIS recognizes two distinct subgroups within the category of Concerned Others. For example:

290 See DIS Supplementary Rules, supra n. 19, at 3.
291 Id.
292 See Hwang, supra n. 5, at 83.
293 For example, arbitration of internal trust matters may involve external parties in cases where (1) a side agreement that includes an arbitration provision has been explicitly incorporated by reference into a trust or (2) a side agreement that includes an arbitration provision explicitly refers to disputes arising out of an associated trust. See Decker v. Bookstaver, No. 4:09-CV-1361, 2010 WL 2132284, at *1-2 (E.D. Mo. May 26, 2010); New South Federal Savings Bank v. Anding, 414 F. Supp. 2d 636, 639 (S.D. Miss. 2005); see also supra n. 202.
[d]isputes requiring a single decision binding all shareholders and the corporation and in which a party intends to extend the effects of an arbitral award to all shareholders and the corporation without having been introduced as a party to the arbitral proceeding (Concerned Others), the Concerned Others shall be granted the opportunity to join the arbitral proceeding pursuant to the [DIS Supplementary Rules] as a party or compulsory intervenor in the sense of section 69 German Code of Civil Procedure (Intervenor). This applies mutatis mutandis to disputes that require a single decision binding specific shareholders or the corporation.294

Therefore, a Concerned Other may act as either a party or an intervenor, with different rights and responsibilities being associated with the two different classifications.

Collective shareholder arbitration is a relatively homogenous affair, with most shareholders either sharing identical concerns or being classifiable into easily definable groups.295 Trust disputes can involve a wider variety of parties with more diverse connections to the trust and the issue in contention, although the number of variations is not unlimited. Nevertheless, the distinction between a party and an intervenor may be useful in trust arbitration, to the extent that such a distribution reflects the difference between an active participant and a party who is only passively involved in the proceeding but whose rights will be affected by the outcome. Interestingly, the concept of third party intervenors in trust-related arbitration has been used on at least one occasion involving a Liechtenstein ‘stiftung’ (foundation), which is Liechtenstein’s version of a trust.296

PROCEDURES ASSOCIATED WITH NAMING CONCERNED OTHERS

After defining the term ‘Concerned Others’, the DIS Supplementary Rules go on to describe the practical procedures to be followed with regard to identifying and providing notice to those persons. This is a several-step process that begins when the claimant files its statement of claim. At that point, the claimant is required to ‘identify the respondent and any shareholders or the corporation itself to which the effects of the arbitral award shall extend, by providing an address of service and requesting the DIS-Secretariat to deliver the statement of claim also to the Concerned Others’.297

Respondents are also given the opportunity to identify additional Concerned Others, as are any Concerned Others who subsequently join as parties.298 The procedure for notification is the same in each case, with Concerned Others being given 30 days from the time they receive the copy of the statement of claim to notify the DIS Secretariat in writing whether they choose to

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294 DIS Supplementary Rules, supra n. 19, §2.1.
295 For example, all shareholders might stand in the same position with respect to a claim regarding mismanagement of the company. However, shareholders might be split with respect to the propriety of a proposed merger, although the division would be likely be binary (i.e., either in favour of the merger or against it) and thus relatively straightforward.
296 See Weizmann Institute of Science v. Neschis, 421 F. Supp. 2d 654, 668, 678 (S.D.N.Y. 2005) (discussing intervenors in a Liechtenstein arbitration and noting they were given ‘full party status’).
297 DIS Supplementary Rules, supra n. 19, §2.2.
298 See id. §§3.2, 4.1.
join the proceedings 'on claimant’s or respondent’s side as party or as intervenor’.\textsuperscript{299}

This type of notice procedure would also appear to work very well in the trust context. In fact, this type of provision appears very similar to the kind of notice requirements described in various probate codes regarding mandatory notice to presumptive heirs.\textsuperscript{300} It also complies with suggestions made by experts in trust law that ‘potential beneficiaries should be notified of an arbitration – preferably prior to the constitution of the arbitral tribunal – and that the parties should agree to the intervention of such interested persons during the arbitral proceedings’, with the burden of identifying potentially interested parties falling not upon the arbitrator but upon the claimant (possibly with a related duty of respondent to inform claimant of any known potential beneficiaries).\textsuperscript{301}

Some difficulties could arise as a result of the need for Concerned Others to affiliate themselves with either the claimant or the respondent, since that assumes that the substantive issues in trust-related disputes can always be characterized as bilateral in nature. Of course, to some extent, a bilateral administrative procedure may be necessary, at least as a presumptive default option, since that is the norm in both litigation and arbitration. However, allowing Concerned Others to choose their affiliation for themselves is much better than mechanically assigning parties to a particular group based solely on the time at which they enter the proceedings, as appears to be the case under the AAA Trust Arbitration Rules.\textsuperscript{302} Notably, the approach outlined in the DIS Supplementary Rules appears to have been adopted by at least one U.S. court in the context of a trust arbitration.\textsuperscript{303}

According to the DIS Supplementary Rules, failing to opt into the proceeding within the prescribed time period acts as a waiver of a Concerned Other’s right to join the arbitration actively as either a party or an intervenor.\textsuperscript{304} Nevertheless, Concerned Others can join the proceeding even after the notice period has expired, although consequences do arise as a result of the delay. For example, those who wish to join the proceedings after the expiry of the initial time period may only do so ‘provided that they refrain from raising objections against the composition of the arbitral tribunal and either accept the arbitral proceeding as it stands at the point in time of their joinder, or the arbitral tribunal approves their joinder at its free discretion’.\textsuperscript{305} Notably, this provision regarding late joinder applies not only to Concerned Others who were named during the initial

\textsuperscript{299} Id. §3.

\textsuperscript{300} See McGovern et al., supra n. 15, at 628–630 (discussing formal and informal probate); see also UTC, supra n. 7, §813 (discussing trustees’ duty to inform and report); id. §817 (discussing notice upon termination of trust funds).

\textsuperscript{301} Wüstemann, supra n. 5, at 53–54.

\textsuperscript{302} See AAA Trust Arbitration Rules, supra n. 17, rule 5.


\textsuperscript{304} See DIS Supplementary Rules, supra n. 19, §4.2. However, the Concerned Other’s interests will still be affected by the arbitration, so long as notice has been properly given. See id. §11.

\textsuperscript{305} Id. §4.3. This is similar to restrictions on intervention in German courts. See Howard D. Fisher, The German Legal System & Legal Language, 94–95 (1999).
notification period but also to Concerned Others who were not identified until after that period has ended.\textsuperscript{306} Interestingly, the approach adopted in the DIS Supplementary Rules somewhat resembles certain provisions adopted in a model arbitration clause designed by the ICC for use in trusts.\textsuperscript{307} The relevant portions of that model clause state that:

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\text{[i]f, at any time, any person requests to participate in arbitral proceedings already pending under the present arbitration clause, or if a party to arbitral proceedings pending under this arbitration clause desires to cause any person to participate in the arbitration, the requesting party shall present a request for joinder to the Court setting forth the reasons for the request. It is hereby agreed that if the Court is prima facie satisfied that a basis for joinder may exist, any decision as to joinder shall be taken by the Arbitral Tribunal itself. When taking a decision on the joinder, the Arbitral Tribunal shall take into account all relevant circumstances, including, but not limited to, the provisions of the trust and the stage of the proceedings. It is further agreed that the Court may reject the request for joinder if it is not so satisfied, in which case there shall be no joinder. In case of a joinder after the signature or approval of the Terms of Reference, an amendment to the same will be made either through signature by the parties and the Arbitral Tribunal or through approval by the Court, pursuant to Article 18 of the ICC Rules of Arbitration. It is agreed that in such a case, the Court may take whatever measures that it deems appropriate with respect to the advance on costs for arbitration.}\textsuperscript{308}
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While both the ICC and the DIS attempt to balance issues relating to any possible prejudice to either the joining or existing parties, the DIS approach seems slightly better, in that it gives the parties the absolute right to join the arbitration so long as they do not attempt to attack retroactively any of the procedural decisions already made. Given the importance of having all the parties to a trust dispute present, that appears better than leaving the final decision in the hands of the arbitral tribunal.

The DIS Supplementary Rules also distinguish between the rights and responsibilities of Concerned Others who have joined as parties and the rights and responsibilities of Concerned Others who have joined as intervenors. For example, Concerned Others who have joined the proceeding as parties ‘become a party to the arbitral proceeding with all rights and duties pertaining thereto at the moment their declaration of joinder is received by the DIS-Secretariat’.\textsuperscript{309} Alternatively, those who join as intervenors ‘are entitled to the rights of a compulsory intervenor in the sense of section 69 German Code of Civil Procedure’.\textsuperscript{310} One of the ways in which the two groups differ is that only those who join as parties are permitted to

\textsuperscript{306} See DIS Supplementary Rules, supra n. 19, §§2.3, 4.3.
\textsuperscript{307} See id. §§2.3, 4.3; ICC Model Trust Clause, supra n. 16. The ICC chose to address the unique challenges associated with trust disputes through creation of a new model clause rather than a new set of procedural rules. See id. Explanatory Notes 4–6. For a more detailed analysis of the ICC Model Trust Clause, see Strong, Language, supra n. 16, at 316–325. The AAA Trust Arbitration Rules do not address the late joinder of parties, although the rules do contemplate the possible late submission of claims. See AAA Trust Arbitration Rules, supra n. 17, rule 7.
\textsuperscript{308} ICC Model Trust Clause, supra n. 16; see also Strong, Language, supra n. 16, at 324–325.
\textsuperscript{309} DIS Supplementary Rules, supra n. 19, §4.1.
\textsuperscript{310} Id.
This obviously increases the legitimacy of the joinder process, since those who are official parties to the dispute (as opposed to intervenors) will suffer most if there is any malfeasance in the naming process and thus have a heightened incentive to identify all relevant parties but no others.

One issue that could arise in the context of trust disputes but not shareholder disputes involves the possibility that some Concerned Others may not be inclined to name additional parties if the Concerned Others think that in so doing they will decrease the benefits they will receive under the trust. However, failure to provide notice to the appropriate parties will open the arbitral award up to challenge, since parties who have not received notice will not be bound by the award. Therefore, it is in the best interest of all parties to ensure that the notification process is full and fair.

Another potential difficulty involves the logistics of notice. The DIS Supplementary Rules make some provision for this, indicating in the introductory notes that:

> it is recommended to adopt elsewhere in the articles of incorporation a provision pursuant to which all shareholders are obliged to provide the corporation with a current address of service or a representative for service and that receipt of any written communication at this address will be assumed after the expiry of an adequate time period.

Settlors may not be able to impose a similar obligation on the beneficiaries of a trust, particularly since some beneficiaries may be unborn or unascertained at the time the trust is created. However, trustees and protectors (both past and present) could certainly be required to provide a current address for service of process.

(ii) Privacy and Confidentiality

Although privacy and confidentiality have long been considered hallmarks of arbitration, the DIS Supplementary Rules explicitly permit limited derogations from both. Notably, the AAA Trust Arbitration Rules may also allow some deviation from the strict application of privacy, although the relevant language is somewhat ambiguous.

Under the DIS Supplementary Rules, confidentiality is diminished to the extent that the arbitral tribunal is required to inform Concerned Others who have been identified but who have not yet joined the arbitration 'on the progress of the

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311 See id. Other differences are discussed below. See infra nn. 338–346 and accompanying text (regarding costs).

312 For example, a trust benefiting a class identified as 'all past and present employees of Acme Manufacturing still living at the time of the distribution of the trust funds' would result in larger per-capita distributions if the size of the class is kept small. Some class members might see this as an incentive not to identify other potential members of the class.

313 Notably, the same incentives for non-disclosure exist in trust disputes being heard in litigation, so trust arbitration is not operating under any sort of special handicap.

314 DIS Supplementary Rules, supra n. 19, Introduction.

315 However, neither principle is necessary for a procedure to be considered arbitration per se. See Born, supra n. 118, at 2249-50, 2253; Strong, First Principles, supra n. 163, at 246 n. 220.

316 See AAA Trust Arbitration Rules, supra n. 17, rule 21; see supra nn. 255–257 and accompanying text.
arbitral proceeding by delivering copies of written pleadings of the parties or intervenors as well as decisions and procedural orders by the arbitral tribunal to the Concerned Others at their indicated addresses, unless Concerned Others have expressly waived in writing to receive this information. This approach is necessary because the DIS Supplementary Rules are essentially an opt-in procedure, which results in a heightened need to keep Concerned Others who have not yet joined the arbitration individually apprised of the proceedings so that any non-participants have the opportunity to exercise their right to join the arbitration before the award is finalized. The DIS Supplementary Rules indicate that the same procedure 'applies for other communications of the arbitral tribunal to the parties or intervenors', though 'only in so far as it can be reasonably assumed that these are significant for the decision of a Concerned Other on its later joinder to the arbitral proceeding.'

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This procedure would likely be as useful in trust arbitration as it is in shareholder arbitration. Both types of disputes may involve parties who are technically interested in the outcome of the arbitration but who may not wish to participate actively. However, because potentially interested parties in these special types of multiparty arbitration cannot keep themselves apprised of the status of the case in the same way that they do in litigation, it therefore appears appropriate to impose a limited duty of notification on either on the trustee or the arbitral tribunal. In many ways, this poses few, if any, problems as a matter of principle, since notifications are only going to those who have been identified as having an actual or potential interest in the outcome of the dispute and no more information is being provided than would be available in a litigation.

Confidentiality is not the only principle that is affected under the DIS Supplementary Rules. Privacy is also diminished, with the rules stating that 'Concerned Others, that have not joined the arbitral proceeding, are not entitled to participate in the oral hearing.' Although the language is formulated in the negative, the result is that any Concerned Others who have joined the arbitral proceeding may participate in the oral hearing, thus expanding the number of persons who may be present at the hearing beyond the individuals who filed the arbitration or were initially named as respondents.

Opening the doors of the hearing to Concerned Others who have joined the proceedings makes good sense in trust arbitration as well, since those persons are

317 DIS Supplementary Rules, supra n. 19, ¶5.1.
318 See Strong, DIS, supra n. 281, at 55–58 (distinguishing the ramifications of an opt-in versus an opt-out regime).
319 DIS Supplementary Rules, supra n. 19, ¶5.1.
320 If a trust dispute were litigated, parties could keep abreast of legal proceedings by attending public hearings or viewing any court documents that were made publicly available.
321 Under the DIS Supplementary Rules, the Tribunal appears to be given the task of notification, although commentators in the trust law context have suggested that trustees be given the duty of providing notice. See DIS Supplementary Rules, supra n. 19, ¶5.1; Wüstemann, supra n. 5, at 53–54.
322 DIS Supplementary Rules, supra n. 19, ¶5.2. The AAA Trust Arbitration Rules may also have adopted this approach, although the language is somewhat unclear. See AAA Trust Arbitration Rules, supra n. 17, rule 21; see supra nn. 255–257 and accompanying text.
bound by the outcome of the arbitration to the same extent as parties who were named initially. The exclusion of Concerned Others who have not yet joined the dispute is not problematic as a matter of principle, since the DIS Supplementary Rules require that notice be given of any matter that might be significant to a Concerned Other’s decision to join the proceedings.\footnote{DIS Supplementary Rules, supra n. 19, §5.1.} While this may not mirror judicial procedures perfectly, in that non-parties can freely attend any hearings in court while they are only given notice of a particular in-person proceeding in a trust arbitration, the DIS’s approach allows any Concerned Other who is truly interested in the outcome of that oral hearing to join the arbitration and attend the proceeding.

(iii) Substantive Amendments to the Statement of Claim

One of the most pressing problems in large-scale dispute resolution involves the question of who has the ability to make decisions for the group regarding litigation strategy. This is a problem not only in shareholder arbitration but also in any type of internal trust dispute that requires a coordinated response from a large group of beneficiaries.\footnote{DIS Supplementary Rules, supra n. 19, §6.} The DIS Supplementary Rules address this issue by making ‘[a]n extension of claim or a change of the subject-matter (including any possible counterclaims)...only admissible with consent of all Concerned Others.’\footnote{Id.} However, ‘[t]he complete or partial withdrawal of claim is admissible without consent of the Concerned Others, unless a Concerned Other objects within 30 days after being informed on [sic] the intended withdrawal of claim and the arbitral tribunal acknowledges his legitimate interest in a final decision of the dispute.’\footnote{See AAA Trust Arbitration Rules, supra n. 17, rule 7.}

In these provisions, the DIS is attempting to balance the rights and interests of the various parties and appears to be doing so appropriately. However, the DIS’s approach is somewhat different than that reflected in the AAA Trust Arbitration Rules, which state that no new or different claim can be submitted by a party without the consent of the arbitrator.\footnote{See Strong, Abaclat, supra n. 153.} Although the distinction is slight, one worry under the DIS Supplementary Rules might be that the arbitration could be effectively held hostage by one party who refuses to consent to an amendment to an existing claim. This is somewhat problematic given that the failure to provide consent in a large, multiparty procedure may not even be intentional but could instead simply be due to an oversight on the part of a person who did not
understand the ramifications of his or her actions. Nevertheless, the DIS obviously took the view that party autonomy should prevail over procedural efficiency, at least in matters as important as the formulation of claims and counterclaims. Whether and to what extent the DIS approach should be adopted in trust arbitration is open to debate, since there are good arguments to be made either way.

(iv) Procedures Relating to Parallel Proceedings

Issues relating to the substantive amendment of claims demonstrate some of the difficulties associated with strategic decision-making in the multiparty context. Another area of concern involves the coordination of related claims brought by different individuals and the possibility of parallel proceedings. Again, this is an issue that can easily arise in trust disputes, given the number of parties and the potential disparity of their relationships to each other and the trust itself.

The DIS Supplementary Rules take a uniquely forward-looking view of this particular issue by specifically addressing the possibility that ‘multiple arbitral proceedings with a subject-matter have been initiated, requiring a single decision binding the parties and the Concerned Others.’328 In such cases, “[t]he arbitral proceeding that has been initiated first (leading arbitral proceeding) precludes the conduct of an arbitral proceeding initiated at a later point in time (subsequent arbitral proceeding). A subsequent arbitral proceeding is inadmissible” 329

Given the ease with which a Concerned Other can join an existing arbitration under the DIS Supplementary Rules, this appears to be a reasonable solution and would work equally well in trust disputes.330 While some difficulties might arise with respect to the ability of late-joined Concerned Others to affect the litigation strategy and bring claims or counterclaims, the DIS Supplementary Rules notably limit the first-to-file rule to actions that involves a single subject-matter and require a single decision to bind all parties.331 This suggests that actions involving significantly different claims would not be subject to this rule.

Furthermore, by restricting the application of this provision to subsequent arbitral proceedings, the DIS Supplementary Rules leave open the possibility of an appropriate parallel proceeding in court. This is particularly important in trust disputes, which might involve concurrent jurisdictional competency either as a

328 DIS Supplementary Rules, supra n. 19, §9.1.
329 Id. §9.2. The priority among the various procedures is described in sec. 9.3, whereas the timing and circumstances of the joinder of Concerned Others is discussed in sec. 9.4.
330 See id. §§2.3, 4.3.
331 See id. §9.1.
result of a statute giving the courts exclusive jurisdiction over certain matters\textsuperscript{332} or a split jurisdiction provision found in the trust itself.\textsuperscript{333}

\textit{(v) Appointment of Arbitrators}

Another potential pitfall for any kind of multiparty arbitration involves the appointment of arbitrators. Many of the traditional difficulties in this regard\textsuperscript{334} have been avoided in the DIS Supplementary Rules through provisions allowing the DIS Appointing Committee to nominate a sole arbitrator if the parties cannot agree on a neutral within the requisite time.\textsuperscript{335} In cases involving three arbitrators, the DIS Supplementary Rules allow the claimant group and the respondent group to select their own party-appointed arbitrators.\textsuperscript{336} If one side cannot agree on an arbitrator within the requisite time, the DIS Appointing Committee appoints two arbitrators, an approach that is also used in the general DIS Arbitration Rules.\textsuperscript{337}

\textit{(vi) Issues as to Costs}

Another area of concern in multiparty disputes involves the allocation of costs and fees, particularly when loser-pays rules apply.\textsuperscript{338} This can become particularly problematic when some members of the presumed collective have decided not to join a legal action while another subgroup of the collective has.

Cost-sharing issues are taken into account in the DIS Supplementary Rules through an explicit reference to Section 35 of the general DIS Arbitration Rules, which states that:

[i]n principle, the unsuccessful party shall bear the costs of the arbitral proceedings. The arbitral tribunal may, taking into consideration the circumstances of the case, and in particular where each party is partly successful and partly unsuccessful, order each party to bear his own costs or apportion the costs between the parties.\textsuperscript{339}

\textsuperscript{332} See Strong, Two Bodies Collide, supra note 8; see also supra nn. 133–165 and accompanying text. The AAA Trust Arbitration Rules handle the issue of parallel litigation slightly differently, indicating that "[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party’s right to arbitrate." AAA Trust Arbitration Rules, supra n. 17, rule 40(a).


\textsuperscript{335} See DIS Supplementary Rules, supra n. 19, §7.

\textsuperscript{336} See id. §8(2).

\textsuperscript{337} See id. §8(3). The dual appointment reflects the recalcitrant team’s appointment and the chair, who otherwise would have been named by the two party-appointed neutrals. See id. §13. These procedures are similar to those adopted by the AAA Trust Arbitration Rules, in that the AAA will also appoint the arbitrator(s) if parties cannot come to an agreement. See AAA Trust Arbitration Rules, supra n. 17, rule 11.


\textsuperscript{339} DIS Arbitration Rules, supra n. 286, §35.2; see also id. §12.1.
While no guidance exists as to how costs will be split, the DIS Supplementary Rules do indicate that ‘Concerned Others that have not joined the arbitral proceeding as a party or intervenor are not entitled to reimbursement of costs.’\textsuperscript{340} Furthermore, the DIS Supplementary Rules indicate that the costs amount is to be calculated pursuant to point number 11 of the Appendix to Section 40.5 of the DIS Arbitration Rules, with any identified Concerned Others being treated as a party.\textsuperscript{341}

The DIS’s approach is not the only possible means of allocating costs among parties to a collective dispute. For example, some commentators have suggested that it might be appropriate to provide a smaller costs award in collective disputes that involve some sort of public interest.\textsuperscript{342} Application of this principle might be appropriate in trust arbitration, not only with respect to charitable trusts (which by definition involve some sort of public benefit),\textsuperscript{343} but also perhaps with respect to some types of commercial trusts (such as pension or investment trusts) that arguably involve a public benefit or service.\textsuperscript{344}

While arbitral tribunals may always make appropriate orders as to costs, having the standards or procedures set forth in the governing rule set improves the process by making it more transparent and less discretionary. Currently, the AAA Trust Arbitration Rules permit some reduction in fees in cases of hardship, which provides a useful means of avoiding inequitable treatment of the parties but which does not increase predictability.\textsuperscript{345} This is particularly problematic given the amount of money that it takes to pursue some types of collective disputes\textsuperscript{346} and the need for parties to know in advance whether and to what extent they will be responsible for their opponents’ fees and costs in case of an adverse judgment or award.

\textit{(vii) Binding Parties to the Dispute}

The final issue to consider involves potential problems associated with binding certain parties to an arbitration. For example, one issue that can arise in the context of shareholder disputes is the possibility that former shareholders might raise objections to the continuing applicability of any arbitration agreement. This issue has been resolved by the DIS through language in its model arbitration clause explicitly stating that former shareholders remain bound by the

\textsuperscript{340} DIS Supplementary Rules, supra n. 19, §12.1; see also DIS Arbitration Rules, supra n. 286, §35.
\textsuperscript{341} See DIS Supplementary Rules, supra n. 19, §12.2; see also DIS Arbitration Rules, supra n. 286, §40.5, Appendix to 40.5, point number 11 (indicating that ‘[i]f more than two parties are involved in the arbitral proceedings [counting any identified Concerned Others as parties], the amounts of the arbitrators’ fees pursuant to this schedule are increased by 20% for each additional party’, but also noting that the arbitrators’ fees are to be increased by ‘no more than 50% in total’).
\textsuperscript{342} See Thomas D. Rowe Jr., \textit{Shift Happens: Pressure on Foreign-Attorney Fee Paradigms from Class Actions}, 13 Duke J. Comp. & Int’l L. 124, 147 (2003) (limiting the applicability of loser-pay rules in ‘public interest’ type cases, which might include cases involving collective redress); Strong, De-Americanization, supra n. 152, at 519.
\textsuperscript{343} See McGovern et al., supra n. 15, at 436–439.
\textsuperscript{344} See supra nn. 58–82 and accompanying text.
\textsuperscript{345} AAA Trust Arbitration Rules, supra n. 17, rule 41.
\textsuperscript{346} See \textit{In re American Express Merchants’ Litigation}, 634 F.3d 187, 197–198 (2d Cir. 2011).
A similar type of issue might arise in trust disputes regarding former beneficiaries, trustees or protectors, suggesting that trust arbitration would benefit from the adoption of an approach similar to that used by the DIS.

Second, the DIS recognized that disputes can arise as to whether an award resulting from an arbitration should be given res judicata effect with respect to persons who do not actively participate in the arbitration. This concern is handled in the DIS Supplementary Rules through language in both the model clause and the Rules themselves stating that:

> [t]he effects of an arbitral award extend also to those shareholders, that have been identified as Concerned Others within the time limits provided, irrespective whether they have made use of their opportunity to join the arbitral proceedings as a party or as an intervenor. . . . The shareholders named as Concerned Others within the time limits provided, commit to recognize the effects of an arbitral award rendered in accordance with the [DIS Supplementary Rules].

This language is useful in that it helps provide finality by eliminating any possible objections based on the non-participation of a particular party. While it may be more difficult to bind all actual and potential parties to a trust dispute through language of this nature, particularly given issues relating to the representation of unborn, unascertained and legally incompetent beneficiaries, those involved in drafting arbitral procedures may wish to consider whether similar language regarding the res judicata effect of an award arising out of a trust arbitration would be at all useful.

VI. CONCLUSION

Interest in mandatory arbitration of internal trust disputes is on the rise, with settlors and trustees in a variety of jurisdictions eager to find a way to minimize spiralling litigation costs and avoid some of the procedural concerns associated with cross-border judicial procedures. While arbitration seems in many ways to be the natural solution, mandatory arbitration of internal trust disputes faces a number of unique challenges not found in other areas of law.

One of the most pressing questions relates to the actual procedure to be used in the arbitration. Interestingly, it appears that settlors can increase – or, possibly, decrease – the enforceability of a mandatory arbitration provision found in a trust

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347 See DIS Supplementary Rules, supra n. 19, Model Clause (stating '[f]ormer shareholders remain bound by this arbitration agreement').

348 This issue can be particularly problematic in states where the right to assert a legal claim is considered to be individual in nature. See Strong, De-Americanization, supra n. 163, at 507, 536.

349 DIS Supplementary Rules, supra n. 19, Model Clause. The language in s. 11 varies slightly. See id. §11. In some ways, this provision negates the claim that the DIS Supplementary Rules constitute an opt-in procedure, since Concerned Others have no way to avoid being bound by the outcome of the award, even if they do not actively participate in the proceedings. However, the nature of these sorts of shareholder disputes requires an in rem approach, just as trust disputes do.

350 Arbitration of internal trust disputes carries a number of benefits beyond cost savings. See Strong, Two Bodies Collide, supra n. 9.
by adopting particular procedures. This puts significant pressure on settlors to choose appropriate procedures so as to ensure a favourable determination on the enforceability of an arbitration provision.

Although there are a number of ways for settlors to dictate arbitral procedures to be used in future trust disputes, the easiest and best way is to adopt an arbitral rule set specifically designed for use in trust disputes. However, the only set of institutional rules that even purports to address the special needs of trust arbitration – the AAA Trust Arbitration Rules – appears to be entirely inadequate to the task. Rather than offering a highly specialized set of rules tailored specifically to the unique demands of trust arbitration, the AAA appears to be operating largely under the belief that trusts are just another type of business association\(^ {351}\) and that standard arbitral procedures are sufficient to address any disputes arising under a trust. Very little appears likely to change under the upcoming revisions to the AAA Trust Arbitration Rules. Therefore, settlors must look elsewhere for assistance.

Happily, the DIS has provided a number of extremely innovative ideas in the DIS Supplementary Rules. While the DIS has restricted use of these rules to certain types of shareholder disputes, settlors can nevertheless use the rules as inspiration when setting up individual, ad hoc arbitrations.

Of course, widespread reliance on ad hoc procedures is not the best way for the trust industry to proceed on a long-term basis. Instead, the trust bar and the arbitral community need to come together to develop a new set of arbitral rules that truly takes the unique challenges of trust arbitration into account. While the drafters of those rules can and indeed should look to the DIS Supplementary Rules for inspiration, particularly with respect to the identification of and notice to actual and potential parties, there are a number of other issues that need to be addressed. These include (1) matters regarding late-joining and non-participating parties, (2) special or virtual representation, including appointment and payment of the representative, (3) arbitral (as opposed to judicial) approval of consent awards and (4) the possibility of multiple awards regarding judicial accounting or instruction procedures, including the extent to which an arbitrator could consider facts raised and decisions made in earlier arbitral proceedings.

It is also important that any rules relating to trust arbitration reinforce certain principles of arbitration law that may not be well-known among the trust bench and bar, since that will help eliminate any residual prejudices that may remain in the trust industry regarding arbitration.\(^ {352}\) Therefore, any new arbitral rules targeted toward trust disputes should explicitly demonstrate (1) the fairness of the appointment mechanism, (2) the independence and impartiality of the arbitrators and (3) the extent to which arbitrators must apply the law.

\(^{351}\) There is little evidence that the AAA considered concerns relating to commercial trusts separately from those arising under non-commercial trusts. While very little attention has been paid to this issue generally, one would expect an arbitral institution that was drafting a specialized rule set to have considered such matters at length.

\(^{352}\) See ACTEC, supra n. 10, at 5 (discussing the ‘blinding prejudice’ to arbitration in contemporary trust and estates practice).
Current trends suggest that an increasing number of jurisdictions are going to rule favourably on mandatory trust arbitration in the coming months and years.\textsuperscript{353} As such, the number of trusts with mandatory arbitration provisions is bound to increase. Since many of these trusts will be international in nature, it is incumbent on the international arbitral community to do its part to ensure that the law in this field develops in accordance with established principles of arbitration law and practice. While this Article has only addressed one of a number of concerns, it is hoped that this discussion will act as an inspiration for further developments, initiatives and research involving mandatory arbitration of internal trust disputes.

\textsuperscript{353} See Strong, Two Bodies Collide, supra n. 8.
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Getting a Better Balance on International Arbitration Tribunals

by LUCY GREENWOOD & C. MARK BAKER *

ABSTRACT

In this article the authors look at gender diversity in international arbitration tribunals and draw a comparison with gender diversity in the judiciary, in law firms and in major companies. Concluding that the lack of gender diversity in international arbitration tribunals cannot wholly be attributed to the lack of women at the senior end of the legal profession, the authors suggest that one way to diversify and expand the pool of arbitral candidates is for states to implement policy changes in the manner in which arbitrators are selected for investment treaty arbitrations. Changes made at this level will increase the visibility and profile of arbitral candidates and may result in a trickledown effect on appointments to commercial arbitration tribunals.

I. DIVERSITY ON INTERNATIONAL ARBITRATION TRIBUNALS

The lack of gender diversity in international arbitration tribunals is seen as an 'ongoing issue...rearing its head now and again.' In seeking to achieve a better balance on international arbitration tribunals, this article focuses on the 'male' element of the assertion made by Sarah Francois-Poncet in 2003, and often repeated, that most international arbitrators are 'pale, male and stale.' We leave for another day the questions surrounding the lack of diversity in relation to age

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1 Posting by Sophie Nappert to OGEMID@mailtalk.ac.uk (Feb. 9, 2012, 03:29 am CST). OGEMID discussions are subject to the Chatham House rule. Those quoted in this article have given express permission for their comments to be attributed.

2 See Michael Goldhaber, Madame La Presidente, 1 Transnatl. Dis. Mgt. (July 2004).
and ethnicity that are also evident in the composition of international arbitration tribunals. In this field, there are occasional blog postings about gender diversity, intermittent flurries of discussion in internet forums, and, much less frequently, the occasional publication of hard statistics about the composition of international arbitration tribunals. There has been relatively little comment on the reasons underpinning the lack of gender diversity in international arbitration tribunals; in contrast, there appears to be general acceptance that this is the status quo. International arbitration practitioners have become comfortable with the notion that women are a significant minority, if not a ‘tiny fraction’ of the international arbitrator population.

A major cause of the under-representation of women on international arbitration tribunals is the lack of women making it through to the upper echelons of the legal profession. However, the limited data that is available indicates that women are even more poorly represented on arbitral tribunals than at a senior level in law firms. It appears that the additional obstacles which an international arbitrator must overcome in order to succeed may penalize women disproportionately. The number of women appointed to international arbitration tribunals is therefore smaller than it should be, even taking into account the difficulties women face in getting to a stage at which they may be considered for an arbitral appointment.

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3 The opening paragraph of Dr. K.V.S.K. Nathan’s article Well, Why Did You Not Get the Right Arbitrator? sums up the general lack of diversity in international arbitration tribunals: ‘An observer from planet Mars may well observe that the international arbitral establishment on Earth is white, male and English speaking and is controlled by institutions based in the United States, England and mainland European Union. For the most part, arbitrators and counsel appearing actively in international arbitral proceedings originate from these countries. The majority in a multi-member international arbitral tribunal is always white. The red alien from Mars will be puzzled in his own way because the majority of the published disputes before international arbitral tribunals involve parties from the developing countries and nearly three-quarters of the people on Earth live in those countries and are not white and more than half the total population are women.’ Dr. K.V.S.K. Nathan, Well, Why Did You Not Get the Right Arbitrator?, 15 Mealey’s Intl. Arb. Rep. 24 (July 2000). The article dates from July 2000, but Dr Nathan’s observations appear to be equally true today.


5 Members of OGEMID can review the various discussion threads on diversity, which are archived online at http://www.transnational-dispute-management.com/ogemid/.


7 An anonymous posting to OGEMID@mailtalk.ac.uk (30 June 2009 08.58 GST) thought that ‘too much was made of women in arbitration...It just so happens that in current circumstances there are more good men than good women.’

8 Per Franck supra n. 6.
II. THE UNDER-REPRESENTATION OF WOMEN ON INTERNATIONAL ARBITRATION TRIBUNALS

Although it is generally acknowledged that women are under-represented on international arbitration tribunals, it is nonetheless instructive to look at the available data and to place that data in context, as far as possible. In researching this article it was notable how little data was publicly available on this topic and how difficult additional data was to obtain.9

In 2006, Professor Susan Franck carried out detailed research into investment treaty arbitrations by analysing the population of investment treaty arbitrations that were publicly available at that time.10 The population of her study comprised 102 awards, of which 100 had three-member tribunals and two were rendered by a sole arbitrator, resulting in 145 different arbitrators. Professor Franck concluded that women were a ‘tiny fraction’ of the arbitrators in the awards she analysed. There were 5 women (3%) in the population of 145 investment treaty arbitrators she reviewed. For this article, research was carried out into the constitution of ICSID tribunals as published on the ‘concluded cases’ section of ICSID website as at 1 March 2012, in order to update and revisit Professor Franck’s research in relation to the representation of women in investment treaty arbitration tribunals.11 The population of this study comprised 254 concluded ICSID cases,12 from January 13, 1972 to January 18, 2012.13 In these cases, 746 arbitrators were appointed,14 42 (5.63%) of those appointments were of female arbitrators. So while the percentages have almost doubled, the levels are still very low. It is of course, more difficult to replicate this process with international commercial

9 The authors contacted the LCIA, SCC, ICDR, and the ICC requesting information on the gender of the arbitrators appointed in arbitrations administered by the institutions. In an email exchange with Lucy Greenwood on 17 February 2012 and subsequently followed up by a telephone call on 21 February 2012, the ICC confirmed that it did not maintain information on diversity. Note that Louise Barrington reported that in 1990 the ICC named 517 arbitrators, of whom 4 (0.78%) were women and in 1995, the ICC named 766 arbitrators, of whom 22 (3%) were women. Louise Barrington, The Commercial Way to Justice (Khwer 1997). The Stockholm Chamber of Commerce responded to the author on 9 March 2012 that 6.5% of all appointed arbitrators (both party appointed and appointed by the SCC between 2003 and 2012) have been women and 8.4% of the arbitrators appointed by the SCC have been women. However, it did not maintain these statistics routinely. The LCIA reported to Lucy Greenwood by email on 20 March 2012 that of 336 arbitrator appointments in 2011, 22 (6.5%) were female. The ICDR did not provide statistics to the authors. The Arbitration Institute of the Finland Chamber of Commerce stated that 27% of the arbitrators appointed by the FCC in 2011 were women, but indicated that very few of the party-appointed arbitrators were female (email to Lucy Greenwood dated 20 June 2012).

10 Franck supra n. 6.
12 Concluded cases were defined as all awards (even where subsequently annulled), annulment decisions, resubmission decisions, and fully constituted tribunals in proceedings that were discontinued before an award was rendered. Rectification decisions, interpretation decisions, revision decisions, and conciliation proceedings were omitted. So defined, there was a total of 234 concluded cases: 246 three panel tribunals and 8 cases involving sole arbitrators.
14 Of this figure, there were 8 sole arbitrator appointments. 738 appointments were made to 246 three-member tribunals. The figure only includes the final composition of the tribunal; any prior appointees were omitted.
arbitrations, as information on international commercial arbitrations is not routinely published. In the 2009 American Lawyer Scorecard of major arbitrations, Michael Goldhaber stated that around 4% of the 250 arbitrators involved in the cases he analysed were female.¹⁵ The Stockholm Chamber of Commerce reported to the authors that 6.5% of all arbitrators appointed in its arbitrations have been women. The LCIA reported that in 2011, 6.5% of all arbitrators appointed in its arbitrations were women. Extrapolating from this data, it appears that the best estimate of the percentage of women appointed to international commercial arbitration tribunals is around 6%.¹⁶

(a) Why Are Women Under-represented on International Arbitration Tribunals?

Why are women so under-represented on international arbitration tribunals? The answer is not straightforward. The over-riding reason for the disproportionate appointment of men is rooted in the difficulties women continue to face in reaching the senior levels at law firms: there are simply not enough women reaching the top of the profession. However, the problem is then exacerbated by the peculiarities of international arbitration, in particular the lack of transparency in the appointment process.¹⁷

In 2012, it is probably fair to say that a significant number, if not the clear majority, of practicing international arbitrators came through the ranks as practicing lawyers acting as counsel in international arbitrations. It is therefore appropriate to focus on this route as the primary route most potential arbitrators will take in establishing their career.¹⁸ Given the numbers of female lawyers entering the profession, there should be no shortage of supply of female potential arbitrators in the pipeline. Female students in the US and the UK have been accepted to study law at around the same rate as male students since the 1990s.¹⁹ In fact, almost 63% of graduate trainees at entry level in the UK are women,

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¹⁵ Michael Goldhaber, Deciding Women, Focus Eur. 27 (Summer 2009).
¹⁶ See supra note 9.
¹⁸ In this article, we are focusing on legally qualified international arbitrators.
according to a 2010 survey by the Law Society.20 However, it is sobering to note that the 65% figure has dropped to less than 20% by the time those graduates reach partner level.21 This is known as ‘pipeline leak’ by commentators, who attribute the leak to various factors, including office climate, difficulties in managing dual careers, lack of female role models and mentors, lack of flexible work options and attitudes to flexible working.22 At the potential international arbitrator level we are dealing with those who have reached the top of their profession, and the numbers are correspondingly extremely small. Thus, it can be posited that the main culprit for the scarcity of female arbitrators is the effect of pipeline leak. In the international arbitration field, once a female associate makes it through the pipeline to partnership, she is likely to find that almost nine out of ten of her partner colleagues are male, a stark comparison to when she started work, when only around four out of ten of her trainee colleagues would have been men.23


21 The 2011 Diversity Survey published by the Black Solicitor’s Network surveyed 44 firms and found that 57.4% of trainees at participating firms were female, compared to 56.3% of associates and 23% of partners. Black Solicitors’ Network, Diversity League Table 2011, available at http://www.satsumadesign.co.uk/Diversity LeagueTable2011-TMP/. Participation in the survey was voluntary and therefore self-selecting; The survey found that there had been little change in these figures over the past five years. In The Lawyer’s 200 Annual Report 2011, the firm with the greatest proportion of female equity partners – SJ Berwin – had just 20%, with only 18 of the 200 firms having 10 or more percent female equity partners. UK’s top firms fail to increase female equity partner figures, The Lawyer (Sept. 14, 2011), http://www.thelawyer.com/uk’s-top-firms-fail-to-increase-female-equity-partner-figures/1009165.article.

22 See, in particular, the pyramid at http://www.catalyst.org/publication/213/us-women-in-business, March 2012, which shows women at 51% of management, professional and related occupations, 14% of Fortune 500 Executive Officers, 16% of Fortune 500 board seats, 7.3% of Fortune 500 top earners and 3.4% of Fortune 500 CEOs. See also http://www.pwc.com/en_GX/gx/women-at-pwc/assets/leaking_pipeline.pdf. The Leaking Pipeline: Where are our female leaders? March 2008. In this study, research commissioned by PwC UK indicated that, in most ‘first world’ countries, entry-level men and women in the professional services sector are hired at an equal rate. Women were lost from the pipeline through voluntary termination at a rate two or three times faster than men once they reached mid-career level. The study found no evidence of deliberate, conscious bias. Reasons for the pipeline leak included: lack of female role models; lack of mentoring opportunities; work/life challenges and perceived lack of flexibility; gender stereotyping; lack of opportunities; lack of clear career path; perceived lack of skills/experience.


However, the figures for female arbitrators appointed to international arbitration tribunals compare poorly to female representation in the judiciary and in companies, both of which suffer similarly from ‘pipeline leak’. In England and Wales in 2011, women made up a total of 22% of the judiciary, including 15% of High Court Judges, up from 14% and 8% respectively in 2001. In the United States, 49 of the 162 active judges currently sitting on the thirteen federal courts of appeal are female (30.2%). Approximately 30% of active United States district (or trial) court judges are women. The percentage of women directors on FTSE 100 companies has been constant at around 12% for the last three years, with women holding 16.1% of the boardroom seats at Fortune 500 companies in 2011. The best estimates of 6% of women appointed as arbitrators on international arbitration tribunals is just over half the 11% figure for female partners on international arbitration teams. Accordingly it seems that international arbitration is suffering from more than the usual ‘pipeline leak’.

(b) Arbitrator Selection

Previous service as an arbitrator is considered to be the ‘pre-eminent qualification for an arbitrator-candidate’. As so much of the arbitration process is confidential, information about an individual’s track record is limited and such information that is shared is usually kept within a small group. Largely due to the fact that there is...
very little else to go on, the number of previous appointments held by an arbitrator candidate is viewed as a badge of quality.

Historically there has been nowhere counsel can easily go to identify arbitrators willing to serve, so there is a natural tendency to consider the ‘elite’ names that instantly spring to mind. Second, there is safety in numbers of appointments. Counsel need to have the courage to convince clients (and themselves) that a lesser-known arbitrator will do a good job. In 2011 American Lawyer identified ten ‘top’ arbitrators. These arbitrators are not necessarily divided from the rest of the international arbitration world by talent alone. They are also there because it is human nature to look for validation in decisions and this is found in the awareness that others have appointed the same individuals to do the same job. However, purely because one person has been appointed a certain number of times more than another does not make him or her a certain number of times more efficient, more fair, more just or necessarily a better arbitrator. It makes him or her busier, which contributes to the situation in which many arbitration practitioners find themselves, of having to explain to clients that international arbitration is not in fact, quicker (or cheaper) than litigation before a national court. The unavailability of the ‘elite’ arbitrators contributes significantly to the delays faced in the arbitral process: in the appointing process, in fixing hearing dates, and receiving the award.

One of the difficulties faced by those wishing to appoint arbitrators for both commercial and investment treaty arbitrations is the lack of visibility of potential arbitrators. Service as an arbitrator is generally a second career, which is either concurrent with or subsequent to other professional service, such as serving as a member of the judiciary, a member of the bar, as an attorney or an academic. Women, who may have taken longer to reach a point at which they can begin to develop this second career, often suffer disproportionately from this lack of visibility. The issue is more acute with regard to commercial arbitrations, where there is little or no transparency in the arbitration process. In investment treaty arbitrations, there is a greater degree of transparency and, subsequently, more opportunity to make changes in the appointment process which could expand the pool of arbitrators under consideration.

There may also be other factors at play in the appointment process that affect the choice of an arbitrator. It has been posited that our social behaviour is not completely under our conscious control and that behaviour is driven by learned stereotypes. Our brains categorize information about people largely by labelling...
– what used to be known as stereotyping. The notion of unconscious bias is based on the idea that individuals develop an embedded, unconscious belief and response system through repeated experiences and messaging. Our brains are wired to categorize age, gender, race and role into the simplest way to enable easy recall of the information. Yet grouping information in this way often leaves us making unconscious assumptions which then affect our decision making.

Unconscious gender bias manifests itself in many ways. Studies have shown that men and women do not evaluate men and women equitably in professional capacities. In one study, resumes and journal articles were rated lower by male and female reviewers when they were told the author was a woman. A Swedish study of postdoctoral fellowships awarded showed that female awardees needed substantially more publications to achieve the same rating as male awardees. In this study the peer reviewers over-estimated male achievements and/or underestimated female performance. Women are also disadvantaged through the tendency of individuals to appoint successors (and arbitrators) 'in their own image', i.e. where senior counsel chooses individuals who are similar to themselves in age, background, experience, and gender. The assumption that all arbitrators are male can be pervasive. In 2007, Professor Ilhyung Lee reported on a survey he carried out into the nationalities of international arbitrators with a view to determining how nationality influenced those appointing arbitrators. Professor Lee looked, in particular, into what would influence someone making an appointment and asked his respondents to assume hypothetical situations in which they were making an appointment and to consider how various permutations involving an arbitrator’s nationality and national affiliation would affect their choice of arbitrator. The first stereotypes. Greenwald went on to develop the Implicit Association Test. See Anthony Greenwald, Debbie McGhee & Jordan Schwartz, Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J. Personality & Soc. Psychol. 1464 (American Psychological Association, 1998), available at http://faculty.washington.edu/agg/pdf/Gwald_McGh_Schw_JPSP_1998.OCR.pdf.

There is an online test designed to test whether the participant has implicit bias in relation to associations of gender with career or family. This Implicit Association Test (IAT) is part of ‘Project Implicit’ which is run by a ‘virtual laboratory’ with scientists from Harvard University, the University of Washington, and the University of Virginia. See https://implicit.harvard.edu/implicit/.


hypothesised situation promulgated by Professor Lee was that the potential arbitrator had a wife with a particular nationality.\textsuperscript{37}

On occasion, unconscious bias can mutate into a deliberate (and occasionally articulated) choice to appoint a man rather than a woman. In 2003, Professor Thomas Wälde told Michael Goldhaber of his experience with a male general counsel who consciously favoured ‘old boys’ in making appointments, reasoning that ‘because the other arbitrators on a panel are likely to be old boys’ he maximized his chances of influencing them by appointing his own. This general counsel said to Professor Walde ‘we make appointments not to challenge perceived prejudices, but to cater to them’.\textsuperscript{38} In a later article, Michael Goldhaber recounted a story told by Lucy Reed, co-head of Freshfields’ International Arbitration Group, of a client being ‘openly worried’ as to how the arbitrators on the panel would regard his nominee if he chose a woman. He ultimately chose a ‘usual (male) suspect’.\textsuperscript{39}

In a 2007 survey of members of Arbitral Women conducted for Global Arbitration Review, 46% of respondents said they had experienced ‘unwitting bias’ during an international arbitration.\textsuperscript{40} One possible contributor to this unwitting bias is the link that is often made between experience and quality.\textsuperscript{41} As the majority of experienced international arbitrators are male, this leads to a tendency to qualify discussions of diversity with references to maintaining standards. The view that diversity may somehow dilute the quality of the tribunal or lead to discord within the tribunal percolates through a number of the sporadic online discussions on the subject.\textsuperscript{42}

\textsuperscript{37} Professor Lee’s survey stated ‘The prospective arbitrator is American, with US citizenship, lives in the US and is married to a Japanese woman.’ The survey asked respondents to indicate whether this raised concerns about the arbitrator’s independence or impartiality.

\textsuperscript{38} Michael Goldhaber, Madame La Présidente, Focus Europe 23 (2004).

\textsuperscript{39} Michael Goldhaber, Deciding Women, Focus Europe 27 (Summer 2009) and Michael Goldhaber, High Stakes, Focus Europe (Summer 2011). The client did not give the co-arbitrators the opportunity to react (or not) to the appointment of a women. The client’s actions are reminiscent of the classic example of women not being given travel opportunities after returning to work post-children because of an assumption that they want or need to be at home overnight.


\textsuperscript{41} See, for example, the anonymous comment ‘I think too much is made of women in arbitration. My view is that you select the best arbitrator for the job, man or woman. It just so happens that in current circumstances there are more good men than good women. That is the result of historical circumstance, not of any innate difference between men and women. But I would ask those who say that the current situation is a disgrace: What would they do to remedy the situation? Would they risk a client’s arbitration by selecting an inexperienced arbitrator just to promote diversity? I think that would border on malpractice’. Anonymous posting to OGEMID@mailtalk.ac.uk (30 June 2009, 07.56 am CST). Note the implicit suggestion in this posting that appointing a woman would not be appointing the best arbitrator for the job and the coy reference to ‘inexperienced arbitrator’ rather than woman.

\textsuperscript{42} Comments such as ‘I recall an esteemed colleague, who acts as both counsel and arbitrator, stating at a conference that, when asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone’s mind. “We are not being asked to make a statement” he said, “we are asked to pick the best person for the job”’, posting by Sophie Nappert to OGEMID@mailtalk.ac.uk (9 Feb. 2012 03.27 CST) perpetuate the notion that gender diversity will result in the appointment of less skilled arbitrators. See also, the anonymous contribution to OGEMID quoted at the beginning of this article ‘Diversity does not feature in parties’ agendas...parties want an arbitrator who will hold sway vis-à-vis the others...”

Getting a Better Balance on International Arbitration Tribunals

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Perhaps more so than in other fields, it is difficult to identify concrete reasons why we should care whether women are under-represented on private arbitration tribunals.\textsuperscript{43} Women are under-represented at partner level in law firms, in companies and in the judiciary and we can more easily articulate reasons why diversity should be (and is) addressed in the context of those careers. It is simple to make excuses as to why we should not care about the representation of women on tribunals. We may be peripherally aware of the various studies showing that gender-balanced leadership improves corporate governance, lessens unnecessary risk-taking and reduces so-called ‘group-think’. We may know of the positive correlation between gender-balanced leadership and the bottom line which has also been established.\textsuperscript{44} However, it is easy to argue that none of this is really applicable to international arbitration and the particular role played by arbitrators. Selecting arbitrators is a nuanced process, with a huge number of factors influencing the final choice. Diversity really is ‘the last feature on anyone’s mind’.\textsuperscript{45} Counsel is likely to be far more pre-occupied with researching the potential arbitrator’s track record, his or her writings in the field, his or her language capabilities and in reviewing any previous decisions, rather than noting the potential arbitrator’s gender. This is a factor of the short-term nature of most

\textsuperscript{43} In relation to investment treaty arbitration, this argument is even more difficult to make, see Gus Van Harten, \textit{The (Lack of) Women Arbitrators in Investment Treaty Arbitration}, supra n. 30, ‘Representation of women is important, not because women would necessarily make different choices than men, but because arbitrators who make decisions of public importance should reflect the make-up of those affected by their decisions.’

\textsuperscript{44} See, for example, Catalyst, \textit{The Bottom Line: Connecting Corporate Performance and Gender Diversity} (2004), available at \url{https://www.catalyst.org/file/44/the%20bottom%20line%20connecting%20corporate %20performance%20and%20gender%20diversity.pdf}, and McKinsey & Company, \textit{Women Matter: Gender Diversity, A Corporate Performance Driver} (2009) \url{http://www.mckinsey.com/locations/swiss/news_publications/pdf/women_matter_english.pdf}. The Catalyst Study (2004) examined 335 Fortune 500 companies, and noted at 2: ‘The group of companies with the highest representation of women on their top management teams experienced better financial performance than the group of companies with the lowest women’s representation. This finding holds for both measures analyzed: Return on Equity (ROE, which is 35.1 percent higher, and Total Return to Shareholders (TRS), which is 34.0 percent higher.’ The McKinsey study found that companies with at least three women in senior management perform better than all-male management teams. See also \textit{Why Diversity Matters}, Catalyst, \textit{Research Studies 2003-2019}, \url{http://integritybridges.com/cms/wp-content/uploads/2011/03/Catalyst-Why_Diversity_Matters_11-2-10.pdf}.

\textsuperscript{45} Anonymous posting to OGEIMID, supra n. 42. ‘I recall an esteemed colleague, who acts as both counsel and arbitrator, stating at a conference that, when asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone’s mind. “We are not being asked to make a statement” he said, “we are asked to pick the best person for the job”.'
arbitral appointments. Understandably, in-house counsel only has an interest in the arbitration he or she is facing.\(^46\)

(c) Achieving a Better Balance on International Arbitration Tribunals

There is an argument that we do not need to do anything more than we are doing.\(^47\) Some of the well-known female arbitrators have been quoted by journalists as being confident that women will 'make their way'\(^48\) and that 'fair representation will come with time'.\(^49\) Others think 'we've already broken through the glass ceiling'.\(^50\) Unfortunately, the statistics show that only limited progress has been made. Back in 1997, Professor Louise Barrington reported that in 1995, the ICC named 766 arbitrators, of whom 22 (3%) were women. In 1998, the LCIA

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\(^{46}\) As Professor Franck notes, supra n. 6, it would, of course, be useful to consider the role women play on international arbitration tribunals more systematically, so that an objective reason for taking gender into consideration could be established (or eliminated), but the numbers of women who are appointed as arbitrators are so small that results cannot achieve statistical significance. Per Professor Franck: 'Should the number of women increase over time, one might usefully conduct studies that consider potential gender differences on issues such as party success, amount of awards, and treatment of costs. Such research might be of interest to parties considering arbitrator appointments and to stakeholders that are interested in the integrity of the process of resolving investment disputes.' Until such time such research can be carried out, then we must seek to counter the argument that diversity should not be addressed simply for the sake of addressing diversity. A good example is the following anonymous comment made to OGE:\(^{47}\) (30 June 2009, 10:49 CST): 'I do not understand “the value and benefit of a diverse workforce (over and above any moral dimension)”. I think that it is an easy thing to say, may make us all feel good about ourselves, make us think we are good, decent people, but the reality is that the point of a workforce is to get the job done. If diversity is a qualification for the job, then all well and good. But, if I were undergoing brain surgery, I do not see any additional value in the team being diverse. If I were putting together a baseball team, I see no additional value in diversity.'

\(^{48}\) The networking association, Arbitral Women, has been instrumental in recent years in improving the number of women speaking at conferences and in raising the profile of women in arbitration generally. It currently has a membership of 278 women on a searchable database. It also runs a successful mentoring program that benefits women seeking to pursue a career in international arbitration. www.arbitralwomen.org. CPR has a national task force on diversity and has made efforts to make its candidates more diverse. http://cpradr.org/Committees/IndustryCommittees/NationalTaskForceonDiversityinADR/DiversityEsource.aspx. The AAA also has a diversity committee. www.adr.org. Interestingly, women’s arbitration groups have not taken off in the way that the “young” arbitration groups took off in the early 2000s. See, the LCIA, Young International Arbitration Group, http://www.lcia.org/Membership/VIAG/YoungInternational_Arbitration_Group.aspx (last visited Feb. 28, 2012), ICC, Young Arbitrators Forum, http://www.iccwbo.org/yaf/ (last visited Mar. 6, 2012), AAA, IDR Young & International, http://www.adr.org/sp.asp?id=24986 (last visited March 6, 2012), ICA, Young ICA, http://www.arbitration-ica.org/YoungICCA/Home.html (last visited March 6, 2012), CIArb, Young CIArb, http://www.ciarb.org/young-members/ (last visited March 6, 2012). In addition to Arbitral Women, SWAN – the Swedish Women in Arbitration Network – which was founded in 2009 has 200 members. http://www.sccinstitute.com/?id=25049, seems to be the only other women in arbitration group.


\(^{50}\) Michael Goldhaber, Madame La Presidente, 1 Transnational Dispute Management (July 2004), available at http://www.arbitralwomen.org/files/publication/00072217081344.pdf. In this 2004 article, Lucy Reed was stated to be 'confident that fair representation would come with time'.

appointed 66 arbitrators, of whom one (1.5%) was female.\textsuperscript{51} In all ICSID cases registered from 1972 to 1995, there were 36 tribunals constituted, 35 three-member panels and one sole arbitrator. Of the 106 arbitrators appointed, 3 (2.83%) were women. Seventeen years later the comparable figures for commercial arbitration (around 6\%)\textsuperscript{52} and ICSID arbitration (5\%) indicates that a very long time indeed will need to elapse before there is fair representation.\textsuperscript{53}

Many commentators place the onus for addressing diversity on the arbitration institutions.\textsuperscript{54} In her essay, Professor Rogers considered the institutions to be the ‘primary regulators’ of international arbitrators and, as such, it is a simple extension of that notion to say that the institutions should take responsibility for promoting diversity in the candidates they appoint. The rules of the major arbitral institutions are silent on diversity.\textsuperscript{55} Some arbitration institutions, like the ICC, seem to be ill-equipped to address gender diversity at all (as they do not appear to be in possession of the requisite information on the candidates).\textsuperscript{56} Others make more of an effort. For example, the AAA established an Advisory Committee on Diversity in 2006 and states that the representation of women on its arbitrator panels increased from 11\% in 2003 to 13\% in 2007.\textsuperscript{57} Anecdotally, it appears that efforts are made to produce names of diverse candidates, certainly by the institutions that use a list procedure, such as the ICDR.

\textsuperscript{51} See supra n. 9.

\textsuperscript{52} Based on Michael Goldhaber’s figure from 2009, see supra n. 15 and the various figures provided by the LCIA and the SCC. The LCIA reported to the author by email on 20 March 2012 that in 1998 1 out of 66 (1.5\%) of arbitrators appointed in its arbitrations were female, this proportion increased to 22 out of 336 (6.5\%) in 2011. The figures from the Arbitration Institution of the Finland Chamber of Commerce, see supra n. 9, also support the view that institutions may appoint more women.


\textsuperscript{54} By way of an example of these views, see the posting by Baiju Vasani to OGEMID@mailtalk.ac.uk (30 June 2009, 10.11 CST) ‘Re a remedy, this may sound simplistic, but the onus has to be on the institutions. The anonymous author is correct in so far as it is difficult for counsel to advocate an inexperienced arbitrator even in what counsel – and we as a community (note the focus on “big dollar” cases in rankings and write-ups) – may perceive as a “smaller” case. To the client, who may not have many arbitrations on its books, its arbitration is not “small” at all. Not so institutions, who can put forward a new/female/diverse candidates in a “smaller” case.”

\textsuperscript{55} In the rules of the major arbitral institutions (ICC, LCIA, ICDR) there is no provision equivalent to that found in the World Trade Organization’s Understanding on Rules and Procedures Governing the Settlement of Disputes, which states: ‘Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience’ http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

\textsuperscript{56} See supra n. 9.

\textsuperscript{57} See, Increasing Diversity Among Arbitrators A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal By Sasha A. Carbone & Jeffrey T. Zaino, http://www.mystra.org/userfiles/Carbone-1-12.pdf. The 2007 press release for the establishment of the AAA Advisory Committee on Diversity states ‘currently, 22% of the AAA national roster of neutrals is diverse by gender, race, and ethnicity, with women making up 13% and ethnic minorities 7%. This is a substantial increase over the numbers in 2003, when the benchmark was first established for neutral diversity at 11\% female and 6\% ethnically diverse’ http://www.adr.org/sp.asp?id=29590.
It is notable from the limited data that is available that institutions do tend to appoint more diverse candidates than the parties. For example, the LCIA reports 336 appointments of arbitrators in 2011. Of these 336, 217 were selected by the parties or their nominees and 119 by the LCIA Court, 22 were female. Of these 22, 16 were selected by the LCIA Court (13.5% of 119) and 6 by the parties (3% of 217). The SCC reports that 6.5% of all appointed arbitrators between 2003 and 2012 (both party appointed and appointed by the SCC) have been women but that 8.4% of the arbitrators appointed by the SCC have been women.\footnote{Reports provided by email to the author by the LCIA on 20 March 2012 and the SCC on 9 March 2012.}

Gender diversity on international arbitration tribunals could be more easily addressed in the field of investment treaty arbitration, due to the greater level of public policy compliance that should be expected in this more public field of arbitrations. The ICSID Convention provides for arbitrators to be designated by ICSID Contracting States. Designated arbitrators then remain on the ICSID Panel of Arbitrators for six years.\footnote{Arbitrators may be appointed from outside the Panel of Arbitrators, save where the Chairman is making a default appointment, ICSID Convention Article 40, http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf} The designated arbitrators are expected to be ‘persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment’. In designating persons to serve on the panels, the Chairman is to ‘pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity’.\footnote{ICSID Convention Article 14, http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.}

There is no reference to the diversity of panel members, unlike the World Trade Organization’s Understanding on Rules and Procedures Governing the Settlement of Disputes, which states: ‘Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.’\footnote{See supra n. 57.}

Each ICSID Contracting State may designate four individuals to the panel of arbitrators. While admittedly a small pool, the statistics show that 205 arbitrators are currently designated by Contracting States; of those, only 30, or 14.7%, are women.\footnote{This information was gathered from the October 2012 version of the ICSID listing of Members of the Panels of Conciliators and of Arbitrators. Only Contracting Party-appointed arbitrators whose terms had not yet expired were included in this total. See http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRHR&hactionVal=ShowDocument&reqFrom=ICSIDPanels&language=English.}

This figure falls short of female representation in many national judiciaries. For example, the United States and Australia, both of which have made significant efforts to increase female representation in judicial appointments, have nominated between them eight men and no women to the ICSID Panel of Arbitrators.\footnote{For American judicial statistics, see supra n. 25. Australian courts reflect similar levels of female participation, according to 2011 figures released by the Australasian Institute of Judicial Administration. On Australian federal courts, 29% of judges and magistrates were female; in New South Wales and Victoria this figure was 32% and 30% respectively. See Australasian Institute of Judicial Administration, Judges and Magistrates (% of Women).} Only one country, the Bahamas, has nominated more than two women.\footnote{54}
The ICSID Panel of Arbitrators presents an opportunity for states to address the gender imbalance in international arbitration tribunals. Paralleling efforts made in relation to the appointment of individuals to the judiciary, states should designate higher numbers of women to the ICSID Panel of Arbitrators. This would allow these arbitrators to demonstrate their expertise in an open forum, where awards are publicly available. As a result, the visibility of arbitrators would be improved and the pool of candidates expanded.

Finally, in making an arbitral appointment, whether in the public or private sphere, we believe each individual must take personal responsibility for considering a diverse slate of candidates. This is because an overtly inclusive approach benefits the parties, the tribunal, counsel and the administration of justice, even in a private setting. In advising in-house counsel as to the identity of potential arbitrators, lawyers should proactively take an inclusive approach.

III. CONCLUDING REMARKS

The peculiarities of international arbitration mean that no-one really owns the problem of diversity in international arbitration tribunals. The short-term nature of the relationship between party-appointed arbitrator and party contributes to the difficulties faced in seeking to address the issue. It is understandable that, when a party is making one appointment every few years, diversity is the ‘the last feature on anyone’s mind’. Certainly, in the field of public arbitrations, greater effort should be made by states appointing individuals to the ICSID Panel of Arbitrators to ensure that their selections properly reflect the state’s public policy on diversity. This will go some way towards increasing the visibility of individual arbitrators and...

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64 The countries with the highest number of female designations are the Bahamas, Cameroon, France, Germany, Lebanon, Panama, Peru, and Timor-Leste.

65 ‘From the assembly line to the boardroom, it is an increasingly common management practice to include as many perspectives as possible in the problem-solving process, on the ground that different values and assumptions coming into the process will yield a more sophisticated result.’ It Remains A. White, Male Game, Natl. L. J. (Nov. 27, 1996) http://cpradr.org/Portals/0/Resources/Articles/It%20remains%20a%20white, %20male%20game%20%28NLJ%29.pdf.

66 Companies have made efforts to improve diversity. In 1999, Charles Morgan, then general counsel of BellSouth Corp., launched an initiative titled ‘Diversity in the Workplace: A Statement of Principle’, more generally known as ‘The Morgan Letter’. The Morgan Letter was a statement by chief legal officers of more than 500 companies, who said: ‘Our companies conduct business throughout the United States and around the world, and we value highly the perspectives and varied experiences which are found only in a diverse workplace. Our companies recognize that diversity makes for a broader, richer environment which produces more creative thinking’: http://cpradr.org/Portals/0/Resources/Articles/It%20remains%20a%20white, %20male%20game%20%28NLJ%29.pdf. See also the 2004 Call to Action, which has been signed by more than 100 companies, see Hitting the Legal Diversity Market Home: Minority Women Speak Out, http://digitalcommons.wcl.american.edu/ See also supra n. 43.

67 Anonymous posting to OGEMID, supra n. 42. ‘I recall an esteemed colleague, who acts as both counsel and arbitrator, stating at a conference that, when asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone’s mind. “We are not being asked to make a statement” he said, “we are asked to pick the best person for the job.”’
expanding the pool of potential candidates and, ultimately, should trickle down to
the commercial arbitration field. In the meantime, those committed individuals
making appointments need to assume personal responsibility for acknowledging
and eliminating unconscious bias against the appointment of diverse candidates.
**Abstract**

In international arbitration awards are being challenged more frequently than before. The losing party often challenges the arbitral award on the grounds that the arbitral tribunal – allegedly – has either exceeded its authority or has not given a party a sufficient opportunity to present its case. Such grounds are sometimes invoked when the tribunal has applied the principle of jura novit curia when determining the contents of the applicable substantive law, i.e. the lex causae. In this context, it is argued that the award should be set aside, since the arbitral tribunal has exceeded its authority or failed to comply with the fundamental requirements of due process, such as the right to be heard.

The question of whether, and how, the arbitral tribunal may apply the principle of jura novit curia has been much debated in international arbitration literature. This issue has also been addressed in a number of court decisions over the last five years: by the Swiss Federal Supreme Court in February 2009 and August 2010, by the Quebec Superior Court in December 2008, by the Finnish Supreme Court in July 2008, and by the Paris Court of Appeal in December 2010.

It has been suggested that the question of whether and how the arbitral tribunal’s authority to apply the principle of jura novit curia when determining the contents of the lex causae will depend on the legal culture of arbitrators, i.e. whether the arbitrators perceive the lex causae as a law or as a fact. The article argues that rather than focusing on the law/fact dichotomy, the tribunal should never apply the principle of jura novit curia without first ascertaining that this does not jeopardize the finality of the award.

The article first examines the application of the principle of jura novit curia in the international arbitration context. The article then reviews the limits of the arbitral tribunal’s authority to apply the principle of jura novit curia, namely the grounds for setting aside an award. Thereafter, the referenced case law is presented and analyzed based on the criterion of foreseeability. In conclusion, and against the background of the referenced case law, some thoughts are presented on what issues the arbitral tribunal should consider if contemplating applying the principle of jura novit curia in international arbitration.
In international arbitration awards are being challenged more frequently than before. The losing party often challenges the arbitral award on the grounds that the arbitral tribunal — allegedly — has either exceeded its authority or has not given a party a sufficient opportunity to present its case. Such grounds are sometimes invoked when the tribunal has applied the principle of jura novit curia when determining the contents of the applicable substantive law, i.e. the lex causae. In this context, it is argued that the award should be set aside, since the arbitral tribunal has exceeded its authority or failed to comply with the fundamental requirements of due process, such as the right to be heard.

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I. INTRODUCTION

Within the international arbitration community, it is often said that arbitral awards are being challenged more frequently than before. Unlike in the ‘good old days’, an arbitral award is no longer seen as the ultimate resolution to the parties’ dispute. Once the award is rendered, a whole new ball game starts: proceedings to set aside the award.

The losing party frequently challenges the arbitral award on the grounds that the arbitral tribunal – allegedly – has either exceeded its authority or has not given a party a sufficient opportunity to present its case. Such grounds are sometimes invoked when the tribunal has applied the principle of jura novit curia when determining the contents of the applicable substantive law, i.e. the lex causae. In

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1 The principle of jura novit curia means that the judge or arbitrator may apply provisions of the lex causae beyond the parties’ submissions.

2 This article will discuss the above issues in a context where the parties have agreed on the lex causae. For the avoidance of doubt, this article will not discuss the determination of the lex causae, i.e. the question of what law
this context, it is often argued that the award should be set aside, since the arbitral tribunal has exceeded its authority or failed to comply with the fundamental requirements of due process, such as the right to be heard.

One of the arbitral tribunal’s paramount duties is to render an award that is final. Thus, the question is to what extent the provisions on setting aside an arbitral award limit the tribunal’s authority to apply the principle of jura novit curia in international arbitration, i.e. to determine the contents of the lex causae beyond the parties’ submissions. This question goes to the core of international arbitration. Is it for the parties to prove the contents of the lex causae, or is it for the tribunal to determine such contents of its own initiative? May the arbitral tribunal apply provisions of the lex causae not invoked by the parties? If so, how far can the tribunal go without risking that the award will be set aside? What procedural requirements must the tribunal observe in this respect?3

The question of whether, and how, the arbitral tribunal may apply the principle of jura novit curia has been much debated in international arbitration literature. This issue has also been addressed in a number of court decisions over the last five years: by the Swiss Federal Supreme Court in February 2009 and August 2010, by the Quebec Superior Court in December 2008, by the Finnish Supreme Court in July 2008, and by the Paris Court of Appeal in December 2010.

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The article first examines the application of the principle of jura novit curia in the international arbitration context (section 2). The article then reviews the limits of should apply to the merits of the dispute as such. On this, see e.g. Gary B Born: Chapter 18 of International Commercial Arbitration, 2105–2248 (vol. II, Kluwer Law International 2009). Nor does this article deal with questions arising in connection with the lex causae being a non-national law, i.e. where the parties have agreed that lex mercatoria, the UNIDROIT Principles, or other transnational rules shall apply to the merits of the dispute. It does also not analyze situations where the parties have agreed that the dispute should be decided ex aequo et bono, i.e. applying principles of fairness. These questions would merit further contemplation from a jura novit curia point of view. The question of the arbitral tribunal’s authority to determine the contents of the lex causae beyond the parties’ submissions closely relates to the question of whether and to what extent an arbitral tribunal should apply mandatory rules of law even if such rules have not been invoked by the parties. This question would also merit a closer look but will be left out of this analysis. Regarding the power of arbitrators to consider issues of public policy or mandatory laws, see Gary B Born, Chapter 18 of International Commercial Arbitration, 2177–2184 (vol. II, Kluwer Law International 2009). For reflections on the principle of jura novit curia and mandatory law, see Ieva Kalnina, Jura Novit Curia – Scylla and Charybdis of International Arbitration?, 102 (vol. 8, Baltic Yearbook of International Law 2008).

3 In addition to rendering an award that cannot be set aside it is also one of the paramount duties of the arbitral tribunal to render an award that is enforceable. When applying the principle of jura novit curia and determining the contents of the lex causae beyond the submissions of the parties the arbitral tribunal may under certain circumstances risk rendering an arbitral award that may not be enforced. This issue cannot be further elaborated on in this article. On this subject see e.g. Gary B. Born, Chapter 25 of International Commercial Arbitration, 2748–2750 (vol. II, Kluwer Law International 2009). For case law on this issue see e.g. the decision by the French Cour de cassation, 1ère chambre civile (23 June 2010).
the arbitral tribunal’s authority to apply the principle of *jura novit curia*, namely the grounds for setting aside an award (section 3). Thereafter, the referenced case law is presented (section 4), and analyzed (section 5). In conclusion, and against the background of the referenced case law, some thoughts are presented on what issues the arbitral tribunal should consider if contemplating applying the principle of *jura novit curia* in international arbitration (section 6).

II. DETERMINATION OF THE CONTENTS OF THE *LEX CAUSAЕ* IN INTERNATIONAL ARBITRATION

In applying the *lex causae* to the merits of the dispute, the tribunal must first determine its contents. In a purely national context, where the parties, their counsel, and the tribunal are domiciled in the country where the arbitration takes place, determining the contents of the *lex causae* is fairly straightforward. If the law of the country in question is the *lex causae*, the contents of such law usually need not be separately determined.

In an international context, however, the situation is often different. The very nature of international arbitration entails that the arbitrators are not necessarily trained in the *lex causae*. In fact, the *lex causae* may have no connection to the parties, and the perceived neutrality of the *lex causae* may be the very reason for choosing it. The arbitrators may also come from different legal cultures and may not have any background in, or knowledge of, the *lex causae*. Thus, the parties cannot rely on the arbitral tribunal knowing its contents. Therefore the arbitral tribunal must, somehow, determine the contents of the *lex causae*.

Standard practice in international arbitration is that the parties make their legal arguments in written submissions and ‘prove’ the contents of the *lex causae* through legal texts, case law or legal experts. But may the arbitral tribunal conduct its own investigations on the contents of the *lex causae*? Is it bound by the parties’ submissions when determining the contents of the *lex causae*? In other words, does the principle of *jura novit curia* apply in international arbitration?

The principle of *jura novit curia* is widely accepted in court litigation, in particular in civil law jurisdictions like Germany, Switzerland, Sweden and Finland. In these jurisdictions, the *lex causae* – at least to the extent it coincides with the *lex fori* – is considered a law (rather than a fact) whose contents the court must know. Thus, the court may conduct its own investigations on the contents of the *lex causae* beyond the parties’ submissions. In common law jurisdictions, such as England, the principle of *jura novit curia* is not applied and the *lex causae* is considered a fact (rather than a law) whose contents the parties must prove. The court conducts no investigations beyond the parties’ submissions.

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4 In the context of this article it has not been possible to analyze and form an opinion on whether the contents of the *lex causae* in the referenced case law have been correctly determined. Unless otherwise specifically stated, the assumption of this article is that this is the case. Thus, this article analyses merely the implications of applying the principle of *jura novit curia*, not whether the *lex causae* has been applied correctly.
It is not possible to draw a direct parallel between court litigation and international arbitration in this respect. Unlike in court litigation, an international arbitration cannot be characterized as ‘civil-law’ or ‘common law’. Concepts like domestic law and foreign law bear no relevance in international arbitration. Nevertheless, since international arbitration is not delocalized, and because arbitral awards may be reviewed by the courts of the arbitral seat in proceedings seeking to set aside the award, the application of the principle of jura novit curia in court litigation at the seat of the arbitration is not without relevance.

Most arbitration laws and institutional rules are silent on the extent to which the tribunal may apply the principle of jura novit curia when determining the contents of the lex causae. This question has been much debated by international arbitration scholars.\(^5\)

In international arbitration, there seem to be three different approaches to determining the contents of the lex causae. According to the first approach, the arbitral tribunal adopts a civil law starting point and considers the lex causae a law. According to the second approach, the arbitral tribunal adopts a common law starting point and considers the lex causae a fact. According to the third approach, the arbitral tribunal adopts a hybrid methodology, combining the first and second approaches. This last approach leaves the tribunal considerable discretion, and it has been suggested that this approach is increasingly the norm in international arbitration.\(^6\)

The way international arbitration proceedings are conducted is significantly influenced by the composition of the tribunal and the attitudes of the arbitrators and counsel, who are often influenced by their own legal culture. Considering the discretion that the tribunal is given to determine the contents of the lex causae under most arbitration laws and rules, tribunals may take different approaches to

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\(^6\) See Julian D.M. Lew, Loukas A. Mistelis & Stefan Kroll, supra n. 5, 443.
applying the principle of *jura novit curia* when determining the contents of the *lex causae*.

Regardless of the arbitrators’ chosen approach in determining the contents of the *lex causae*, the prevailing view is that such determination should never come as a surprise to the parties. Thus, if the tribunal decides to determine the contents of the *lex causae* beyond the parties’ submissions, it should do so only after having informed the parties and having given them a chance to provide arguments on this issue.7

The question of whether the arbitral tribunal may apply the principle of *jura novit curia* is relevant because it is one of the arbitrators’ paramount duties to ensure that they determine the contents of the *lex causae* so that the award will be final. The question of whether and to what extent the arbitral tribunal may apply the principle of *jura novit curia* must therefore be assessed against the rules for setting aside awards by the courts at the arbitral seat.

III. LIMITATIONS RELATING TO THE PROVISIONS REGARDING SETTING ASIDE OF AN AWARD

The grounds for setting aside an arbitral award limit the arbitral tribunal’s authority to determine the contents of the *lex causae* beyond the parties’ submissions. The arbitral tribunal should make sure that the arbitral award cannot be set aside. Thus, irrespective of how the arbitral tribunal decides to determine the contents of the *lex causae*, it should do so without risking the finality of the award.

The grounds for setting aside an arbitral award can be found in the *lex arbitri*, i.e. the law at the seat of the arbitration. Most national arbitration laws, as well as the UNCITRAL Model Law, provide for a limited number of grounds based on which an arbitral award can be set aside.8 Although there are differences between the national arbitration laws in this respect, it is legio for national arbitration laws to provide for the same basic grounds for setting aside an arbitral award.

One ground for setting aside an arbitral award that appears in many national arbitration laws is that the arbitral tribunal has exceeded its authority. In Article 34.2(a)(iii) of the UNCITRAL Model Law, this is expressed as the award dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration. Since arbitration is based on a contract between the

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parties, the scope of such contract limits the arbitral tribunal’s mandate. Furthermore, within this scope, it is for the parties to present their respective cases.

Another ground for setting aside an arbitral award that appears in many national arbitration laws is a violation of due process. The arbitration proceedings must comply with certain fundamental procedural parameters, such as the impartiality of the arbitral tribunal and the principle of *audiatur et altera pars*. In the UNCITRAL Model Law, the most fundamental due process requirements are laid out in Article 18. The parties shall be treated equally and each party shall be given a full opportunity of presenting its case. It follows from Article 34.2 (a)(iv) of the UNCITRAL Model Law that the award may be set aside if the arbitration proceedings do not comply with these due process requirements.

In the context of the arbitral tribunal’s authority to determine the contents of the *lex causae* beyond the parties’ submissions, the due process requirement is twofold. First, it means that the arbitral tribunal must give each party the opportunity to present its case. It follows that it may be questionable if the arbitral tribunal bases the award on a provision of the *lex causae* that the parties have neither invoked nor had the opportunity to submit arguments on. If the award is based on such provisions, the losing party may challenge the arbitral award alleging a lack of sufficient opportunity to present its case.

Second, in the context of determining the contents of the *lex causae*, the due process requirement also means that if the arbitral tribunal applies provisions of the *lex causae* of its own initiative, the arbitral tribunal is at risk of appearing biased. It can be argued that if the application of a provision of the *lex causae* that neither party has invoked leads to a favorable outcome for one party this may subject the tribunal to allegations of bias.9

Thus, the arbitral tribunal may, under certain circumstances, risk rendering an arbitral award that can be set aside when applying the principle of *jura novit curia* in international arbitration.

IV. *JURA NOVIT CURIA* IN RECENT CASE LAW

(a) Switzerland

The question of *jura novit curia* in international arbitration came up in a case decided by the Federal Supreme Court of Switzerland in *Urquijo Goitia v. da Silva Muñiz* (February 2009).10

The case concerned a contract between a Brazilian football player and the player’s Spanish agent. The contract was governed by the relevant FIFA rules and,

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secondarily, by Swiss law. Under the contract, the agent had the exclusive right to find a new club for the football player. However, the football player found a new club without the agent’s assistance. The agent subsequently claimed his fee. The claim was rejected first by the competent body in FIFA and thereafter by the arbitral tribunal.

In rejecting the claim, the tribunal relied on a Swiss law provision, under which exclusivity clauses in agency agreements relating to employment contracts are void. Neither party had invoked this provision.

The Swiss Federal Supreme Court set aside the arbitral award. It stated that since the case had no link to Switzerland other than the (secondary) lex causae, the parties could not have anticipated that the tribunal would base its award on the provision in question. The arbitral tribunal should have at least told the parties it intended to apply the provision so that both parties would have had the opportunity to plead on the issue. Because the tribunal had not notified the parties of its intention to apply the provision, it had violated their right to be heard. Therefore, the Federal Supreme Court of Switzerland set aside the award.  

The question of jura novit curia in international arbitration also came up in another case decided by the Federal Supreme Court of Switzerland in X. SA v. Y. SA (August 2010). The case concerned a business consultancy agreement in 2001 between Belgian company X and Spanish company Y, under which Y undertook to facilitate the conclusion of an agreement for the construction of a storage facility for liquid gas between X and a third party (the 2001 Agreement). The construction agreement was concluded in 2003 but the business consultancy agreement was allegedly replaced by another business consultancy agreement between an affiliate of X and a Dutch company (the 2003 Agreement).

Y subsequently commenced arbitration proceedings against X claiming its commission under the 2001 Agreement. The sole arbitrator awarded the commission to Y, concluding that the 2001 Agreement was still in force and that the 2003 Agreement that allegedly had replaced the 2001 Agreement was a sham. The sole arbitrator based the final award on the relevant Swiss law provisions on sham agreements. X argued that its right to be heard had been violated because the final award was based on legal considerations and concepts that had not been invoked and pleaded by the parties.

The Federal Supreme Court of Switzerland upheld the arbitral award. It stated that the right to be heard covers in particular the right to present the facts of the case. With regard to legal issues, as a rule, the principle of jura novit curia prevails. The arbitral tribunal must grant the parties the opportunity to plead their case on

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11 It should be noted that the Federal Supreme Court also stated that the relevant Swiss law provision was not applicable and that the arbitral tribunal had been mistaken in determining the contents of the lex causae. To what extent the erroneous application of the lex causae may have influenced the Federal Supreme Court’s decision is not possible to determine based on the reasoning in the decision.

12 Case reference 4A_254/2010, Federal Supreme Court of Switzerland. For comments see Georg von Segesser & Patrick Rohn, X vs. Y AS, Federal Supreme Court 3 August 2010, in a contribution by the ITA Board of Reporters.
a legal issue only in exceptional circumstances, i.e. if the concept or provision on
which the tribunal intends to base its decision has not been invoked by the parties
and if the application could not be foreseen by the parties. In the case at hand the
Federal Supreme Court held that the parties could have foreseen that the sole
arbitrator would base the award on the legal concepts in question. In particular,
the Federal Supreme Court pointed out that X had been represented by Swiss
counsel and that X’s counsel had referred to concepts similar to the one on which
the sole arbitrator based the award in its briefs. Therefore, the Federal Supreme
Court of Switzerland upheld the award.

(b) Quebec
The Quebec Superior Court also addressed the application of the principle of jura
novit curia in Dreyfus v. Tusculum (December 2008).13
The case concerned a contract between two parties who each held 50% of
the shares in a joint venture. The contract provided for the acquisition of the parties’
respective shareholding and included undertakings concerning reorganization of
the company. If such reorganization did not take place, the contract provided for
an exercise of put and call options at prices determined according to a specified
formula. Following a failed reorganization attempt, one party initiated arbitration
proceedings to exercise the options.
In the arbitration, the parties sought to apply a certain remedy clause in the
contract. Nevertheless, the arbitral tribunal issued a partial award in which it
terminated the joint venture agreement based on the doctrine of frustration under
New Y ork law, which was applicable to the relevant contract. Neither party had
invoked the doctrine of frustration as grounds for termination.
The Quebec Superior Court held that by imposing a remedy that neither party
had invoked, the arbitral tribunal had violated the audiatur et altera pars rule and
dealt with a dispute not contemplated by the parties. Also, the tribunal had failed
to observe the applicable arbitration procedure. Further, the Superior Court held
that the tribunal had taken on the role of amiable compositeur although the parties
had not requested, mandated or permitted it to do so. The Superior Court thus
concluded that the tribunal had breached public policy in basing its partial award
on the doctrine of frustration without hearing the parties on this issue. The partial
award was therefore set aside.

13 Case reference 2008 QCCS 5903, Quebec Superior Court. For comments see Sophie Nappert, Arbitral
Activism: The Manifold Guises of Jura Novit Arbiter, Les Cahiers de l’Arbitrage 2010-1, pp. 125–158. See also
2009 in reply to Laurent Lévy’s post of 20 Mar. 2009. See also the same author Canada Contribution: Dreyfus
The application of the principle of *jura novit curia* was an important issue in the case *Werfen Austria v. Polar Electro* (July 2008) before the Supreme Court of Finland.\(^\text{14}\)

The case concerned a sole distribution agreement between an Austrian company and a Swiss company. According to the agreement, the distributor was not entitled to compensation for good will if the agreement was terminated with notice. Upon termination of the agreement, the distributor nevertheless claimed compensation for good will, alleging that under Austrian and Finnish law the contractual term denying the distributor compensation for good will was void.

The arbitral tribunal found that the contractual term that denied the distributor compensation for good will was unreasonable and that the claimant could be considered to have raised a secondary argument of unreasonableness or adjustment of the relevant contractual term. The tribunal then adjusted the agreement by applying section 36 of the Finnish Contracts Act, even though neither party had invoked it.

The losing party challenged the arbitral award, arguing that the tribunal had exceeded its authority and failed to give the losing party a sufficient opportunity to present its case.

The Supreme Court held that the arbitral tribunal had not awarded anything beyond the parties’ claims, and therefore upheld the award. Also, the Supreme Court held that tribunal had not based its award on issues the parties had not invoked. Hence, the Supreme Court found that the arbitral tribunal had not exceeded its authority. The Supreme Court also stated that an arbitral tribunal is not bound by the legal arguments presented by the parties. Further, the Supreme Court found that the proceedings had not affected the losing party’s opportunity to present its case and that the arbitral tribunal, thus, had not violated the right to be heard.\(^\text{15}\)

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\(^{15}\) It should be noted that the decision was not unanimous and includes two dissenting opinions. The decision is controversial and has been much debated by Finnish legal scholars. The critics find that the relief sought did not include adjustment of the contract, that the arbitral tribunal decided the case ultra petita and that the award, hence, should have been set aside. According to these views, it is not a question of applying the principle of *jura novit curia*, but a question of awarding more or something else than the parties had pleaded. See e.g. Jyrki Virolainen, and Jan Waelius and Tanja Jussila, supra note 14.
Finally, the application of the principle of jura novit curia was at the heart of the case Engel Austria GmbH v. Don Trade (December 2009) before the Paris Court of Appeal.\footnote{Case reference CA Paris, pole 1, 1re ch., 3 déc. 2009, no RG: 08/13618, Paris Court of Appeal. For comments see Andrea Carlevaris, L’arbitre international entre Charybde et Scylla: le principe jura novit curia entre principe de la contradiction et impartialité de l’arbitre, 2 Le Cahiers de l’Arbitrage 433–451 (2010).}

The case concerned a contract for the delivery of an industrial system for fabricating moulds for plastic PET bottles between an Austrian company and a Serbian company. Upon delivery of the system the parties disagreed as to whether the system fulfilled the agreed productivity level. The purchaser claimed compensation for loss of profit whereas the seller requested that the contract be declared null and void.

The arbitral tribunal partially avoided the contract based on the Austrian law principle of Wegfall der Geschäftsgrundlage, even though neither party had invoked it. The seller challenged the arbitral award, arguing that the tribunal had failed to give the parties a sufficient opportunity to be heard.

The Paris Court of Appeal set aside the arbitral award. The Court of Appeal held that the arbitral tribunal had based its decision on the Austrian law principle of Wegfall der Geschäftsgrundlage despite the fact that neither of the parties had invoked such principle. The Court of Appeal also found that the arbitral tribunal had not respected the principle of audiatur et altera pars since it had based its decision on a legal principle taken into account ex officio, without giving the parties a possibility to be heard on the application of such principle.

V. CASE LAW ANALYSIS

(a) Civil Law/Common Law Divide as a Starting Point?

As a starting point for the analysis, it should be noted that it is difficult to compare case law regarding the setting aside of arbitral awards, since the grounds for setting aside arbitral awards vary between different jurisdictions. Nevertheless, most national arbitration laws contain the same essential grounds for setting aside arbitral awards.\footnote{See, e.g., § 1059 of the German Code of Civil Procedure, ss 67 and 68 of the 1996 English Arbitration Act, Article 190(2) of the Swiss Federal Act on Private International Law, s. 33 of the Swedish Arbitration Act, s. 41 of the Finnish Arbitration Act, Arts 1502 and 1504 of the French Code of Civil Procedure, and Art. 1065 of the Code of Civil Procedure of The Netherlands. See also Art. 34 of the UNCITRAL Model Law on International Commercial Arbitration.} Thus, decisions from different jurisdictions on setting aside arbitral awards may be compared on a general level to identify common indicators and trends.

Bearing this in mind, it can be concluded that the cases discussed above, at least on the face of it, reveal different approaches to the application of the principle of jura novit curia.
In its decision of 2009, the Federal Supreme Court of Switzerland concluded that the arbitral tribunal should not have applied a provision of Swiss law not invoked by the parties (and not applicable in the dispute). This was also the conclusion in the Quebec case, where the Quebec Superior Court concluded that the tribunal should not have applied a doctrine that neither party had invoked. The Paris Court of Appeal came to a similar conclusion as regards the legal doctrine applied by the arbitral tribunal in the case. In all three cases the courts, thus, concluded that the arbitral tribunal had gone too far in its application of the principle of *jura novit curia*, and, as a consequence, the respective arbitral awards were set aside.

In the Finnish case and in the Swiss decision of 2010, on the contrary, the arbitral awards were not set aside despite the application by the arbitral tribunals of the principle of *jura novit curia*. The Supreme Court of Finland concluded that the arbitral tribunal could apply a provision of Finnish law that neither party had expressly invoked. The Supreme Court of Finland thus found that the application of the principle of *jura novit curia* was acceptable and that the arbitral award should not be set aside. Similarly, the Federal Supreme Court of Switzerland concluded in its 2010 decision that the application of the principle of *jura novit curia* was acceptable and that the award should not be set aside despite the fact that the arbitral tribunal had based the award on a legal concept that had not been expressly invoked by the parties.

As stated above, it has frequently been argued that the perceived divide between civil law and common law jurisdictions concerning the application of the principle of *jura novit curia* in court litigation is also relevant in international arbitration. It thus follows that in civil law jurisdictions (such as Switzerland, Quebec, Finland and France), the principle of *jura novit curia* would apply as a rule and that an arbitral award should not be set aside because the tribunal applied a provision of the *lex causae* that neither party had invoked.

When analyzing these cases based on the traditional notion that the principle of *jura novit curia* applies in international arbitration in a civil law context, it would seem that the Federal Supreme Court of Switzerland in its 2009 decision, the Quebec Superior Court and the Paris Court of Appeal have abandoned the *jura novit curia* approach and instead moved towards limiting the arbitral tribunal's authority to determine the contents of the *lex causae* beyond the parties' submissions. The Supreme Court of Finland and the Federal Supreme Court of Switzerland in its 2010 decision, on the other hand, seem to have upheld the traditional civil law approach and have allowed the application of the principle of *jura novit curia*.

Basing an analysis of the application of the principle of *jura novit curia* on the traditional notion that such principle applies in international arbitration in a civil law context is, however, not an optimal approach. There are no civil law or

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18 Despite its location, Quebec is a civil law jurisdiction. See J. William Rowley QC., David W. Kent & Markus Koehnen, Canada chapter in *Arbitration World – Jurisdictional Comparisons Reference Series* (2nd ed. The European Lawyer Ltd. 2006), Reference Series, 33–47.
common law jurisdictions when it comes to international arbitration and more often than not international arbitration has links to a number of different jurisdictions – the country of the *lex causae*, the country of the seat of the arbitration, the nationalities of the arbitrators to name a few.

Having said this, it must be kept in mind that the issue of application of the principle of *jura novit curia* in international arbitration cannot be entirely delocalized. Since it is for the courts at the seat of the arbitration to determine whether an arbitral award shall be set aside or upheld, the application of the principle of *jura novit curia* will ultimately be reviewed against the backdrop of the rules regarding the setting aside of arbitral awards at the arbitral seat, i.e. the *lex arbitri*. Also, local courts that review challenges will in all likelihood be influenced by the application of the principle of *jura novit curia* in court litigation at the seat of the arbitration.

Thus, when assessing the application of the principle of *jura novit curia* in international arbitration argumentation based on the perceived divide between civil and common law should be abandoned. Instead, the analysis should be conducted merely against the background of the *lex arbitri* provisions regarding setting aside of arbitral awards. Since appeals on the merits, as a rule, are excluded in international arbitration, and because the arbitral tribunal should render a final award, provisions on setting aside an arbitral award form the outer limits of the tribunal’s authority to determine the contents of the *lex causae* beyond the parties’ submissions. No matter how well established the principle of *jura novit curia* may be in the arbitrators’ own legal culture, the determination of the contents of the *lex causae* must at all times be consistent with the provisions regarding setting aside of an arbitral award applicable at the seat of the arbitration. To the extent that the application of the principle of *jura novit curia* conflicts with e.g. due process requirements such as the right to be heard, the tribunal must refrain from determining the contents of the *lex causae* beyond the parties’ submissions.

The above conclusion may seem simplistic at first glance. It is not breaking news that arbitral proceedings must comply in all respects with due process and that the arbitral tribunal should render an award that is final. Upon closer consideration, however, the conclusion serves as an important tool for analyzing and understanding the above seemingly incoherent case law.

*(b) The Surprise Element as a Decisive Factor*

When analyzing the referenced case law the applicability of the principle of *jura novit curia* seems not so much to be linked to any perceived divide between civil law and common law. Rather, the common denominator of the above cases is the assessment by the respective courts of to what extent the arbitral tribunals have taken the parties by surprise when applying the principle of *jura novit curia*. In other words, the relevant question does not seem to be if the principle of *jura novit curia* is applicable in international arbitration at the seat of arbitration as such, but rather if application of that principle has a negative impact on the foreseeability of the
arbitral award, to an extent that would constitute a violation of the right to be heard.

Taking Switzerland as an example, the Federal Supreme Court has established the applicability of the principle of *jura novit curia* in case law. In 2003, the Federal Supreme Court concluded that an arbitral tribunal may determine the contents of the *lex causae* beyond the parties’ submissions and base its award on provisions of the *lex causae* not invoked by the parties.\(^\text{19}\) Despite the above case law, the Federal Supreme Court concluded in its 2009 decision that the arbitral tribunal should not have applied a provision of the *lex causae* that had not been invoked by the parties. The arbitral award was thus set aside for application of the principle of *jura novit curia* despite the fact that the Federal Supreme Court had expressly confirmed the application of such principle in previous case law.

What may, at first glance, seem like a change of directions by the Federal Supreme Court becomes understandable when viewed against the backdrop of the concept of foreseeability. In its 2009 decision, the Federal Supreme Court of Switzerland concluded that the arbitral award should be set aside due to a violation of the right to be heard. In previous case law, the court had also concluded that the right to be heard limits the application of the principle of *jura novit curia*. Likewise, it follows from previous case law that the arbitral tribunal should not take the parties by surprise, e.g. it should not raise legal arguments in the arbitral award that the parties could not have expected. In its 2009 decision the Federal Supreme Court particularly argued that the parties could not have foreseen the application of the Swiss law provision in question, and that the right to be heard had therefore been violated. In other words, the arbitral tribunal had taken the parties by surprise when applying the principle of *jura novit curia*.\(^\text{20}\)

The above is mirrored also in the 2010 decision by the Federal Supreme Court of Switzerland. As in the 2009 decision, the Federal Supreme Court confirmed in the 2010 decision that the principle of *jura novit curia* applies in international arbitration seated in Switzerland and that arbitrators may determine the contents of the *lex causae* beyond the parties’ submissions. The Federal Supreme Court emphasized that application of the principle of *jura novit curia* may constitute a violation of the right to be heard only in exceptional circumstances, i.e. where the application of a legal concept or provision would come as a surprise to the parties. As there, according to the Federal Supreme Court, was no surprise element in the

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\(^{20}\) In case 4A.108/2009, 9.6.2009 the Federal Supreme Court of Switzerland also set aside an arbitral award due to violation of the right to be heard. See the commentaries Georg von Segesser, *Jura novit curia – the right to be heard (decision of the Swiss Federal Supreme Court as of 9 June 2009 – 4A_108/2009)*, by on the Kluwer Arbitration Blog at www.kluwerarbitrationblog.com on Aug. 30, 2009; and Georg von Segesser & Andrea Meier, *Swiss Federal Supreme Court 9 June 2009, 9 June 2009 – Federal Supreme Court, Digest by ITA Board of Reporters, Kluwer Law International on 11 December 2009*. In said case, the arbitral award was set aside because the tribunal had applied a contract provision – not a provision or principle of the *lex causae* – that neither party had invoked. The case is therefore not analyzed further in this article.
arbitral award underlying the 2010 decision, the award had been foreseeable. Thus, there was no violation of the right to be heard.

When analyzing the Quebec case based on foreseeability, it follows the lines of the Swiss case law. The Quebec Superior Court concluded that the arbitral tribunal had determined the contents of the *lex causae* beyond the parties’ submissions, thereby taking the parties by surprise. The Quebec Superior Court also concluded that the parties had not been given sufficient opportunity to be heard, and that this constituted a violation of due process. Consequently, the award was set aside.

The reasoning of the Paris Court of Appeal points in the same direction. The award was set aside because the arbitral tribunal had based its award on a legal principle that neither party had invoked. The court found a violation of the right to be heard because the tribunal had taken the legal principle into account *ex officio*, without giving the parties a possibility to be heard on the application of such principle.

In the Finnish case, as in the Swiss decision of 2010, foreseeability was a key factor in the Supreme Court’s decision to uphold the arbitral award. In the underlying arbitration proceedings, the arbitral tribunal had applied, of its own initiative, a Finnish law provision regarding adjustment of contracts. It was as such undisputed that adjustment of the contractual provision at hand had not been invoked. The Supreme Court concluded that since the parties in the course of the arbitration had referred to reasonableness when contesting the claim for indemnity – although in a somewhat different context – the parties had been given the opportunity to plead on the issue and that there thus was no violation of the right to be heard.21 The Supreme Court thus, in essence, based its decision on the fact that the application of the adjustment provision to a contractual provision that was claimed to be null and void, could not have come as a surprise to the parties.

This, in all five cases the decision was based on whether or not the arbitral tribunal had taken the parties by surprise. Foreseeability is thus the common denominator for the referenced cases.

(c) Foreseeability Criteria

What, then, is foreseeable? When analyzing the referenced case law one can conclude that the courts have approached this question in different ways and based on a variety of criteria. One factor to which some of the courts seem to have given

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21 In addition, it was also argued that the award should be set aside based on excess of authority. As regards the Supreme Court’s reasoning regarding this ground, certain aspects of the Finnish law provision applied by the arbitral tribunal must be understood. Section 36 of the Finnish Contracts Act is a provision regarding adjustment of contracts. The prevailing view in Finnish contract law seems to be that cancellation of a contract and the adjustment thereof are two different things which, consequently, must be invoked in separate prayers for relief. There is, however, a minority view that a request for adjustment of a contract is included in the request for cancellation. In its review of the arbitral award, the Supreme Court of Finland accepted the minority view as a starting point. The Supreme Court’s reasoning regarding excess of authority is thus based on the Supreme Court’s controversial interpretation of Finnish contract law.
weight is the fundamental nature of the legal concept or provision applied by the arbitral tribunal of its own initiative.

The referenced cases from the Federal Supreme Court of Switzerland serve as a good example of this. In the 2009 case, which was based on a CAS award, the Swiss law provision applied by the arbitral tribunal without having been pleaded in the case, was a specific provision of Swiss employment law, which was not fundamental in nature. The Federal Supreme Court concluded that the Swiss law provision (wrongfully) applied by the arbitral tribunal was not foreseeable. To what extent the Federal Supreme Court’s decision was influenced by the fact that the relevant provision was, in fact, not applicable to the case, is not possible to conclude from the decision.22

In the 2010 decision, on the contrary, the Swiss law concept on sham agreements applied by the arbitral tribunal of its own initiative is of fundamental nature in Swiss law. The Federal Supreme Court concluded that the application of the Swiss law concept by the sole arbitrator was foreseeable.

The main difference between the two Swiss cases seems to lie in the difference in the nature of the provisions applied by the arbitral tribunal of its own initiative. The Swiss law provisions on sham agreements are of fundamental nature in Swiss law. By contrast, the Swiss provision (wrongfully) applied in the 2009 case was not of a similar fundamental nature. It can thus be argued that the more fundamental a certain legal concept is, the higher the threshold for the application of such legal concept to come as a surprise to the parties.

In the Finnish case, the provision that the arbitral tribunal applied of its own initiative concerned the adjustment of contracts, which is a fundamental element in Finnish (and Scandinavian) contract law. The Supreme Court of Finland thus apparently based its decision on the reasoning that the application of the Finnish law provision on adjustment of contracts was foreseeable.

There are similarities between the outcome of the Finnish case and the Swiss decision of 2010, in which cases the arbitral awards were upheld despite the application of the principle of *jura novit curia*. Both cases concerned a fundamental legal concept in the respective jurisdiction: the Swiss concept of a sham agreement, and the Finnish provision on the adjustment of contracts. It seems fair to say that these provisions and concepts are fundamental elements of the *lex causae*, and that their application as such should have been foreseeable to anyone operating in those jurisdictions. In fact, in its 2010 judgment the Federal Supreme Court of Switzerland pointed out that the Swiss provisions regarding sham agreements should be applied by a court or arbitral tribunal *ex officio*, thereby underlining the fundamental nature of such provisions. Both the Federal Supreme Court of Switzerland and the Supreme Court of Finland have thus exercised discretion in

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22 It is noteworthy that the wrong application of the *lex causae* – as in the Swiss decision of 2009 – does not constitute grounds for setting aside the award. Thus, if the arbitral tribunal in the Swiss case of 2009 had heard the parties on the specific provision of the *lex causae* and then applied such provision despite the fact that it was not applicable, there would not have been any grounds for setting aside the award.
assessing whether or not the application of the respective legal concepts or provisions came as a surprise to the parties.

The French and Quebec cases, however, constitute exceptions to this line of reasoning. To the extent the fundamentality of concepts from different jurisdictions can be compared in abstract terms, the Austrian law doctrine applied by the arbitral tribunal of its own initiative in the French case would seem to be of an equally fundamental nature as, e.g., the provision applied in the Finnish case. The same would seem to be true as regards the New York law doctrine of frustration applied in the Quebec case. Both doctrines, however, seem to be clearly more fundamental than the Swiss employment law provision applied in the Swiss 2009 decision, and less fundamental – and not applicable *ex officio* – like the Swiss provisions regarding sham agreements applied in the Swiss 2010 decision. Thus, based on the referenced case law, the fundamental nature of the provision or doctrine applied by the arbitral tribunal of its own initiative would not seem to be the only distinctive factor in the courts’ reasoning.

In relation to the fundamental nature of a legal concept or provision applied by the arbitral tribunal of its own initiative, one can obviously ask what importance the parties’ choice of the *lex causae* should have, if any. In the Swiss case of 2010, in the Quebec case and in the Finnish case the parties had expressly chosen the *lex causae*. By contrast, in the Swiss case of 2009 and in the French case the parties had not expressly chosen any *lex causae*. In the Swiss case Swiss law was applicable based on provisions relating to sports arbitration and the FIFA rules.23 In the French case, it appears that the contract between the parties did not contain a choice of law clause but that the arbitral tribunal applied Austrian law based on the parties’ pleadings.

It can be argued that by choosing to submit their contract to a certain *lex causae*, the parties accept the fundamental concepts inherent in that *lex causae* and that those fundamental concepts, therefore, cannot come as a surprise to the parties. Applying this argument to the French case is could thus be argued that although the Austrian doctrine applied by the arbitral tribunal of its own initiative would have been a fundamental legal concept under Austrian law, the fact that the parties had not agreed on Austrian law as the *lex causae*, but that Austrian law was applied by the arbitral tribunal based on the parties’ pleadings, could have played a role when the Paris Court of Appeal assessed whether the application of the Austrian law doctrine came as a surprise to the parties.

Considering that agreeing on the *lex causae* more often than not is the result of a negotiation process by the parties it may be a too far reaching conclusion to argue that the parties would accept all fundamental concepts of the *lex causae* when choosing the applicable law. Nevertheless, the fact that the parties have chosen a certain *lex causae*, as opposed to e.g. the arbitral tribunal having determined what law to apply absent an express choice of law, could be a relevant factor when

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23 Article R58 of the Code de l’arbitrage en matière de sport (edition 2004) and Art. 59 al. 2 of the FIFA statues applicable at the relevant time.
assessing whether the application of a certain legal concept or provision of the \textit{lex causae} has been foreseeable.

The question of to what extent an express choice of the \textit{lex causae} should have a bearing on the assessment of what is foreseeable is closely linked to the question of the nationalities of the parties and their counsel. In the Swiss case of 2009, the Quebec case and the French case it does not appear from the court decisions whether the parties had instructed counsel who were familiar with the \textit{lex causae}. In the Swiss case of 2010, on the contrary, the Federal Supreme Court expressly referred to the fact that the party challenging the award had instructed Swiss counsel in the arbitration proceedings, in which Swiss law was applicable. In the Finnish case, the Supreme Court did not expressly address this question. Nevertheless, both parties had instructed Finnish counsel in the arbitration proceedings, where Finnish law was applicable.

It can be argued that it is for the parties to select and instruct counsel and that the selection of counsel that is not sufficiently versed in the \textit{lex causae} constitutes conscious risk taking which should work to the detriment of that party. In practice, however, the familiarity of counsel with the \textit{lex causae} may also play a role in an assessment of whether or not the application of a certain provision or principle of the \textit{lex causae} comes as a surprise or not.

Yet another factor that seems to have been of importance in the courts' assessment of foreseeability is to what extent the parties, during the arbitration, have touched upon concepts similar to the ones applied by the tribunal of its own initiative. In the Swiss case of 2009, no concepts similar to the provision applied by the arbitral tribunal of its own initiative seem to have been addressed during the proceedings. In the Swiss decision of 2010 and in the Finnish case, both courts referred explicitly to the fact that although the legal provision or concept applied by the arbitral tribunal had not been expressly invoked by the parties during the arbitration proceedings, similar concepts were discussed in the course of the proceedings to an extent that, in the view of the courts, rendered the application of such concepts foreseeable.

In this context it is noteworthy that the Paris Court of Appeal came to a different outcome. In the proceedings before the Paris Court of Appeal one of the parties argued that the doctrine applied by the arbitral tribunal of its own initiative had indeed been discussed during the proceedings and that that party's counsel had responded to points made by opposing counsel regarding the doctrine in question. It appears that such defense was given no weight by the Paris Court of Appeal. In its decision, the Paris Court of Appeal expressly referred to the fact that the arbitral tribunal had stated in its award that the question of the relevant Austrian law doctrine was not debated by the parties during the arbitration.

In the Quebec case, the doctrine of frustration under New York law had been addressed in the course of the arbitration proceedings, albeit in a different context. The Quebec court concluded that this was not enough to create foreseeability, and

\footnote{On this see Andrea Carleavis, supra n. 16.}
that the application by the arbitral tribunal of the doctrine of frustration leading to an *ultra petita* decision crossed the line as to what could have been foreseen by the parties. It can obviously be argued that in the Quebec case, the *ultra petita* decision would, as such, have been set aside even without any *jura novit curia* element. Nevertheless, the Quebec case serves as an interesting benchmark for the above analysis.

When assessing foreseeability based on discussions on similar concepts or provisions it is obviously key to determine how remote a discussion in the course of the proceedings can be in order to still create foreseeability. This is naturally a question that cannot be assessed in the abstract, but which must be decided on a case by case basis based on the concepts in question and the *lex causae* as a whole.

Furthermore, when assessing a challenge to an award against the backdrop of foreseeability, the *in dubio* validity of the award is highly relevant. The fact that an arbitral award should rather be upheld than set aside, if in doubt, may obviously influence the assessment of foreseeability: the threshold for what is considered foreseeable will probably be set rather low in cases of doubt. In this context it should be noted that in its 2010 decision the Federal Supreme Court of Switzerland expressly emphasized that any exceptions to the principle of *jura novit curia* must be applied restrictively, which will naturally have had an impact on the court’s assessment.

On balance, it can be concluded that what is foreseeable will always have to be determined on a case by case basis, depending on the relevant facts at hand. The Federal Supreme Court of Switzerland emphasized this in its 2010 decision, concluding that the question of what a party could or could not foresee is a matter of judgment. Various factors can play a role in the assessment, such as whether the legal concept or provision applied is of fundamental nature, whether the *lex causae* was expressly chosen by the parties, whether or not the parties and their counsel had links to the relevant *lex causae* and whether or not similar concepts were discussed in the course of the proceedings.

When analyzing the referenced case law based not on the question of the applicability of the principle of *jura novit curia* as such, but based on whether the arbitral tribunal’s decision was foreseeable, the seemingly incoherent case law does not differ dramatically. In light of due process requirements, in particular the right to be heard, the cases discussed above all point in the same direction. Regardless of the differences in outcome, these decisions are all based on the overriding notion that the right to be heard should prevail at all times, regardless of whether the principle of *jura novit curia*, as such, is recognized at the seat of the arbitration. All the decisions are also based on the notion that the arbitral tribunal should not take the parties by surprise. In light of the referenced case law, the assessment of when the arbitral tribunal’s decision has been foreseeable remains a matter of judgment for each arbitral tribunal, and ultimately for the national courts at the seat of the arbitration assessing whether the application of the principle of *jura novit curia* constitutes grounds for setting aside the arbitral award.
VI. CONCLUSIONS

The question of whether and to what extent the arbitral tribunal may determine the contents of the *lex causae* beyond the parties’ submissions should be reviewed against the background of the provisions on setting aside of an arbitral award. The arbitrators’ lodestar should be that the essence of their mandate is to render an arbitral award that cannot be set aside, and they must carefully review all actions they take against this backdrop. In this context, the question of whether the seat of the arbitration is in a civil- or common law jurisdiction and, thus, whether (prima facie) the *lex arbitri* allows or disallows the application of the principle of *jura novit curia*, should be given only secondary importance.

It should also be kept in mind that in addition to the grounds for setting aside the arbitral award, as discussed in this article, the grounds for denying enforcement of an arbitral award are also relevant to the application of the principle of *jura novit curia*. Thus, it is not sufficient for the arbitral tribunal to conclude that the application of the principle of *jura novit curia* is acceptable at the seat of the arbitration in order to exclude challenges to the award. The application of the principle of *jura novit curia* should also be reviewed against the background of the rules for refusing enforcement in the various jurisdictions where the award may need to be enforced.

The arbitral tribunal is thus faced with a fairly complex task if it wishes to apply the principle of *jura novit curia* and determine the contents of the *lex causae* beyond the parties’ submissions without risking that the award may be challenged or even rendered unenforceable.

If the tribunal nevertheless wishes to apply the principle of *jura novit curia*, it should ensure that it does not surprise the parties in doing so. If the arbitral tribunal considers applying a provision of the *lex causae* that neither party has invoked, it must ensure that such application is foreseeable and that it does not violate the right to be heard. The crucial question, thus, is what procedural requirements the tribunal must observe in this respect.

First, the arbitral tribunal must ensure that each party is given sufficient opportunity to present its case. The arbitral tribunal must be careful not to base the award on the application of rules of law concerning which the parties have not had the opportunity to plead. Second, the arbitral tribunal must take care not to appear biased when applying provisions of the *lex causae* that neither party has invoked. If applying a certain provision is decisive for the outcome of the case and would detrimentally affect one party, the arbitral tribunal may later face allegations of bias if applying such provision on its own initiative.

If the arbitral tribunal wishes to base its award on a legal concept or provision of the *lex causae* that the parties have not invoked, it should do so only after having invited the parties’ comments concerning the application of the provision in question. It is of the utmost importance that the parties are not taken by surprise by the application of a *lex causae* concept or provision that they have not invoked. If the tribunal ensures that both parties are granted sufficient opportunity to present their cases, that due process is observed, and that the tribunal does not
exceed its authority in applying a provision that neither party has invoked, the arbitral tribunal should feel fairly comfortable in applying the principle of *jura novit curia* in international arbitration.

by OLA O. OLATAWURA *

The power of courts to stay litigation proceedings for commercial arbitration tribunals is universally recognized. In its sections 4 and 5, Nigeria’s Arbitration and Conciliation Act 1988 (now Cap. A. 18 LFN 2004) contain two unusual provisions for stay of proceedings. These are respectively influenced by the UNCITRAL Model Arbitration Law 1985 and the old Arbitration Act 1914. (Cap. 13 LFN 1958) In view of the different historical and philosophical backgrounds, the intention, nature, scope, and functions of the sections have proven controversial and difficult in interpretation and application to courts and scholars. From the standpoint of the new pro-arbitration environment, this article provides a legitimizing functional analysis of the provisions. It distinguishes the sections’ objects and scope, and identifies flaws of interpretation. There is in existence a deliberate and justifiable two tier-structure automatically obligating arbitration at the will of a party and a further ‘second chance’ provision. They are applicable to both domestic and international arbitration. Finally, the article expounds new and wider horizons of application, and specifies duties of the courts in the management of the provisions.

I. THE SETTING

(a) Global and Local Contexts of ‘Stay of Proceedings’

(i) The Global Context

Historically, one of the enduring provisions in arbitration law and practice is the power of the national court to stay a case properly pending before it in favour of

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arbitration proceedings.\(^1\) A stay of proceedings was always considered at the request of a party to an arbitration agreement.\(^2\) The disposition of the court towards ordering a stay of proceedings was conditioned on a party fulfilling procedural and substantive provisions in the law. Under most states’ laws the court’s power to stay proceedings was discretionary.\(^3\) Courts construed their power to stay proceedings strictly. The strict disposition was influenced by prejudicial belief that: arbitration practitioners sought to rival the courts and judges in importance and influence; arbitration was a clever way by parties to rob courts of their constitutional authority, and was designed to evade the law or enforce questionable relationships or obligations. In international arbitration cases, strictness veered towards hostile prejudice. There were perceptions that the instrumentality of arbitration generally reflected lack of confidence in the quality and content of adjudication;\(^4\) were more or less contracts of adhesion designed by parties with the stronger bargaining power to favour themselves at the expense of local parties; and generally were unfair as their awards favoured foreigners. In all jurisdictions, suspicion, this time towards foreign arbitration rather than litigation, arose from a perceived lack of quality, independence, and transparency of local or regional arbitrators and their institutions. It was thought better for a contractual party to go to his home or ‘friendly’ state court than to go to arbitration in certain states.

Faced with unilateral and discordant reactions of states, the international community under the auspices of the United Nations agreed to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on June 10 1958 in New York.\(^5\) The ‘New York Convention 1958’, as it is more popularly called, heralded the beginning of a favourable, modern, and uniform global perspective on stay of proceedings, albeit in international arbitration. Article II contains provisions on stay of proceedings. Article II (1) obliges the courts and their judges, to recognize agreements on subject matter capable of being subject to arbitration. Article II (3) obliges the courts when seized of an action governed by arbitration agreements to refer the matter to arbitration at the request of one of the parties, unless it finds the agreement null and void, inoperative or incapable of being performed. With the success of the New York Convention 1958, it is therefore

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\(^1\) Provisions for a stay of proceedings can be found in the world’s first arbitration law, the Arbitration Act 1689, (England). See sec. 3, ibid. See also, sec. 5 Arbitration Act 1889 (Eng.), sec. 3 Federal Arbitration Act 1925 (United States), sec. 34 Arbitration Act 1950 (India). See also, art. II (3), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

\(^2\) Ibid. See also, sec. 5, Arbitration Act, Cap. 13 LFN 1958 (Nigeria). See also art. 8 (1), UNCITRAL Model Arbitration Law (MAL) 1985.

\(^3\) Sec. 4 (1), Arbitration Act 1950 (England).

\(^4\) The most suspected courts were of developing and Third World countries. See Amazu Asouzu, International Commercial Arbitration and African States 33–41 and 62–63 (Cambridge University Press 2003). See also, J. Flood J & A. Caiger, The Juridification of Construction Disputes, 56 MLR 412, 418 (1993) (Western business people and lawyers mistrust legal systems other than their own, preferring instead what they perceive to be a neutral or at least familiar forum.) Even between developed countries, resistance to international arbitration agreements were observable. See, Lovelock v. Exporties, [1968] 1 Lloyds Rep. 165 (GA (Eng.)).

\(^5\) 330 UNTS 38. Entered into force on 7 June 1959.
apparent that the recognition and enforcement of stay of proceedings is part of binding international law.

(ii) The Local Context

Having lived with a dated colonial arbitration law, which by origin was notorious for judicial hostility to arbitration practice, Nigeria enacted a new Arbitration and Conciliation Act in 1988, (now Cap. A. 18 LFN 2004) substantially modelled after the pro-arbitration friendly UNCITRAL Model Arbitration Law (MAL) 1985. The latter had been drafted to update arbitration laws and practices, protect parties, and assist arbitral tribunals in the use and enforcement of arbitration agreements. While MAL 1985 primarily focused on international commercial arbitration, it was made flexible to be generally applicable with or without adaptations to domestic arbitration. Nigeria’s response in Cap. A.18 LFN 2004 embraced both domestic and international arbitration. In line with UNCITRAL MAL 1985 provision, local drafters incorporated in section 4, Cap A.18 LFN 2004, a slightly modified version for stay of proceedings. However, the real origin of section 4 lies in Art. II (3), New York Convention 1958, which now forms the Second Schedule, Cap. A.18 LFN 2004. Apparently not done yet, the drafters retained with few literal and structural alterations, the previous regime’s provision on stay of proceedings in section 5, Cap A.18 LFN 2004. Accordingly, two different provisions on stay of proceedings respectively exist as section 4 and section 5, Cap A.18 LFN 2004. While it can be assumed that these provisions reflect local circumstances and the institutional legal landscape, potential controversies of interpretation and application would result. Invariably, there are problems with regard to the letter and spirit of the sections. Second, conflicting friendly and hostile interests, claims and predispositions, resulting from the
knowledge base and experience of the professionals called to interpret and apply the new law inexorably fuels the controversies.

(b) General Functions of Stay of Proceedings Provision

Generally, the provision for a stay of proceedings assists in securing the often repeated advantages of arbitration. It is a call for respect for mutual promises freely contracted, if not solemnly made, and for enforcing the general principle of good faith in domestic or international law. The existence provides a needed degree of certainty that the arbitration obligation would be respected if a national court was asked to intervene or assist. Its existence also makes the whole arbitration process and award easier, since a party whose litigation is stayed knows it has to fully participate in the arbitration. A subsequent challenge of the award for want of arbitral jurisdiction or denial of justice for non participation would yield no returns. Where an objection to litigation is erroneously refused, the subsequent trial will on appeal be set aside as a nullity. Similarly, the right to seek a stay gives the opportunity to parties to reaffirm their interest and commitment to the arbitration agreement. Parties’ reaction may give rise to a waiver or an estoppel. If a party chooses to pursue litigation, and the other party expressly does not object, the court is entitled and obliged to fully hear the case and give judgment on the merits. The term and conditions attached to the grant of stay of proceedings also speeds up the dispute resolution process for the parties. A party interested in arbitration is nudged to speedily and effectively initiate the arbitration process. Otherwise, parties may by default lose the right and benefits of arbitration to the litigation process. Specifically with regard to domestic transactions, the ability to secure a stay of proceedings order is relevant to securing a neutral local forum, competent judges, and avoiding technical and procedural niceties afflicting the domestic litigation process. In international transactions, potential or actual right of recourse to stay of litigation proceedings for arbitration facilitates trade and investment, reduces legal risks, and gives a level of comfort to the parties of a fair resolution of dispute.

12See generally, Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 26–28 (Sweet & Maxwell 2004); Ganiu Ezejiefor, infra n. 19, 14, 42. See also, Andrew Chukwumerije, infra n. 20, 226.
16See Amazu Asouzu, supra n. 4, 33–34 and Alan Redfern & Martin Hunter, supra n. 12.
Reactions to the New Regime

The provision of dual regimes in the new law immediately generated academic and practitioners’ reactions. In the absence of official promotion and policy explanations from the drafter, writers, scholars, and a semi-official National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria, set up by then incumbent Federal Minister of Justice criticized the co-existence of sections 4 and 5, Cap A18 LFN 2004. The views, which will be contested, are that: ‘it is certainly an error most likely inadvertently made’; the presence of section 5 is ‘duplicitous and inexplicable’; ‘creates an incongruous situation where the results of an application to the court to stay proceedings will differ simply because of the provisions pursuant to which the application is made’; and ‘the result is that the sections are at least incompatible, if not positively conflicting’. It is also stated that section 4 should, because of its UNCITRAL MAL 1985 origin, be placed in the international arbitration sections of Cap A.18 LFN 2004. Section 5 should, it is said, be applied to domestic arbitration. Generally, the approach of lawyers and courts to the provisions follow the interpretations and applications proposed by scholars and old case law. Apparently, the sections are not properly distinguished, wrongly read together rather than exclusively, and given interpretations not justifiable as a matter of law or policy.

The correctness of the prevalent view needs to be assessed by examining and appreciating the nature, scope, functions and policy intention of both sections in the light of the historical and modern contexts of the legislation. Then it is important to see the problems and challenges associated with each and both sections. Finally, it is necessary to appreciate new areas beyond the limited traditional scope where the provisions may be utilized.

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24 Ibid., 321. See also, A.A. Olawoyin, supra n. 22, and B.J. Fagbohun, ibid. Cf. Gaius Ezejiofor, supra n. 19, 42. (Section 5 is a better provision for the system than section 4.)
25 See supra nn. 19–24. Cf. Gaius Ezejiofor, supra n. 19, 43. (Section 4 should be deleted as soon as possible.)
26 See ‘Of Relationship and Limitation by Section 5 (2)’, infra sec. 2.3.3, and ‘Of Relationship with section 4’, infra sec. 3.3. See also, Ezejiofor v. Ogbona, supra n. 15; *The MV Lupex*, infra n. 143; *The MV “Matrix”*, infra n. 172, 273–274 and *De Geophysique Nig. Ltd v. Ojugo*, (2012) 2 CLRN 117, 122.
II. SECTION 4

(a) The Letter

Section 4 provides:

(1) A court before which an action is the subject matter of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.

(2) Where an action referred to in subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made by the arbitral tribunal while the matter is pending before the court.

(b) The Spirit of Section 4

(i) General Points

Section 4, Cap A18 LFN 2004 mandates the court to automatically stay its own proceedings and refer the subject matter of the dispute to an arbitration tribunal after confirming that a written arbitration agreement exists between the parties. It is the clearest expression of an underlying good faith obligation for enforcing arbitration agreements.\(^27\) It guarantees and confirms that an arbitration agreement is specifically enforceable as a personal and contractual right of the parties under the law.\(^28\) The section also confirms that no power or right exists in the court to reject arbitration in favour of litigation.\(^29\) Similarly, there is no power by the court to inquire into the validity of the arbitration agreement or the substantive obligations.\(^30\) Such is left to the arbitration tribunal to decide.\(^31\)

In *Environmental Development Construction Ltd v. Umara Associates*,\(^32\) an appeal challenging the assumption of jurisdiction by a trial court was successful where the parties previously initiated arbitration proceedings and certain preliminary orders had been made by the arbitral tribunal. The resistance by a preliminary objection to a subsequent court proceedings filed by one of the parties was subsequently vindicated by the Court of Appeal. In allowing the appeal, it held that the arbitration agreement was irrevocable and binding on the parties. In *Ogun State Housing Corp. v. Ogunsola*,\(^33\) clause 12 of the agreement contained an arbitration


\(^28\) Strictly at common law, specific performance was not available to enforce an arbitration agreement. See *Doleman & Sons v. Ossett Corp.*, [1912] 3 KB 257, 260–270 (CA (Eng.) Cf. *In Compelling an Order for Arbitration*, infra sec. 4.1.1.


\(^31\) See secs 2 and 12, Cap A. 18 LFN 2004. See also, art. 16, *UNCITRAL MAL 1985*. Cf. *"Of Section 4 (2) and Clash of Authority with the Court"*, Sec. 2.3.2 infra.

\(^32\) [2000] 4 NWLR (Pt 652) 293.

\(^33\) [2004] 14 NWLR (Pt. 687) 431.
clause. Following a suit, the defendant promptly objected and applied for arbitration. The trial judge rejected the application and went on to conduct a trial, giving judgment in favour of the defendant. It was held the trial was a nullity.

The section also prevents an application for stay of arbitration proceedings in a domestic or foreign forum from being granted. A court action does not operate as an automatic stay of arbitration proceedings. Neither is it contempt of the court for a party or an arbitral tribunal to commence or continue arbitration proceedings, and even make an award. It is by the provision irrelevant that a court action has been filed in breach of an arbitration agreement, pursuant to an action to revoke the existing arbitration agreement, in challenge of the arbitrator or the tribunal, or to otherwise temporarily or permanently stop the arbitration in any other way. The discretion to continue with the arbitration proceedings or render an award, in view of the court action, is left to the parties and the arbitral tribunal. Also, the right of a party to invoke the section is predicated on the court having jurisdiction to hear the case.

Accordingly section 4 is applicable to domestic arbitrations and certain international arbitrations where, had it not been the arbitration agreement, the court would normally have jurisdiction over the substantive suit. However, where by virtue of the arbitration agreement, statutes, or rules of private international law there is no jurisdiction by a court, the court must strike out the litigation. This also applies to a request solely for security for damages, interests, and costs in foreign arbitration proceedings.

Where the court ordinarily has jurisdiction but must defer to arbitration, it has been provided that it has the power to stay proceedings. This situation will normally arise in international arbitration agreements with no Nigerian element. Finally, the courts duty to enforce the arbitration agreement with a stay of proceedings is circumscribed by an unequivocal law preventing arbitration of certain disputes.

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34 See sec. 4 (2), Cap A.18 LFN 2004. See also, art. II (3), New York Convention 1958, Second Schedule, Cap A.18, LFN 2004. Cf. “Of Section 4 (2) and Clash of Authority with the Court”, Sec. 2.3.2 infra.
36 Ibid.
37 Cf. J. Olakunle Orojo & M. Ayodele Ajomo, supra n. 22, 320.
38 Under Regulation 42, First Schedule, Petroleum Act, Cap. P.10 LFN 2004, any questions or dispute over licenses shall be resolved by arbitration, except it relates to a matter expressly excluded from arbitration or left to the discretion of the minister. By sec. 26 (2) and (3), Nigerian Investment Promotion Commission Act, (NIPC) Cap. N.117, LFN 2004, an investor may decide to pursue arbitration against the state under Cap A.18 LFN 2004, Bilateral Investment Treaty (BIT) in force, or under any other agreed machinery. In disagreement as to the method of dispute settlement, the International Centre for Settlement of Investment Disputes (ICSID) Rules shall apply.
40 Courts have so far refused to strike out such wrongfully filed cases. Cf. “Of Provision for Stay of Proceedings only”, sec. 2.3.1 infra.
41 See sec. 35 (a), Cap A. 18 LFN 2004 and art. II (3), NY Convention 1958 (No reference where agreement is null and void and incapable of being performed). Cf. art. II (1), ibid. (Obligatory on a state to recognize an arbitration agreement on a subject matter capable of settlement by arbitration.) See also, ‘Foreign Litigation and Arbitration Clauses’, infra Sec. 4.3.2.
(ii) The Procedure

To obtain the order seeking respect for the arbitration agreement five general issues have to be noted. First, a requesting party must provide a ‘statement’ on the substance of the dispute. By virtue of this provision, there is no need for a party who is a defendant or respondent to a suit to enter appearance before the court. A written letter-by the party or through counsel-supported with evidence of an arbitration agreement may suffice. There is in principle no reason why the Chief Judge or competent officer cannot issue a direction pursuant to the Act. This simple formal letter writing approach when compared with formal legal appearance is possibly the safest approach to avoid argument about a party’s submission to the jurisdiction of the court or waiver of the right to arbitration.\textsuperscript{42} It is particularly relevant and recommendable in international arbitration proceedings that may take place in Nigeria or abroad, in international commercial relationships with no business relationship in Nigeria, where Nigerian law does not apply, or the Nigerian court does not ordinarily have jurisdiction. In these situations a party may not have or wish for a legal practitioner to appear before a Nigerian court. In the majority of cases, the party will formally file a conditional appearance and a preliminary objection against the commencement of the suit under the court’s rules.

Second, the only time to consider the grant is restricted to when the first statement requesting a stay of proceedings is provided. In general, the court lacks the power to extend or enlarge the time within which a party may bring an application to consider or grant mandatory stay of proceedings. Third, being a statutory right granted to the applicant, the court cannot by virtue of an arbitration agreement unilaterally order a stay of proceedings.\textsuperscript{43} Fourth, in the different and unique scenario where a party only wishes to seek the assistance of the court to mandate arbitration, pre-empting thereby the other party from commencing litigation on the substantive matter, it will need to file court processes with a statement supporting the sought order under the rules.\textsuperscript{44} Fifth, the litigant who favours and commences trial proceedings in disregard of the arbitration agreement has a very limited role in the determination of the outcome of the application. Section 4, Cap A.18 LFN 2004 is enacted exclusively for the protection of the applicant’s right. A litigant cannot oppose the application brought within time. It can only resist the application for stay where the arbitration agreement has been validly revoked by one or both of the parties in accordance with

\textsuperscript{42} This is seen from the decisions on ‘taking a step’ in proceedings under the English law. See, Ives \& Barker v. Williams, [1894] 2 Ch. 478, 484 (Writing of letters not to be ‘a step’) and Metropolitan Tunnels \& Public Works v. London Electricity Rly Co., [1926] Ch 371. (Letter that appearance to a direction summons in court without prejudice to exception to procedure sufficed to prevent being ‘a step’.) Cf. sec. 5, Cap A. 18 LFN 2004.

\textsuperscript{43} Cf. T. A Hammond Projects Ltd v. Federal Housing Authority, [1977] 11 CCHCJ 2467. (Judge unilaterally referred to the clause before compelling arbitration even though trial had begun and claimant had insisted on litigation without objection from the defendant.)

\textsuperscript{44} See ‘Other Possible Applications of Section 4’, infra Sec. 4.1. See also, ‘Other Possible Applications of Section 5’, infra Sec. 4.2.
the agreement. Alternatively, the permission of the court or the judge must be obtained to revoke. A court or judge granted revocation under Cap A.18 LFN 2004 is not an independent right of the parties. There must be a specific application showing a contractual or other legal right to revoke and that both parties disagreed on the exercise of the right. This revocation application and power of the judge remains controlled by the dictum of G.B.A. Coker JSC that:

it will be asking too much of any court to sanction an unwarranted departure from the terms of a contract in which two free and able parties entered unless such a contract or any part of it has been lawfully abrogated or discharged.

(c) The Specific Problems of Section 4

(i) Of Provision for ‘Stay of Proceedings’ only

The power of the court only to ‘order of stay of proceedings’ in litigation proceedings, and ipso facto section 4 (1) would ordinarily be understood to mean that the court has general or complete jurisdiction over a subject matter but will not do so for specified reasons. Since the statutory recognition of the right of parties to arbitration by contract in the provision precludes the existence of jurisdiction by a court as a matter of law, a ‘stay of proceedings’ would generally be redundant and inappropriate. The proper order for a court following a successful request to mandate arbitration would be to strike out the existing suit. There are strategic legal and psychological gains for an applicant who secures a striking out of a suit. The non-provision for ‘striking out’ in the section poses problems to the successful party. The provision for ‘a stay of proceedings’ appears to be relevant in the section’s context where a contractual condition exists when a dispute may be submitted to arbitration. It is also relevant where statute regulates conditions before a dispute may be submitted to arbitration. If however section 4 (1) only precludes the assumption of jurisdiction—not denying or precluding the existence of jurisdiction— the court faced with a request has partial or limited jurisdiction, rather than general or complete jurisdiction. The jurisdiction over arbitration proceedings and award may then only be strictly exercised from time to time as specified by

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45 Section 2, Cap A. 18 LFN 2004.  
46 Section 2, Cap A. 18 LFN 2004.  
51 Cf. sec. 34, Cap A. 18, LFN 2004. See also, art. 5 UNCITRAL MAL 1985.  
52 These conditions are known to arbitration agreements as Atlantic Shipping Clauses.  
53 Cf. sec. 35 (b), Cap A. 18, LFN 2004.
The court becomes a strictly limited auxiliary supervisor of the entire arbitration process. The competent judge becomes seized with management of the arbitration. This outcome reinforces the view that section 4 caters for domestic arbitration which but for section 4 (1), the court could have assumed fullest jurisdiction. It must be stated that an appropriate order striking out litigation proceedings is not excluded where the court does not have jurisdiction as a result of operation of law or the rules of private international law.

(ii) Of Section 4 (2) and Clash of authority with the Court

It has been suggested that under section 4 (2) Cap A. 18 LFN 2004 the right of the arbitral tribunal to commence a hearing and render an award while an action on the subject matter is pending before the court encourages a private judicial tribunal to disregard or disobey the authority of the court. The section is then seen as a direct challenge to the authority of the state and the judicial arm of government. In the light of the wordings and policy of section 4 (1), a clash of authority does not really arise. Section 4 (2) is consistent with the statutory provision that an arbitration is irrevocable except by the agreement of the parties or the leave of the court or a judge. Until the court or judge revokes the agreement, the arbitration process must continue. This policy also reflects the legitimate desire to reduce dilatory tactics by litigants not keen to pursue arbitration or intent on keeping in suspense the substantive rights and claims of the co-contracting party. Finally, since Cap. A.18 LFN 2004 confines a court’s authority and power of intervention to matters expressly provided by the law, the application or decision of the court staying arbitration proceedings or suspending an award while a hearing for an order for stay of proceedings is on-going would violate the law.

(iii) Of Relationship and Limitation by Section 5 (2)

It has been thought a relationship exists between sections 4 (1) and 5 (2), Cap A.18 LFN 2004. In consequence, counsel representing applicants apply for stay of proceedings under both sections. The latter provides conditions for the court to exercise discretion in favour of an applicant for stay of proceedings. Similarly, the
courts have relied on section 5 (2) to supplement or limit the interpretation and application of section 4 (1). There is no relationship between the sections, as each section demands an exclusive interpretation. Indisputably, if a court is under a mandatory duty to refer parties to arbitration it cannot then have a power to allow recourse to litigation. A counsel who makes this irregular application under both sections may find that the court may refuse to grant a deserved mandatory stay while also refusing to exercise discretion in the client’s favour in borderline deserving cases.

(iv) Of ‘Null and void’ or ‘Incapable of being Performed’ Agreements

Art II (3) New York Convention 1958 allows the court not to enforce an agreement and therefore reject a stay of proceedings application in situations where the agreement is null and void or incapable of being performed. The provision applies to New York Convention states’ arbitrations by virtue of reciprocity provision. In one sense, situations contemplated under the instrument may relate with or have meaning in the revocation and ‘invalidity’ sections of Cap A. 18 LFN 2004. Only the revocation provision is relevant in a stay of proceedings context. However, the conclusion that follows from the non-incorporation of the exact words used in Art. II (3), New York Convention 1958 (and Art. 8 (1), UNCITRAL MAL 1985) in Cap A. 18 LFN 2004 is the deliberate legal policy to ease the mandatory application of section 4. If the UNCITRAL MAL 1985 policy were to be used, the grant of stay of proceedings would be delayed or frustrated by a litigant canvassing that the arbitration agreement is invalid, and the court so determining.

(d) Conclusion

Section 4 clearly provides a new, direct, and effective method to enforcing arbitration agreements through stay of proceedings. An unequivocal legalization of the maxim pacta sunt servanda, it also affirms the domestic and international community’s calls for good faith and fair dealing in choice of forum. The regime concurrently applies to local and international arbitration. Unless an arbitration agreement is lawfully revoked, a party or the court cannot independently prevent the application of its mandatory effect. The section’s novelty also produces its own

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63 Section 5 (2) provides for ‘an application made under subsection 1 of this section.’ Cf. sec. 4 (2), Cap A. 18 LFN 2004. (Where an action referred to in subsection (1) of this section has been brought before a court, . . . .)

64 See Second Schedule, Cap A 18 LFN 2004. See also, art. 8 (1), UNCITRAL MAL 1985.

65 Sec. 54, (1) (a), Cap A. 18 LFN 2004. See also, art. XIV, New York Convention 1958.

66 Sec. 2, Cap. A.18 LFN 2004 (Revocation) See secs 48 (a), and 52 (2)(b), Cap. A.18 LFN 2004 (Setting Aside’ and ‘Recognition and enforcement of the award.)

problems of procedural application and interpretation. However these problems in all likelihood will be surmounted in coming years by professionals and the courts.

III. SECTION 5

(a) The Letter

Section 5 provides:

(1) If any party to an arbitration agreement commences any action in any court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

(2) A court to which an application is made under subsection (1) of this section may, if it is satisfied:

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement, and

(b) that the party was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

(b) The Spirit of Section 5

(f) General Points

In the light of a milieu notorious for judicial hostility to arbitration, section 5 represents a compromise between advocates of a freely enforceable regime based on parties agreement and those who wished to reject the enforceability of arbitration agreements because it ‘robbed’ the court of its jurisdiction and influence. 68 It appears to have been drafted to recognize the fact that though an arbitration agreement exists, parties may still choose to litigate. 69 Originally, a party who initiates litigation is deemed to have submitted him- of herself and the subject matter of the dispute to the normal jurisdiction of the court. An opposing party who still wishes to proceed with arbitration may then ask the court to stay litigation proceedings. The timing and other conditions attached to the request for a stay suggest that it is meant to prevent unnecessary interruption to commenced court proceedings and to give certainty to legal procedures of the parties. 70 In this

68 See Global and Local Contexts of “Stay of Proceedings”, supra Sec. 1.1. For the old sec. 5, see supra n. 9.
69 See Obembe v. Wemabod Estates Ltd., supra n. 16, 272.
70 See e.g., Belanu v. O. K Isokariari & Sons, [1994] 7 NWLR (Pt. 358) 587. (“Rather than apply that lower court should appoint an arbitrator appellant issued a writ of summons, amended his pleadings several times, called witnesses, and turned up with temerity that the issue be referred to arbitration.” per Onalaja JCA, ibid., 600.)
wise, section 5 is a restatement of the rule of estoppel against a party who unequivocally elects litigation over the previous arbitration undertaking.\(^71\)

‘THE NATURE OF THE COURT’S JURISDICTION’

The section may be thought to align with the view of courts having general or full jurisdiction over all disputes in the land. In this context, the subsequent possibility of arbitration was, and remains, more of a state privilege than a personal right.\(^72\) Accordingly, even though an arbitration agreement exists, a court ordinarily competent to hear the case may proceed with hearing the dispute by parties subsequent submission to the jurisdiction of the court. The standard traditional view of a full or general jurisdiction of the courts seems reinforced by an exceptional concession for mandatory stay of proceedings of section 4. In reality, the full or general jurisdiction is actually conditioned by other provisions in the present regime.\(^73\) However, in the new era section 5, in general, provides the court with authority to enforce arbitration agreements, by specifically supporting the commencement of arbitration proceedings, even if conditionally.\(^74\) The court with normal jurisdiction can always be approached for necessary measures that support the proper conduct of the arbitration or refer the matter before it to the arbitration tribunal. Section 5 is neither designed to give jurisdiction nor to enable the court assume control of the dispute. The jurisdiction over arbitration by the court may now be characterized as a reserve jurisdiction.\(^75\)

‘EXCLUSIVE REMEDY OF STAY OF PROCEEDINGS’

It must be observed that the section provides for a remedy of stay of proceedings only.\(^76\) This may be contrasted with section 4 (1) which adds a duty to ‘refer the parties to arbitration’ to the order of stay of proceedings. The possibility that an implied reference to arbitration may legitimately be ordered can be spotted in the provision that ‘there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement’.\(^77\) All the same, there are

\(^{71}\) Cf. Eagle Star Insurance Co. v. Yusuf Insurance Co., [1978] 1 Lloyds Rep 357. See also, sec. 33 (a) and (b), Cap A.18, LFN 2004. (Provides waiver of the right to non-compliance with the arbitration agreement or the law.)

\(^{72}\) The view of hostility remains generalized, anecdotal, and challengeable. Subject to certain factors, the courts generally enforced arbitration agreements. For cases where appeals in favour of enforcing arbitration agreements were allowed, see MISR (Nig.) Ltd. V. El-Assad, supra n. 49; Environmental Development Construction Ltd v. Unuma Associates, supra n. 32 and Open State Housing Corp v. Ogunosi, supra n. 14. Cf. “The Spirit of Part 4”, supra Sec. 2.1.

\(^{73}\) See sec. 34, Cap A. 18 LFN 2004. (A court shall not intervene in matters governed by the Act except where so provided in this Act.) See also art. 3, UNCITRAL MAL 1985.

\(^{74}\) See infra n. 76. See also, General Functions of Stay of Proceedings Provisions, supra Sec. 1.2. Cf. MV Lupex, infra n. 143, Lagos State Water Corp. v. Salammers Construction, [2011] 5 CLRN 171; MV Matrix, infra n. 93.

\(^{75}\) Cf. Belanwu v. O. K Isokanara & Sons, supra n. 70, 610. (“On the question of arbitration, the trial court was right in its refusal to refer the matter to arbitration. This is so because the High Court has unlimited jurisdiction to hear and determine civil proceedings in which the existence or extent of a legal right, power, duty, liability etc is in issue. The same does not hold for an arbitration tribunal which is inferior to the High Court.” per Katsina-Awu JCA.)

\(^{76}\) See sec. 5 (1) (Any party may at any time after appearance apply to the court to stay the proceedings.) and 5 (2), Cap A. 18 LFN 2004. (A court may make an order staying the proceedings.) Cf. sec. 34, Cap A. 18 LFN 2004. (A court shall not intervene in matters governed by the Act.) See also, art. 3, UNCITRAL MAL 1985.

\(^{77}\) See sec. 5 (1), Cap A. 18 LFN 2004. See also, sec. 5 (2), ibid.
other functions that section 5 achieves.\textsuperscript{78} Not the least, is that it is undoubtedly a tool to frustrate a party from proceeding with litigation at the expense of the other party. Second, in its present context, in broad terms, the section offers a ‘second chance’ to a party to request arbitration from the court.\textsuperscript{79} Thus, having not filed an application after the first statement in court— i.e. by filing ‘unconditional appearance’ to a suit, there is a second chance after formal appearance.

‘DISCRETION TO THE COURT’

Section 5 provides the court with discretion to stay proceedings in any action before it.\textsuperscript{80} The discretion which traditionally existed as a power belongs to the court, not the parties.\textsuperscript{81} Such a party seeking a stay of proceedings must satisfy the court that its request must be granted. As it is the court that ‘must be satisfied’,\textsuperscript{82} a high level of subjectivity may be thought to exist in the section. In the modern context, the court’s discretion should be seen as a ‘duty’ thereby imposing an obligation to stay proceedings where the conditions are satisfied.\textsuperscript{83} In other words, no subsection can be read to give discretion when an applicant meets the condition for a stay under the law. It would be wrong on an objectively evaluated standard for the court to refuse to order a stay in favour of the parties expressed agreement for arbitration.\textsuperscript{84} Should the court be favourably disposed, it has powers of granting the order necessary in the light of the legal and factual situation.\textsuperscript{85}

‘CLASSES OF APPLICANTS’

A question that flows from section 5 is whether each subsection – i.e. section 5 (1) and (2) - gives rise to separate considerations of the exercise of an independent duty of stay of proceedings? Historically, and in current practice, both subsections are jointly considered.\textsuperscript{86} However, novel affirmative argument may be deployed to

\textsuperscript{78} See ‘Other Possible Uses of Section 5’, infra Sec. 4.2.

\textsuperscript{79} One who did not file a statement before appearance and failed to get a mandatory order of stay of proceedings under Sec. 4 may get the order after appearance under Sec. 5.

\textsuperscript{80} This is evident from the use of ‘may, if it is satisfied . . . make an order staying the proceedings!’ See sec. 5 (2) (a), Cap A. 18 LFN 2004.

\textsuperscript{81} See Gaus Ezejiofor, supra n. 19, 40.

\textsuperscript{82} Sec. 5 (2) (a), Cap A. 18 LFN 2004.

\textsuperscript{83} See sec. 5 (2) (a), Cap A. 18 LFN 2004. (‘. . . if it is satisfied . . . ‘) It has been held that: ‘When the exercise of the power is coupled with a duty on the person to whom it is given to exercise it, then [may] is imperative.’ Per Karibi Whyte JSC in Adenuga v. Akodese, [1999] 4 NWLR (Pt. 637) 28, 56. Similarly, it has been stated ‘. . . the word “may” in that section must be construed as mandatory . . . since it imposes a public functionary for the benefit of a private citizen.’ See Ogualu v. AG Rivers State, [1997] 6 NWLR (Pt. 508) 209, 233.

\textsuperscript{84} The discretion not being personal to the judge, but to the court as an institution of law, must be an objective one. A failure to stay the proceedings, which if in the eyes of reasonably learned minds is objectively satisfied would be an error. Cf. J. Olakunle Orojo & M. Ayodele Ajomo, supra n. 22, 319. (A discretionary power by the court to be judicially and judiciously exercised.)

\textsuperscript{85} Cf. sec. 5 (2) (b), Cap A. 18 LFN 2004. (‘. . . things necessary for the proper conduct of the arbitration . . . ‘)

\textsuperscript{86} For old case law under Cap 13 LFN 1958 see Obembe v. Wemabod Estates Ltd., supra n. 16; and EKUMA v. Fonz, supra n. 27. For case law under Cap A.18 LFN 2004, see Karatub v. Zach-Mason (Nig.) Ltd., [1992] 5 NWLR (Pt. 239) 102 and Ezebukwu v. Ogoloma, supra n. 15. The old practice was valid because like similar English law provisions, stay of proceeding regime was contained in a single sec. 5 Cap 13 LFN 1938. For English law, see sec. 4 (1), Arbitration Act 1989 and sec. 4 (1), Arbitration Act 1950 (England).
further the overall policy of the law favouring arbitration. Under section 5 (1), a party who complies with the timing requirement or who has not taken any other steps in the proceedings may apply to the court. It seems the power or duty to grant a stay exists by virtue of the agreement for arbitration. It would be inconsistent with the law to refuse such a party, where no injury or loss is suffered by the other party. Under section 5 (2), a court may nonetheless grant an application if in its opinion, the impact of delivering pleadings or taking other steps does not constitute a sufficient reason to deter or prevent arbitration, provided that the applicant had always been and remains ready and willing to undertake the arbitration process. Here the court is entitled to make necessary orders while staying the litigation proceedings. It may make directions, impose conditions, and order security for costs. It can therefore reopen the case should the applicant breach the order or fail to pay costs. The argument here further demonstrates the extent of the 'second chance' policy in the law. However, such a special exercise is entirely dependent on the personal judgment and discretion of the presiding judge.

"TAKING OTHER STEP"

In section 5 (1) the court’s power to order a stay rests on a party ‘after appearance not delivering any pleading or taking any other steps in the proceedings.’ The old regime’s case law on ‘taking other steps’ exemplified the strict and hostile judicial approach against stay of proceedings. It is to be established from the era’s case law that the taking of ‘any other step’ is in the least tantamount to the strict liability tort of trespass or crossing the Rubicon. It is also accurate to be categorized as committing sacrilege or dancing with the enemy. Such an act or ‘step’ was then to be acted upon by the court not as a simple offence or misdemeanour, but felony. In the eyes of the judges this felonious act was despicable and unforgivable to sufficiently justify the penalty of unmitigated public ventilation, trial humiliation, and inherent prolongation of disputes by litigation. Since the result is not determined by the evidence of injury, reliance, detriment, or abuse, the refusal would be unfair, penal, and therefore wrong.

In the present new order, what constitutes ‘any other step’ is by law and policy obliged to be redefined and contextualized. Not every action will constitute an offensive step. Only the election of an unequivocally significant and material act evidently pursued to further substantive court redress with regard to the full subject matter of the arbitration agreement will truly constitute ‘a step.’ In other words, there

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87 Cf. supra n. 79.
88 See Kano State Urban & Development Board v. Fanz, supra n. 27, 87–88. (Ogundere JCA) See ‘Common Challenges – The Power to Allow an Application by Extension of Time’, infra Sec. 4.3.
90 Ibid. See also, Enyelike v. Ogoloma, supra n. 15.
cannot be an automatic rejection of an applicant for taking ‘little’ or ‘brittle’ acts which though would qualify in everyday and common language as ‘a step’, may be deemed not offensive. What is to be deemed intended by the legislator is what in the words of De Lestang CJ, is ‘a major step’.92 Certainly on this issue the law’s language has depth. Unlike before, an objective impact review assessment must be made before rejecting an application. Thus, a necessary or compelling act to preserve the subject matter of a dispute which is subject to a levy, act, or other right of seizure or interference by a party will not be deemed to be ‘a step’.93 It stands in favour of the new interpretation and application canvassed that it is a general principle of law, applicable specifically to arbitration related proceedings, that a conscious or mistaken act by counsel should not be visited on the litigant.94

The more recent Supreme Court decision that a waiver will not be deemed except the Counsel independently took an active step to go on with the case and does not appear to be forced by the judge is consistent with the new standard.95 The court, in the light of notorious or case specific facts should allow an application in favour of the arbitration agreement particularly where a refusal of stay of proceedings will further rupture the implementation of the subject matter of the contract, severely prejudice one or all parties, or definitely cause greater damages.96 Since it is the purpose of arbitration to afford the business community an opportunity of resolving their business differences as expeditiously as possible, saving them the procrastination attendant on normal litigation, no side should be allowed to thwart the process by frivolous excuses.97 The court, in the opinion of a respected judge, should ‘prevent conduct that would amount to infantile recalcitrancy or recusancy’.98

Independently, present High Court rules of Civil Procedure of all federating states empower a pro-active judicial mindset and encourage alternative dispute resolution techniques at any stage of their proceedings.99 With a pre-existing

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92 See Chemia Products (UK) Ltd v. Idewu, supra n. 50. (Filing of a counterclaim by the defendant.) See also, Bulanwa v. O. K Isikariaru & Sons, supra n. 70, 608.
93 See art. 26 (3), First Schedule, Cap A.18 LFN 2004; See, Onward Enterprises Ltd. v. MV Matrix, (2011) 5 CLRN 254, 266–268. See also, Austin & Wheely Ltd v. S. Beoley, (1915) 108 LT 921 (Eng.).
96 It is generally safe to presume that litigation will harm both parties interest and relations. In contrast, the fairness and efficiency promoted and achievable in a well run arbitration is practically commendable. In Nigeria, the current systemic weaknesses in the operation of the judicial system does not favour parties involved in litigation. It must be noted in this context that "parties" include persons claiming under or through one of actual litigating parties, i.e. third parties. See sec. 57 (1), Cap A. 18, LFN 2004. See also, O. Olatavura, The “Privy to Arbitration” Doctrine: The Withering of the Common Law Privity of Contract Doctrine in Arbitration Law, 16 American Review of International Arbitration 429–477 (2005).
97 See Institute of Management and Technology (IMT) v. Akighogu, supra n. 13, 119. (Nwockeri, J.)
98 Ibid.
99 See generally, Order 23 Rule 1 (c), Civil Procedure Rules 2004 (High Court of Lagos State), Order 52 Rule 3, Civil Procedure Rules 2009, (Federal High Court) and Order 17 (1 ) (a)–(d), Civil Procedure Rules 2004 (High Court of the Federal Capital Territory FCT).
arbitration agreement a definite request for stay of proceedings notwithstanding ‘a step’ can in that spirit should be allowed.\(^{100}\) It would be a proper exercise of discretion upon which the section rests for the court to attach conditions to the stay, provided that the other party will not be seriously prejudiced and appropriate costs ordered and paid. It follows that the decision of the Supreme Court in \textit{N.P.M.C Ltd. v. Compagnie Noga}, that an applicant’s request for time to file a statement of defence would be a step in the proceedings, as both counsel conceded, was \textit{per incuriam} and certainly would not be applicable to the present regime.\(^{101}\) It would be observed that there was merely a request, pleadings had not been delivered, and that the action was arguably equivocal, since until at least defence had been prepared and served on all parties and the court’s registry, the possibility of recourse to arbitration under the agreement was still heavy. Similarly, the view that ‘a party must have taken no steps in the proceedings’ so that ‘any application whatsoever to the court constitutes a step in the proceedings’ must now be considered overbroad.\(^{102}\) Indeed, the statement is \textit{obiter}, since in that case, both parties willingly in disregard of the arbitration clause proceeded to litigation and trial was fully conducted without any objection.\(^{103}\)

\textit{‘NO SUFFICIENT REASON’}

In section 5 (2) the court’s power to order a stay rests on there being ‘no sufficient reason’ why the arbitration agreement should not be respected.\(^{104}\) These ‘reasons’ are circumscribed by the law and parties objectives under the agreement.\(^{105}\) A ‘no sufficient reason’ may be described as a reason which the Act directly, or through the parties, the arbitral tribunal, or the court, accommodates. Conversely, if these persons cannot legally remedy or perform what is necessary to ensure that an arbitration proceeds, there would be a sufficient reason for continuation of litigation proceedings.\(^{106}\) However, the legitimate solution is for the pro-litigation party to seek revocation of the arbitration undertaking under the law.\(^{107}\) In domestic transactions the court has the prima facie duty to the parties and the law to order arbitration where no ill consequences flow from enforcing the request for arbitration. In international transactions, a stay of litigation proceedings should be granted based on the presumption that one or both parties benefited from the substantive transaction, which is premised on recourse to international arbitration.

\(^{100}\) Cf. \textit{T. A Hammond Projects Ltd v. Federal Housing Authority}, supra n. 43.


\(^{103}\) Ibid. Cf. ‘\textit{New Vistas’}, infra Sec. IV.

\(^{104}\) ‘A court . . . may if it is satisfied there is no sufficient reason why the subject matter should not be referred to arbitration in accordance with the arbitration agreement . . . make an order staying proceedings.’ See sec. 5 (2) (a), Cap A18 LFN 2004.


\(^{107}\) Sec. 2, Cap A 18 LFN 2004. (By an agreement with the other party or the leave of a court or a judge) Cf. supra nn. 83 and 84. (Obligation to enforce arbitration agreements.)
in the case of disputes.\textsuperscript{108} On this basis, under the Act the court is precluded from considering external or inadmissible facts as reasons.\textsuperscript{109}

`READY AND WILLING TO PURSUE ARBITRATION`

In addition, it is provided that an `applicant must have been ready and still be willing to do all things necessary to the proper conduct of the arbitration`. The provision prevents a party using the arbitration agreement to effectively delay the settlement of legal rights or access to justice. It also supports the seriousness of the party requesting for arbitration. A formal Notice of Arbitration is required to be given to the respondent.\textsuperscript{110} In rejecting a request for stay of proceedings, it has been held that it is not sufficient for the applicant to merely claim or plead that there is an arbitration agreement. Applicant should show what it has objectively done and still doing to effectively kick start the arbitration process.\textsuperscript{111} This case law position is reasonable since it is a `second chance` conditional right or remedy given after appearance in a suit.\textsuperscript{112} The best evidence therefore is not only invoking the arbitration clause \textit{inter partes}, but also partially or fully settling preliminary matters with the arbitral body or appointing institution.\textsuperscript{113} However in the light of the fact that a discretionary power leaning towards enforcing an arbitration agreement is expected, where the applicant has not gone far in commencing the process, the court should stay proceedings for applicant to fully initiate the arbitration proceedings. If applicant fails to comply with the order, the stay of proceedings should be lifted. It follows that where both parties had earlier submitted themselves to the jurisdiction of the tribunal the stay of proceedings should be granted.\textsuperscript{114} To recall a jurist’s words:\textsuperscript{115}

If parties choose for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then . . . a prima facie duty is case upon the courts to act upon such as agreement.

\textit{(ii) The Procedure}

To obtain a stay, it may be noted that it is provided that `at any time after an appearance and before delivering any pleadings or taking any other steps` an application may be made for stay of proceedings. Section 5 is a formulation of the rule of laches. It is then provided that the applicant has not taken any other steps. This reflects both a waiver and estoppel. Having generally rested on a

\textsuperscript{108} See ‘General Functions of Stay of Proceedings Provisions’, supra Sec. 1.2.
\textsuperscript{109} See art. II (3), New York Convention 1958. See also, art. 8 (1), UNCITRAL MAL 1985. Cf. Gana Ezejiofor, supra n. 19, 41–42.
\textsuperscript{110} See art. 3, First Schedule, Cap A18 LFN 2004.
\textsuperscript{111} See \textit{MV Panoramos Bay v. Olam (Nig.) Plc}, supra n. 62.
\textsuperscript{112} Cf. sec. 4 (1), Cap A.18 LFN 2004. This applies to the first statement, i.e. a conditional appearance given in a suit.
\textsuperscript{113} Cf. art. 3, First Schedule, Cap A 18 LFN 2004.
\textsuperscript{114} See \textit{Environmental Development Construction Ltd v. Umara Associates}, supra n. 32.
\textsuperscript{115} Lord Selborne LC in \textit{Willesford v. Watson}, [1873] 8 Ch. App 473, 480. (Eng.)
discretionary power, the applicant must show that a conclusion of laches, waiver and estoppel based on the factual matrix specified within the Act cannot be legally justified. In the light of the preceding analysis, a pro-litigation party will only rely on ‘section 5 criteria’ for a stay of application proceedings. These are: (a) applicant failing to come within the time specified; (b) the taking of a forbidden or prejudicial step; (c) failure by the applicant to establish that there are no sufficient reasons, and (d) failure by the applicant to establish that it was ready and remains willing to do what it is necessary to undertake arbitration. The last requirement appears to provide the best chance for litigant’s success. This is subject to the condition that the pro-litigation party must not have engaged in conduct to frustrate the arbitration agreement. However, it must be stressed that a discretion exercised in favour of the applicant will be final.

(c) The Specific Problems of Section 5

(i) Of Which Interpretation?

In applying the provision under the old section 5, the courts were highly strict and hostile. The old approach cannot for two compelling reasons be followed any longer. In the first place, the two subsections structure of section 5 is different from the one section structure of the old regime. Sublime substantive changes may be noticed to have occurred. Second, the old interpretation would clash with the policy of the new Act to promote and protect arbitration. It is clear that a liberal and benevolent attitude towards a stay of proceedings is contemplated and possible for the section. In line with judicial dicta and the general policy of the Act to promote arbitration agreements, three principles may be extracted on the new approach to interpretation of section 5:

Principle One:

The court should lean in favour of enforcing arbitration agreements by staying proceedings than allowing litigation, unless the parties have made it absolutely impossible to turn back the litigation wheel.

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121 See supra n. 89.
122 See ‘The Spirit of Section 5’, supra Sec. 3.2.
Principle Two:

Generally, stay of proceedings provision is meant to secure arbitration agreements and proceedings, albeit on minimum conditions. It is not meant, by reason of any trifling or necessary conduct, to promote litigation at the expense of the expressly preferred choice of the parties.

Principle Three:

Where reparative orders or remedies can be granted in favour of a respondent to a stay of proceedings application, such should be made. In general, the advantages of arbitration will, in the medium to long term, match and outlast the setback suffered by the party who prefers or opts for litigation.

(ii) Of ‘Front Loading’

The position that an application may be made ‘any time after appearance and before delivering any pleadings or taking any other step’ conflicts with the mandatory provisions of current Civil Procedure Rules of various High Courts that a defendant to send in all documents at once. Apparently, the new rules limit the scope for finding a party ‘taking any other step’. An applicant who files limited papers may not have taken a step to lose the right to arbitration. A subsequent application for stay of proceedings will generally be legitimate, particularly where it is not inconsistent with previously filed papers. Only the filing of all full papers unequivocally indicate a waiver of the right and sustains the claim of estoppel.

(iii) Of Relationship with Section 4

Though it is claimed that both sections 4 and 5 are jointly applicable or alternatives basis for granting and refusing stay of proceedings, it has been argued that each section has its own unique exclusive policies. No section limits the scope of another. Having set the tone in Section 4, section 5 is a continuum of the policy for the grant of stay of proceedings. When contrasted with the mandatory effect of section 4, a stay of proceedings will be granted only in deserving cases under section 5. Accordingly, on a section 5 application no recourse or reliance needs to be made to section 4 in granting the deserved stay. Differently, the argument that section 4 should be limited to international arbitration and section 5 to domestic arbitration is skilfully and wisely avoided by

124 Cf. ‘The Spirit of Section 5 – General Points’, supra Sec. 3.1.1.
125 See ‘General Functions of Stay of Proceedings’, supra Sec. 1.2. See also, ‘Of Relationship and Limitation by Section 5 (2)’, supra Sec. 2.3.3. Cf. ‘The Spirit of Section 4 – General Points’, supra Sec. 2.1.1, and ‘The Spirit of Section 5 – General Points’, supra Sec. 3.1.1.
126 See also, ‘Other Possible Applications of Section 4’ and ‘Other Possible Applications of Section 5’, infra Secs 4.1 and 4.2.
the drafters. Each sector gets equal treatment under the law. For if one sector was to be less mandatory, the growth and respect of arbitration agreements and proceedings would be hampered. Similarly, if only the mandatory arbitration prevailed, the courts would in just and borderline cases sympathize with arguments challenging the legality of the section or reconstruct the provisions to make nonsense of the section or the Act itself.

(d) Conclusion

Though resting on the traditional power of discretion, and consisting of elements associated with the old section 5, Cap 13 LFN 1958, the new section 5 Cap A.18 LFN 2004 operates differently and favourably to support applications for stay of proceedings. It is a 'second chance' lifeline or concession to facilitate the enforceability of arbitration agreements by a stay of proceedings. In line with the new environment, considerations for the discretionary power are evidently wider. By subtle but effective changes in language and structure, the section has a mature appraisal function in promoting the arbitration process. It is a statutory source for deserving court assistance or intervention based on factual realities and practicalities in a given case. It imposes a quasi-mandatory duty on the courts to grant a stay of proceedings. Finally, section 5 is useful to both international and domestic arbitration agreements.

IV. NEW VISTAS AND COMMON CHALLENGES TO SECTIONS 4 & 5

(a) Other Possible Applications of Section 4

(i) In Compelling an Order for Arbitration

By virtue of the arbitration agreement, Cap A.18 LFN 2004 can be used by a party to support and secure an appropriate application for an order of court referring and compelling arbitration proceedings. This right arises where the other party has refused or manifests an intention to refuse to initiate or participate

127 Cf. Gains Ezejifor, supra n. 19, 42–43; Andrew Chukwuemerie, supra n. 21, 258–259; and J. Olakunle Orojo & M. Ayodele Ajomo, supra n. 22, 32–33. See also, A.A. Olawoyin, supra n. 22; J.B. Fagbohun, supra n. 23; A. Chukwuemerie, infra n. 185.

128 Cf. Andrew Chukwuemerie, supra n. 20, 258.

129 It appears common for a desperate party to use arbitration agreements to delay substantive justice. The fact that request are made late appears to be reason why courts reject applications for stay of proceedings. In clear cases, summary judgments and trials are given without sympathy to the applicant's request. Cf. Lagos State Water Corporation v. Sakamori, supra n. 74.

130 Cf. Andrew Chukwuemerie, supra n. 20, 226. (Section 5 must be taken to govern domestic arbitrations pending an amendment, should be expunged, and has lost touch with reality.)

131 Cf. Andrew Chukwuemerie, supra n. 20, 226. (Section 5 must be taken to govern domestic arbitrations pending an amendment, should be expunged, and has lost touch with reality.)

132 Sec. 4 (i), Cap A.18 LFN 2004.
in the agreed arbitration process.\textsuperscript{133} The right follows from the enforceability of mutually agreed promises,\textsuperscript{134} the irrevocability of an arbitration agreement, except by mutual agreement or leave of the court,\textsuperscript{135} the ‘duty to refer the parties to arbitration’,\textsuperscript{136} and quite important the power to order the attendance of witnesses in an arbitration.\textsuperscript{137} There may also be an associated order of mandatory or prohibitory injunction.\textsuperscript{138} Overall, an order sought under the section operates as specific performance.\textsuperscript{139} In \textit{Royal Exchange Assurance v. Bentworth Finance (Nig.) Ltd.},\textsuperscript{140} Udoma JSC giving the judgment of the court stated that:

The appropriate remedy therefore for a breach of a submission is not damages but its enforcement… It is therefore unsound in law for learned counsel for the appellants to submit that a specific performance of a submission could not be enforced by the court.

It may also be noted that the general position of the law is that an arbitration can be performed even if the other party does not cooperate.\textsuperscript{141}

\textit{(ii) In Order In Personam for Arbitration Abroad}

An interesting question with practical consequences is whether pursuant to section 4 (1), an order in personam can be directed to a party to the arbitration to fulfil the arbitration agreement abroad.\textsuperscript{142} Where a defaulting party is based in Nigeria the court is obliged on request to make an order to refer the parties to arbitration overseas. This situation arose in \textit{Owners of MV Lupex v. Nigerian Overseas Chartering & Shipping Ltd.}\textsuperscript{143} The respondent charterer sought to commence trial in the Federal High Court Lagos in a dispute with the foreign owners, although the Bill of Ladling provided that any dispute should be settled in London by arbitration. As a matter of fact, proceedings had commenced in London. In enforcing the arbitration

\textsuperscript{133} See sec. 7 (2) (a) (ii), (b), (3) (c), Cap. A.18 LFN 2004. See also, art. 11 (3)–(5) UNCITRAL MAL 1985. See also, \textit{Environmental Development Construction Ltd. v. Umara Associates}, supra n. 32.


\textsuperscript{136} See sec. 23, Cap A.18 LFN 2004.

\textsuperscript{137} On injunctions, \textit{Afe Babalola, Injunctions and Enforcement of Orders, 97–101 and 155–159 (OAU Press 2000)}.

\textsuperscript{138} See \textit{Royal Exchange Assurance v. Bentworth Finance (Nig.) Ltd.}, infra n. 140. Cf. \textit{Doleman v. Ossett Corp.}, supra n. 28, 268–269 (Specific performance impossible.) It may be noted that rejection of specific performance has been based on old sec. 4 (1) Arbitration Act 1889 England and section 5, Cap 13 LFN 1958.

\textsuperscript{139} [1976] 10 NSCC 648, 657. (1976) 6 UILR 293 (SC). See also, \textit{Msiy (Nig.) Ltd v. Salah El Assad}, supra n. 49, 175. (‘We cannot . . . accede to the argument of learned counsel that even though the clause remains in the contract, yet this Court (or indeed any court) can treat the clause as unenforceable and therefore disown its enforcement in the enforcement of rights under the contract’. [Per Coker JSC])

\textsuperscript{140} See \textit{Lagos State Development and Property Corporation v. Adold Stamm Int.}, supra n. 13. See also, \textit{IMT v. Abaloga}, supra n. 15.

\textsuperscript{141} In general, it becomes difficult for the party to have recourse within Nigeria against the award. See secs 32, 48, and 52, Cap. A18 LFN 2004 (Powers of court to refuse to recognize or set aside an award).

\textsuperscript{142} [2003] 15 NWLR (Pt. 844) 469.
agreement, the Supreme Court justified its reason on the fact that it was better to lean towards enforcing international arbitration agreements than allowing a party to breach the agreement for litigation. The opinion noted that exceptions to enforceability would arise where the litigant party will be denied access to justice abroad, or the agreement is null and void, inoperative or incapable of being performed.

The *MV Lupex* decision arose in the context of a Nigerian company. It is unlikely that the arbitration proceedings obligation would be enforced on a foreign company or individual who resists an arbitration obligation. Jurisdiction of Nigerian courts over persons is normally based on habitual residence, citizenship, and territory. With regard to companies, the primary actors in international commercial transactions, jurisdiction is normally based on local incorporation, doing business in Nigeria, having assets within Nigeria, or on an international treaty or convention. Extra-territorial jurisdiction of the courts whether over individuals or persons is rare, generally limited, based on positive law, and must be strictly construed.

Section 4, Cap. A.18 LFN 2004, being a local law, though derived from an internationally formulated Model Law, does not satisfy the criteria. Accordingly, in many cases, the court would face problems of legality and enforcement of the order.

(iii) In Possible Contempt Proceedings against Defaulter

A party may be liable for contempt of court for breaching an order of referral to an arbitration tribunal made under section 4(1), Cap A.18 LFN 2004. This is so where the party, particularly from a different jurisdiction, persists in litigation in a foreign forum. Similarly, a party that takes positive action to frustrate the commencement of the arbitration process following a court order will be in contempt of the court.

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144 Ibid., 488 [A-H].
145 Ibid., 485–486. Cf. ‘Foreign Litigation and Arbitration Clauses’, infra Sec. 4.3.2.
149 Had the UNCITRAL MAL 1985 been a binding international law instrument, the argument that sec. 4, Cap A.18 LFN 2004 has transnational scope and is applicable to foreign based parties might have been plausible. Cf. NV Scheep v. MV S. Araz, supra n. 39.
150 Cf. NV Scheep v. MV S. Araz, supra n. 39.
Section 5 is applicable and appropriate where recourse to arbitration is by the parties’ arbitration clause permissive rather than mandatory. The presumption must be that parties wish to obtain the advantages of arbitration and avoid disadvantages of litigation. Though a court or judge may be put to considerable pains to determine the actual meaning of a clause ineptly phrased and giving rise to different constructions, G.B.A Coker JSC in the leading Nigerian case stated that the clause still remains the contract of the parties and the ordinarily rules of law relating to contracts must apply. He concluded that ‘no court should accede to argument to treat the arbitration clause unenforceable and therefore discountenance it in the enforcement of rights under the contract.’ In line with the overall philosophy and policy behind the current regime, except where litigation will be best for both parties, the court must generally lean towards ordering arbitration. Technically, a party who issues a writ or originating summons in lieu of pleadings still has a right to request arbitration in accordance with the existing arbitration agreement. Section 5 is also applicable while negotiation for implementation of the arbitration agreement is on-going. It is expected that the court must generally lean towards ordering arbitration, except it finds that the applicant does not, as a result of its conduct, deserve the arbitration.

(ii) In Obtaining Discovery and other necessary Orders

By recognizing the possibility or right of a party’s to commence ‘any action in any court with respect to any matter which is the subject matter of an arbitration agreement’, a party to an arbitration agreement may file an action to obtain

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153 See MISR (Nig.) Ltd v. Salah El Assad, supra n. 49, 179.
154 Ibid.
157 See sec. 5 (2) (a), Cap A. 18 LFN 2004. (If any party...commences any action in any court...any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply...to stay proceedings.)
159 Cf. sec. 5 (2) (b), Cap A. 18 LFN 2004 (‘...the applicant was...and still remains ready and willing to do all things necessary...’). Cf. Owners of MV Lupex v. Nigerian Overseas Chartering & Shipping Ltd., supra n. 143.
discovery, preservative, or other relevant orders in the arbitration proceedings for fair hearing purposes and protection of the subject matter of the dispute. The need for litigation will arise where the arbitration tribunal has not been constituted, the arbitration tribunal fails to act, or does not have the power to act. These forms of 'pro-arbitration' litigation are not to be classified within the forbidden range of intervention of the court under section 34.

(c) Common Challenges

(i) The ‘Scott v. Avery Clause’ Challenge

In the early period of modern arbitration it was common for parties to an arbitration agreement to expressly provide that an arbitration award was a precondition to litigation. This provision was known at common law as a 'Scott v. Avery clause' after the case that established the validity. An application for stay of proceedings can be made where the clause exists. Since, it gave a right to go to court, the clause forestalled the challenge that an arbitration clause was illegal being one that ousted the constitutional jurisdiction of the courts. It brought the arbitration agreement and the tribunal within the general or complete jurisdiction of the courts. This prevented various internecine challenges during the arbitration proceedings, thereby assisting in speedy arbitration proceedings and awards. The clause has been found in Nigerian case law under the old regime. The inclusion of 'Scott v. Avery clause' in arbitration agreements following the enactment of Cap A.18 LFN 2004 is still widespread.

In the context of the present analysis, the Scott v. Avery clause remains problematic. Its condition-precedent character and usage seemingly aligns with the provisions of sections 4 and 5, yet produces awkward results. The clause creates the impression that a party may choose arbitration but the court remains the final decider of the merits of the case, should a party not be satisfied with the award. It has been held to exist independently of the right of the party to make an application for stay of proceedings under section 5, and could be set up in the trial as a defence to a claim. It is submitted that where there is a Scott v. Avery clause

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161 ‘A court shall not intervene in any matter governed by this Decree except where so provided in this Decree.’ See sec. 34 Cap A. 18 LFN 2004. See also, art. 9 UNCTRAL MAL 1985.

162 (1856) 5 H. Cas. 11 (Eng.).


165 Ibid. Cf. sec. 4, Cap A.18 LFN 2004 [Request to be made at the first appearance and mandatory reference by court to follow].

only a stay of proceedings policy or a full substantive trial on the merits regime under sections 4 and 5 Cap A.18 LFN 2004 automatically apply.\(^{167}\) A co-existence or complete autonomy from sections 4 and 5 must be doubted, since Cap A.18 LFN 2004 sufficiently covers and regulates the range of arbitration processes.\(^{168}\) The new section 4 (1) pre-empts the application of the clause by providing a time limit (not later than) when an application should be made to the first statement and directing the court to refer the parties to arbitration.\(^{169}\) In rejecting the right to plead the clause as a defence to a suit at the conclusion of trial, the view of a learned trial judge is apposite: ’\(\text{It would be a shocking waste of precious time of all concerned, coupled with additional expenses, were [party] to obtain a stay now.}^{170}\)’ Second, it is now firmly recognized that the arbitration agreement is generally enforceable and valid, and that the award remains binding until set aside for specific reasons under the enabling law. Consequently, under Nigerian law a \textit{Scott v. Avery} clause becomes otiose, if not invalid, where it will allow the court to reopen the case or award de novo. Third, a party who relies on a common law \textit{Scott v. Avery} clause may find itself subject to hostile readings rather than the pro-arbitration policy of the current regime. In the worst of cases, the whole arbitration clause may not be recognized.\(^{171}\)

\(\text{(ii) Foreign Litigation and Arbitration Clauses}\)

A recent challenge to successful stay of proceedings application in Nigerian law is the application of public policy to protect resident Nigerians and businesses from commencing or participating in arbitration proceedings abroad. In \textit{MV Panoramos Bay v. Olam (Nig.) Plc.}\(^{172}\) clause 7 of the bills of lading provided:

\begin{quote}
Any dispute arising under this bill of lading shall be referred to Arbitration in London. The unamended CENTRECON arbitration clause will apply.
\end{quote}

It was held that enforceable arbitration agreements over ‘admiralty’ matters are limited only to those with Nigeria as its forum by virtue of Section 20 Admiralty Jurisdiction Act, Cap A.5 LFN 2004. Sections 2 and 4 of Cap A.18 LFN 2004 were held to be limited or overridden by the provision.\(^{173}\) Section 20 provides that:

\begin{quote}
\begin{enumerate}
\item \text{\textit{Ibid}. Cf. J. Olakunle Orojo & M. Ayodele Ajomo, supra n. 22, 109.}
\item \text{\textit{Cf. ‘The Power to Allow an Application by Extension of Time’}, infra Sec. 4.3.3.}
\item \text{\textit{Per Oyedeso J in Eghiejobi v. Ethoh}, supra n. 167, 263. Cf. Lagos State Water Corp. v. Salamons Construction, supra n. 74.}
\item \text{\[2004\] 5 NWLR (Pt. 865) 1 (CA). Other decisions directly or impliedly reject \textit{MV Panoramos}. See \textit{The MV Lupex}, supra n. 143, and \textit{Oneward Enterprises v. MV “Matrix”}, (2011) 5 CLRN 254.}
\item \text{\textit{Ibid}.}
\end{enumerate}
\end{quote}
‘Any agreement by any person or party to any cause, matter or action which seeks to oust the jurisdiction of the court shall be null and void, if it relates to any admiralty matter falling under this decree . . . ’

The court relied on the Supreme Court case of Sonnar Nig. Ltd v. Partenreedri MS Nordwind (Nordwind) where application for stay of proceedings in favour of litigation in a foreign forum was refused due to a capricious choice of law designed to bar access of the litigant to justice. The choice was therefore contrary to public policy and not enforceable.  

(iii) The Power to Allow an Application by Extension of Time

It is an important question for the parties and the court whether a party may ask for the court’s positive direction to stay proceedings in favour of arbitration, and that the court may oblige, if the request is made outside the period the pertinent sections are thought to apply? In other words, can the court order a mandatory stay of proceedings to an applicant after ‘the first statement’ has been made under section 4 (1)? Similarly, can the court grant the order after the delivery of pleadings or take any other steps by a party under section 5 (2)?

Section 4 (1) prescribes when the court can act as ‘not later’ than when a party is submitting his first statement. There will arguably be, in the loose sense of the word, no jurisdiction if an application is brought by a party or an order is made by the court after the period provided. In general, section 5 is provided to allow the court to decide whether or not it should stay proceedings when a party does not qualify for automatic stay of proceedings. Section 5 (1) therefore is only a general provision for the court’s power. When there is non-compliance the exercise by a court of the section’s discretionary power is liable to be invoked. In context, Section 5 (2) reflects a classic power of discretion enjoyed by the court. The exercise of a power to extend the time for a stay of proceedings will therefore be valid.

In Kano State Urban Development Board v. Fanz, Ogundere JCA stated that where a step had been taken the existing right to arbitration is suspended and the court seized of the matter. A subsequent application and agreement by the parties counsel to arbitration would be valid and enforceable. Being only suspended, the act of transferring back the cause to an arbitration tribunal was within the discretionary power of the High court and held to be validly exercised by the trial judge. As Ogundere JCA puts it, ‘the discretion to surrender part of the jurisdiction of the

174 [1907] 4 NWLR (Pt. 66) 520.
175 The limitation is subject to the exception that a third party with an arbitrable interest in the subject matter may promptly bring an application thereafter. See sec. 57 (1), Cap A.18 LFN 2004. See also, O. Olatawura, supra n. 96.
177 An argument that the subsection refers to the time specified in sec. 5 (1), Cap A. 18 LFN 2004 may be denied on the basis that the subsection is actually a stand-alone provision and that the prior subsection does not need the exercise of discretion once the timing is met. See generally, supra n. 9. (On textual and structural difference between the new sec. 5 and the old sec. 5). See also, ‘The Spirit of Section 5’, supra Sec. 3.1.
178 Supra n. 27, 87–88.
High Court to an arbitral tribunal is that of the court and not that of a party in the case, in so far as both parties agree.\textsuperscript{179} It is implied that positive discretion may be exercised where there is no objection as well as where the objection was unreasonable or \textit{mala fide}.\textsuperscript{180} An opposition by pro-litigation party solely based on the timing may be rejected on the basis of breach of good faith and abuse of right.\textsuperscript{181} It must be stressed that the power of additional extension can only be exceptionally exercised. Where exercised no right of appeal rejecting the application for the stay would be available. Accordingly, a further principle, applicable to an evident ‘third-chance’ situation emerges as follows:\textsuperscript{182}

Positive discretion founded on extra-ordinary circumstances may be exercised by a court in ordering stay of proceedings where an applicant satisfies the court that there is no sufficient reason why arbitration proceedings should not be resorted to and that he is fully committed to the arbitration proceedings.

(iv) Limited or Inadequate Court Rules

With the establishment of arbitration as an independent private dispute resolution mechanism, and the statutory role and duty of the courts provided, specific Arbitration Rules by courts designated to apply Cap A.18 LFN 2004 need to be enacted.\textsuperscript{183} Section 4, unlike section 5, has no precedent to guide parties and the courts in issues that may arise. The application of general Civil Procedure Rules to arbitration agreements, as shown in the preceding analysis on ‘taking any other step’, has created various crises. In general, the application of traditional adversarial litigation modelled rules, policies, and practices affect the application of pure arbitration policy and provisions. Therefore, the existence of independent Arbitration Rules of the High Courts would assist parties and the courts to clearly appreciate the differences, objectives, and principles for arbitration related action.

It would be within the provenance of the Rules if, as a general rule, courts impose full litigation costs on a party who seeks or enforces litigation in breach of arbitration clauses. Only in special and exceptional cases will the existing rule that ‘costs take its course’ apply. The advantages of spelling out courts and judges’ management powers may not be underestimated. In this context, it is necessary to know precisely the functions of the courts and judges after a stay of proceedings is

\textsuperscript{179} Ibid.
\textsuperscript{180} See, ‘In Compelling an Order for Arbitration’, sec. 4.1.1. (Headnotes 134 and 135, supra)
\textsuperscript{181} Supra n. 27, 86. However, the Supreme Court affirming the appeal court’s judgment held that the power to stay proceedings can only be and must be exercised in accordance with the provisions of sec. 5. Any decision or order not based on sec. 5 is a nullity. See \textit{KSUDB v. Fanz}, supra n. 94, 50 (E).
\textsuperscript{182} See also, ‘The Problems of Which Interpretation?', supra Sec. 3.3.1. Cf. Lagos State Water Corp. v. Sakamori Construction, supra n. 74.
\textsuperscript{183} According to Achike JSC, ‘the power of the High Court to make rules for arbitration has never been doubt.’ See \textit{NV Scheep v. MV S.Araz}, supra n. 39, 674. (SC) Cf. Order 52, Federal High Court CPR 2009. (The Order and Rules leave much to be desired.)
granted. Should parties always go to the seized judge alone? The decision in *Shell Trustees v. Imani & Sons* supports the sensible view that only one judge should have dominion.\(^\text{184}\) Yet in inter-jurisdictional cases, as most arbitration cases are, the possibility for two courts having responsibilities must be looked into. These proposed measures would remove arbitration from the shadow of civil litigation, prevent assimilation of arbitration by litigation processes, and allow arbitration to grow on its own. Further, there is good reason for the judgment enforcing a stay of proceedings order of the trial court to be final and no appeal allowed, except both parties agree or the presiding arbitration judge gives special permission.

\((e)\) Conclusion

From the preceding analysis, it is evident that sections 4 and 5, Cap. A18 LFN 2004 provide wide opportunities to enforce arbitration agreements through stay of proceedings applications. The court may compel arbitration through specific performance, order discovery, enforce arbitration proceedings abroad, and allow extension of time to commence arbitration, despite a valid litigation jurisdiction. Various ‘hurdle’ clauses to arbitration, such as the *Scott v. Avery* clause, must be seen to have been edged out by the powerful provisions. Yet there are challenges that need to be addressed. These pertain to narrowing the legislative and judicial policy on the scope for a party to rely on national legislation and hardship to resist arbitration per se, and providing clear powers and functions in specific Arbitration Rules for courts and judges to enhance the efficient and effective management of statutory powers and roles and driving the new arbitration policy framework.

**PART V CONCLUSION**

\((a)\) General Summary

A regime for stay of proceedings is necessary in arbitration law and practice. A comprehensive and careful analysis of Nigerian arbitration law reveals that the present stay of proceedings regime in sections 4 and 5 Cap. A. 18 LFN 2004 has been uniquely formulated to maximally protect arbitration agreements and the growth of arbitration practice. The general policy is to bring a new and radical approach in line that satisfies the domestic market, while consistent with international instruments, notably the New York Convention 1958 and the UNCITRAL MAL 1985. The outcome goes beyond expectations. However, there is evidently a wide misunderstanding and non-appreciation of the present regime by professionals.\(^\text{185}\) The present analysis shows that there is in existence a

\(^{184}\) [2006] 4 NWLR (Pt. 662) 639.

\(^{185}\) See A. Chukwuemerie, *supra* n. 20. (‘It is very clear the two sections are contradictory and not in any way complementary. Their concurrent presence in the Act without their respective scope of operation being specified is a sad commentary on the federal legal drafting infrastructure.’) See also, A.A Olawoyin, *supra* n. 22, 367–388 (Classic case of inelegant legislative drafting and of conspicuous conflict.) and B.J Fagbohun, *supra* n. 23. (Unfortunate drafting approach.)
deliberate and justifiable two-tier structure automatically obligating arbitration at the will of a party on one hand, and subject to certain conditions, a ‘second chance’ discretionary provision for arbitration, on the other hand. Contrary to established views no real conflict exists.

Without doubt the total regime is generally pro-arbitration. Through section 5, Cap A.18 LFN 2004 effectively dismantles old systemic blocks to arbitration. While the concepts of waiver and estoppel are still the basis for assumption of jurisdiction by the courts, the new regime makes these more factually based. It becomes necessary to reject the old strict cum hostile case law approach for a modern pro-arbitration friendly and functional approach. The sections are equally applicable to both international and domestic arbitration agreements. The position cannot be defended or accepted that the sanctity of contracts, good faith and fair dealing obligation embedded in the provisions is dependent on the arbitration being domestic or international.\textsuperscript{106}

Under Cap A. 18 LFN 2004, the jurisdiction of the court is, in general, to promote arbitration agreements through stay of proceedings, not to whittle down the scope, or see arbitration agreements as ousting the courts’ normal jurisdiction. Accordingly, the true jurisdiction of the court may be characterized as partial and reserved, rather than automatic or general. While there are a large number of cases supporting the new dispensation, other existing cases show a lack of appreciation of the new regime. Further, the range of actions that an applicant may take in pursuit of enforcing arbitration is enlarged by the new section than ordinarily provided by the common law. Consequently, parties are now expected to be aware of the consequences of agreeing to an arbitration clause. Finally, very limited space to wriggle out of domestic and international arbitration proceedings exists under Nigerian law.

(b) Specific Summary

Nigeria operates a two-tier stay of proceedings regime, one automatic, the other a conditional ‘second chance’ policy. The regime is based more on the good faith and fairness doctrine and \textit{pacta sunt servanda} than at any other time. Judicial dicta support the grant of stay of proceedings in most cases. In situations where discretion is to be exercised, the court should, except in limited circumstances promote arbitration based on the agreement. An application should be generously considered. Under the new framework, the applicant will be requested to provide evidence of an intention to go on with arbitration and or sanctioned for applying late. There is no clear support for cast iron automatic rejection of a late applicant, since the discretion of the court operates more as a duty to support arbitration than as a general right of assumption of jurisdiction. Unless there is an unequivocal intention to engage in litigation and this manifestation constitutes ‘a major step’, the arbitration agreement should be respected. Certain necessary acts involving

litigation which advance the intention to go to arbitration are legitimate under the law. They will not be considered as a waiver of right to arbitration or found to constitute an estoppel against an application for stay of proceedings.

Especially the following points must be noted:

- Section 4 sets the general tone of the law for obtaining stay of proceedings in deserving cases. Section 5 is a continuum of the policy commenced in section 4 to grant a stay of proceedings.
- Though sharing general functions in common, each section has unique functions and applications. Each section must be read independently of the other, rather than mingled.
- Specific performance of arbitration agreements, except in rare instances when waiver or estoppel will truly operate, is now an obligatory remedy. A party may now be compelled to undertake arbitration proceedings where the agreement is governed by Nigerian law.
- The radical impact of section 5 must be appreciated. It is a basis for enforcement of the right to arbitration, following a default, and not, as traditionally seen, an inherent right of jurisdiction and enforcement of litigation before the courts.
- Notwithstanding the time period specified in section 5, the existence and exercise of discretion belonging to the court provide further time to allow recourse to arbitration, if the conditions are right.
- It is questionable whether a court may refuse a stay and proceed to hear the dispute without an application and decision for revocation of the arbitration agreement. If the arbitration is still valid, litigation must neither be continued nor commenced.
- The remedy for stay of proceedings where there is mandatory duty under section 4, Cap A.18 LFN 2004 is inappropriate. The proper remedy is striking out or dismissal.
- The sections may be interpreted or applied to override contractual and procedural objections to arbitration by giving straight access to parties that seek arbitration under the law. Accordingly, a Scott v. Avery Clause and an Atlantic Shipping Clause (not discussed) may run foul of the provisions if they delay enforcing arbitration proceedings or promote litigation at the expense of arbitration.
- The application for a stay of proceedings will be validly refused by an unequivocal law preventing arbitration of a subject matter. A law that bars foreign litigation or choice of foreign law does not amount to a bar on local or foreign arbitration. Accordingly, a stay of litigation proceedings application in favour of arbitration would be justifiably upheld.
- Certain case law must now be reviewed or cease to be applied the light of the new policy and structure of Cap. A. 18 LFN 2004. These include:
Obenbe v. Wemabod Estates,\textsuperscript{187} Achonu v. N.E.M \& General,\textsuperscript{188} N.P.M.C Ltd. v. Compagnie Noga D’Importation,\textsuperscript{189} N.P.A v. C.G.F Cogefar SPA,\textsuperscript{190} KSUDB v. Fanz,\textsuperscript{191} and Confidence Insurance Ltd v. Trustees of O.S.C. E.\textsuperscript{192}

\textsuperscript{187} Supra n. 16. \\
\textsuperscript{188} Supra n. 89. \\
\textsuperscript{189} Ibid. \\
\textsuperscript{190} Ibid. \\
\textsuperscript{191} Supra n. 94. \\
\textsuperscript{192} Ibid.
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Revolutionary Movements and De Facto Governments: Implications of the ‘Arab Spring’ for International Investors

by DANIELLE MORRIS *

ABSTRACT
Recent events in the Middle East, such as the revolutions in Egypt and Libya and the civil war in Syria, have raised questions as to when a government is responsible for the acts of revolutionaries and when a revolutionary movement becomes a new government. These questions take on particular urgency in the context of concession agreements or other contracts with the State. If a dispute should arise between the investor and a revolutionary movement that has proclaimed itself the new government of the State, the implications of the revolution for international arbitration become relevant as well. This article aims to shed light on these issues through an examination of general principles of international law and historical precedents. The circumstances in Egypt, Libya, and Syria are then used as examples of political conditions contemporary foreign investors may face, and the article explores the potential implications of these circumstances for business ventures and international treaty arbitration.

I. INTRODUCTION
Recent events in the Middle East, such as the revolutions in Egypt and Libya and the civil war in Syria, have raised the questions of when a government is responsible for the acts of revolutionaries and when a revolutionary movement becomes a new government. These questions take on particular urgency in the context of concession agreements or other contracts with the State, raising such issues as: Who is entitled to any money due to the State under the contract? Who has the authority to (re)negotiate a contract in a way that is binding on the State and successor governments? Is there any redress for property or contract rights taken by revolutionary forces? If a dispute should arise between the investor and a

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revolutionary movement that has proclaimed itself the new government of the State, the implications of the revolution for international arbitration become relevant as well: How might the origins or status of the new government affect a tribunal’s jurisdiction? Does international law provide a post-revolutionary government with any special defences to liability? One source of guidance in answering these questions is the arbitral awards arising out of prior revolutionary movements in the late nineteenth and early twentieth centuries and other historical analyses of when a revolutionary movement constitutes a government capable of binding its successors. This article examines various historical sources in an effort to glean useful guidelines — hard and fast rules being notoriously difficult to discern in this area — as to how international law treats revolutionary movements at various stages of progress.

Section 2 of this article begins with a discussion of general principles regarding the continuity of State obligations despite a change in government and the responsibility of States under international law for the acts of successful and unsuccessful revolutionaries (section 2.1). It then examines the related practice of recognition and the principle of effectiveness (section 2.2), the distinctions between a general and a local de facto government (section 2.3), and historical examples of revolutionary movements determined to be effective or not (section 2.4). Section 3 then seeks to apply these principles in the context of the ‘Arab Spring’. After a brief discussion of current conditions in Syria (subsection 3.1.1), Libya (subsection 3.1.2), and Egypt (subsection 3.1.3), this article considers various potential implications for international investors, whether in their business dealings with revolutionary regimes (subsection 3.2.1) or in connection with international treaty arbitration (subsection 3.2.2, on jurisdiction, and subsection 3.2.3, on liability).

II. REVOLUTIONARY MOVEMENTS AND DE FACTO GOVERNMENTS

(a) Background Principles

Courts and arbitral tribunals have long recognized the general principle of international law that State obligations survive a change in government.1 Similarly, each government is bound by the laws of its predecessor unless and until

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1 See United States v. McRae, (1869) 8 L. R. 69, 75 (Ch.) (‘[A]ny government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power’); King of the Two Sicilies v. Willcox, (1851) 61 Eng. Rrz. 116, 124 (Ch.) (holding that the King succeeded to both the agency and the contracts entered into by the agents of the preceding republican government, established by revolution: ‘[I]f the persons who remitted the monies are members of an unlawful Government, and, after they have exercised the functions of Government for some time, the legitimate Government conquers them, ... that Government will succeed to the rights of the Government they conquered, and, inter alia, to the contracts that that Government had entered into and the property it had purchased; and the agents for the unlawful Government will become agents for the lawful Government: it will succeed to the agency as well as to the property’). For a policy-based argument against this long-standing principle and in favour of a more flexible
it revises them (except for laws, such as constitutional provisions, barring a revolutionary regime change itself). Accordingly, later governments may not escape commitments of a prior regime simply by attempting to nullify all of its acts. There are, however, additional potential complications in the case of attributing State responsibility to revolutionary movements. For example, arbitral tribunals have been virtually unanimous in holding that a State is not responsible for damages caused by an unsuccessful revolutionary movement, absent a showing of negligence on the part of the State, but if the revolutionary movement succeeds

Revolutionary Movements and De Facto Governments: Implications

2 See, e.g., ‘Georgiana’ & ‘Lizzie Thompson’ Cases (U.S. v. Peru), in 2 John Bassett Moore, History and Digest of the Arbitrations to Which the United States Has Been a Party, 1393 (1956) [hereinafter Moore, History & Digest]. The two ships in question were seized in 1858 while loading guano at Pabellón de Pica, in the case of the ‘Lizzie Thompson’, and Punta de Lobos, in the case of the ‘Georgiana’. Both ships had received a license and were cleared at the custom-house in Iquique for that purpose by officials loyal to General Vivanco, a minister of the prior government engaged in an attempted revolution that, at the time the licenses were issued, controlled quite a limited portion of the Peruvian territory. See id. at 1593–1593. The United States then brought a claim on behalf of the ship owners, U.S. nationals, which Peru contested. One of Peru’s primary defences was that ‘[n]either Vivanco nor his government had by any public act pretended to repeal the decrees and regulations touching the guano trade’, which at the time forbade foreigners from loading guano anywhere but the Chinchas Islands. Id. at 1597–1599. Although the United States and Peru agreed to submit the claim to arbitration by the King of Belgium, the latter declined the appointment, confiding to the United States that were he to accept, he would feel constrained to rule against the United States. See id. at 1612. The United States then withdrew the claim.

3 See Aguilar-Amory & Royal Bank of Canada Claims (Gr. Brit. v. Costa Rica), Award (Oct. 18, 1921), 1 R.I.A.A. 369, 381 (1946) [hereinafter Tinoco Claims]. ‘To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary.’

For example, in the Dreyfus Bros. Case, the tribunal held that a general de facto government existed in Peru where Piérola, a rebel leader, ‘was proclaimed supreme chief of the Republic by popular assemblies and maintained by numerous plebiscitary adhesions’ and ‘exercised the legislative power, the executive power and, in part, the judicial power’. French Claims Against Peru (Dreyfus Bros. & Co.), Arbitral Tribunal at The Hague (Oct. 11, 1921), 16 Am. J. Int’L L. 480, 481 (1922). Shortly thereafter, Dreyfus Bros. requested that he decide the numerous controversies that had arisen with respect to a deal by which Peru had sold 2 million tons of guano to Dreyfus Bros. in return for certain loans. Piérola, ‘using his exceptional powers, undertook the solution’ and fixed the amount due to Dreyfus Bros. in a judgment then approved by the Court of Accounts. Id. at 481–482 (quotation marks omitted). When the new government came into power, it passed a law nullifying all acts of the Piérola administration and denied liability to Dreyfus Bros. See id. at 482. The Tribunal, however, held that the nullification act ‘can not be applied to foreigners who [contracted with the interim government] in good faith’ and ordered Peru to pay the sum originally fixed by Piérola, with interest. Id. at 482–483. See also Tinoco Claims, 1 R.I.A.A. at 387 (rejecting the restored government’s attempt to nullify the rights granted to the British claimants by the prior Tinoco regime and instead holding that ‘[t]he decision of [the claims] must be governed by the answer to the question whether the claims would have been good against the Tinoco government as a government, unaffected by the Law of Nullities, and unaffected by the Costa Rican Constitution of 1871 [which was replaced during the Tinoco regime and later restored by the succeeding government]’; Western Electric Co. Claim (U.S. Foreign Claims Settlement Comm’n), Award (May 16, 1959), 30 I.L.R. 166, 167–168 (1966) (rejecting the USSR’s attempt to nullify all claims against the State ‘in connection with the “Imperialist War of 1914-1918” and ordering it to pay the claimant the sum agreed by the prior Russian government').

One of the most fulsome explanations of the principles and authorities underlying the denial of State liability for the acts of unsuccessful revolutionists may be found in the Sambilago Case. See Sambilago Case (Italy-Venezuela).
in overthrowing the government, the State will then be responsible for all the acts of the revolution from its inception.\textsuperscript{6} As Umpire Plumley explained:

\begin{quote}
Responsibility comes because it is the same nation. Nations do not die when there is a change of their rulers or in their forms of government. These are but expressions of a change of national will. ‘The king is dead; long live the king!’ has typified this thought for ages. The nation is responsible for the debts contracted by its titular government, and that responsibility continues through all changing forms of government until the obligation is discharged. The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.\textsuperscript{7}
\end{quote}

This principle raises the question of when a revolutionary movement should be considered a government. Generally speaking, tribunals have looked to the same factors that underlie the principle of effectiveness embodied in current recognition practice. Arbitral tribunals have thus considered the grant of recognition as part of their analysis in determining the status of a revolutionary movement, although recognition alone is neither necessary nor sufficient.\textsuperscript{8} Accordingly, despite the fact

\begin{quote}
\textsuperscript{6} See, e.g., Underhill v. Hernandez, 168 U.S. 250, 253 (1897) (‘If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation.’); Louis B. Sohn & R.R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int’l L. 545, 576–577 (1961) (in article 18, attributing the acts of successful, but not unsuccessful, revolutionaries to the State for purposes of State responsibility); Edwin M. Borchard, \textit{International Pecuniary Claims against Mexico}, 26 Yale J. Int’l L. 339, 339 (1917). (‘While it is a general principle that a state or nation is not responsible for the acts of unsuccessful revolutionists beyond its control, the rule in the case of successful revolutionists is quite different. The government created through its efforts is liable for the acts of the revolutionists as well as for those of the titular government it has displaced.’)

\textsuperscript{7} Bolivar Railway Co. Case (U.K.-Venez. claims Comm’n), Opinion of the Umpire (Ralston) (1903), 10 R.I.A.A. 499, 513 (1960) (collecting authorities and concluding: ‘Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it can not reasonably be said that it should be responsible for a condition of affairs created without its volition’; see also Aroa Mines Case (U.K.-Venez. claims Comm’n), Opinion of the Umpire (1903), 9 R.I.A.A. 402, 440 (1959) (‘The precedents form an unbroken line, so far as the umpire has been favored with a chance to study them, supporting the usual nonresponsibility of governments for the acts of unsuccessful rebels’); Henriquez Case (Neth.-Venez. claims Comm’n), Opinion of the Umpire (1903), 10 R.I.A.A. 713, 716 (1960) (‘The umpire holds concerning the responsibility of Venezuela for the acts of unsuccessful revolutionists that the Government of Venezuela is responsible to aliens, commorant or resident, for injuries they receive in its territory from insurgents or revolutionists whom the Government could control, and not otherwise. That the Government of Venezuela was negligent in a given case must be alleged and proved.’).

\textsuperscript{8} Jarvis Case (U.S.-Venez. claims Comm’n), Opinion of the Umpire (1903), 9 R.I.A.A. 445, 452–453 (1959).}
that it has long been accepted that an unrecognized government can bind the State, and with it successor governments,\(^9\) historical analyses of when a revolutionary movement is sufficiently effective to be eligible for recognition can also shed light on the factors capable of demonstrating the existence of a post-revolutionary government.

(b) Recognition and the Principle of Effectiveness

There has traditionally been a distinction between de jure and de facto governments, with full respect internationally given only to the former.\(^{10}\) De jure governments are those that have been formally recognized by other States.\(^{11}\) De

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\(^9\) See Robert Jennings & Arthur Watts, 1 Oppenheim’s International Law: Peace § 44 (9th ed. 1996) ("[T]he effect of a revolution resulting in a government which for a time fails to secure any recognition from foreign states, does not destroy the international personality of the state or free it, permanently at any rate, from existing treaty obligations; though it involves an interruption in that state’s ability to exercise its legal capacity for international purposes."); D.P. O’Connell, International Law, 88–89 (1970) ("It is essential for clear thinking that the question of recognition and of non-recognition should be kept quite separate from the question of the objective capacities conferred by international law.")

\(^{10}\) See, e.g., 1 Restatement (Third) of U.S. Foreign Relations Law § 205, at 91 (1987) (noting that under U.S. law, a regime not recognized as the government of a state, is ordinarily denied access to courts in the United States...[and] is not entitled to property belonging to that state located in the United States") (hereinafter Third Restatement); O’Connell, supra n. 9, at 89 ("At least in respect of perfunctory administration the capacities vested in the rebel régime differ slightly if at all from those vested in the de jure régime, the main difference, perhaps, lying in respect of the operation extra-territorially of the acts of the de facto régime."); H. Lauterpacht, Recognition of Governments: I, 45 Colum. L. Rev. 815, 818 (1945) ("A State whose government is refused recognition is, for many purposes, deprived of the usual prerogatives of international personality. Thus, for instance, a government from which recognition has been withdrawn or to which it has been refused is deprived of the protection, which it otherwise enjoys under international law, against foreign assistance to forces which have risen in rebellion against it. The acts of its legislative, administrative and judicial organs are treated as invalid; it is often refused jurisdictional immunities; it cannot appear as plaintiff in foreign courts.").

Lauterpacht recognized, however, that other scholars had argued that the “sole result” of non-recognition was “absence of diplomatic relations.” Id. For a more detailed description of State practice with respect to unrecognized governments, see H. Lauterpacht, Recognition of Governments: II, 46 Colum. L. Rev. 37 (1946).

\(^{11}\) As an initial matter, one must note the distinction between the recognition of a State and the recognition of a new head of State or government. See, e.g., 1 Third Restatement § 203, comment a, at 84 ("A State cannot recognize or accept a regime as a government without thereby accepting the sovereignty of the entity which the regime claims to be governing. A state can, however, recognize or treat an entity as a state while denying that a particular regime is its government."). Recognition of a new head of State or government is important because it is a prerequisite to most diplomatic relations between States. See id. § 203, comment d, at 85 ("Recognition of a government is often effected by sending and receiving diplomatic representatives, but one government may recognize another yet refrain from assuming diplomatic relations with it."). However, a State does not lose its international personality, or its concomitant international responsibility, simply because another State has failed to recognize a new head of State or government. See Lauterpacht, supra n. 10, at 821 ("It is, in fact, international law that preserves the legal continuity of the State. It does so by laying down the rule that the State and its obligations remain the same notwithstanding constitutional or governmental changes, revolutionary or other. This is a principle which goes back to Grotius.").
facto governments are unrecognized but have effective control over some or all of a State’s territory.\textsuperscript{12}

Revolutionary movements, to the extent they succeeded in ousting the former government in at least a portion of the State’s territory, were often treated as de facto governments, at least for an initial period post-revolution. Although a continued refusal to recognize a government clearly in de facto control of a State could be a source of friction in international relations (and some scholars have argued that such a government has an entitlement under international law to recognition\textsuperscript{13}), premature recognition of a revolutionary movement as the new government could amount to an international wrong by improperly seeking to interfere in the internal affairs of the State in question.\textsuperscript{14} Perhaps unsurprisingly, political considerations have played a significant role in determining whether to recognize a government, and even a de facto government in effective control of a State might not receive recognition.

\textsuperscript{12}There is some confusion in the literature regarding the de jure/de facto distinction and whether it applies to governments or to recognition itself. See, e.g., Philip Marshall Brown, The Legal Effects of Recognition, 44 Am. J. Int’l L. 617, 617 (1950) (‘De jure recognition means full, complete recognition. It does not refer to the legality of the recognized government. De facto recognition means the situation created by the continuance or the establishment of diplomatic relations with a new government, irrespective of its origin.’); H. Lauterpacht, Recognition of Insurgents as a De Facto Government, 9 Mod. L. Rev. 1, 16 (1936) (similarly distinguishing between de jure and de facto recognition); Herbert W. BriGuy, De Facto and De Jure Recognition: The Amatzuya Mendi, 53 Am. J. Int’l L. 689, 690 (1959) (‘The de facto ay de jure character of a government depends exclusively upon the constitutional law of the state concerned. . . . Granting the political or diplomatic advantages of a distinction between de facto and de jure recognition, it appears, nevertheless, that the legal consequences of de facto and de jure recognition are essentially the same.’) (footnote omitted). This article uses the terms as defined above.

\textsuperscript{13}See Lauterpacht, supra n. 10, at 816 (‘When that government enjoys, with a reasonable prospect of permanency, the habitual and – though this is controversial – willing obedience of the bulk of the population, outside States are under a legal duty to recognize it in that capacity.’); But see Note on Recognition, 35 Brit. Y.B. Int’l L. 246, 246–247 (1959) (quoting a June 1958 interview of Secretary of State Dulles) (‘We recognize governments often times whether we like them or not, but the primary consideration, I think, in terms of recognition is: will recognition serve to advance the interests of your own country? Recognition is not a right. No group has a right to be recognized. We did not recognize the puppet governments that were set up in Europe during the war. They were de facto governments. We did not recognize the puppet government that the Japanese set up in China although it was in effective control. Why? Because it did not serve our interests to do so.’).

\textsuperscript{14}See 1 Third Restatement § 203, comment g., at 86 (‘Recognizing or treating a rebellious regime as the successor government while the previously recognized government is still in control constitutes unlawful interference in the internal affairs of that state.’); 1 Francis Wharton, A Digest of the International Law of the United States, Ch. III, § 70, at 324 (1887) [hereinafter Wharton, U.S. Digest] (quoting a letter dated May 27, 1823, from Secretary of State Adams to Mr. Anderson) (‘When a sovereign has a reasonable hope of maintaining his authority over insurgents, the acknowledgement of the independence of such insurgents would be an international wrong. It is otherwise when such sovereign is manifestly disabled from maintaining the contest.’); A.G. Bundu, Recognition of Revolutionary Authorities: Law and Practice of States, 27 Int’l & Comp. L.Q. 18, 43–44 (1978) (‘Thus, whenever effectiveness is obvious from the beginning the revolutionary government may be recognized at once. If, on the other hand, effectiveness is not obvious then a passage of time may be required before recognition is accorded to the new régime. . . . However, there seem to be two broadly recognised limitations [on a State’s discretion whether to recognize]: first, they must not exercise their judgment prematurely for this would amount to a delict as against the previous recognized government if it is still substantially in existence as a government; and, secondly, it may be suggested that States must in such cases act bona fide.’); Lauterpacht, supra n. 10, at 822 (‘So long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal, the de jure recognition of the revolutionary party as a government constitutes premature recognition which the lawful government is entitled to regard as an act of intervention contrary to international law.’).

Generally speaking, however, recognition has been tied to the reality on the ground and based on the principle of effectiveness. The primary requirement under this analysis is that the revolutionary movement be in actual control of the territory and in possession of the machinery of State. Some States have added requirements beyond effective control alone before recognizing a revolutionary movement as the new government, such as a willingness to comply with international law obligations or a demonstration of the consent of the populace in the change of regime. The United States, for example, generally requires

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15 See 2 Marjorie M. Whiteman, Digest of International Law, Ch. III, § 1, at 25 (1963) (hereinafter Whiteman, U.S. Digest) (quoting Ti-chiang Chen, The International Law of Recognition (1951)) (“The examination of the practice of States has shown that de factoism has undoubtedly been the backbone of the Anglo-American policy of recognition. Such a policy is based upon the view that recognition registers, but does not create, a situation of fact.”).

16 See Lauterpacht, supra n. 10, at 826 (“The principle of effectiveness – either in its literal meaning or as conditioned by the consent of the nation adequately expressed – as the test of recognition must, it will be shown be regarded as expressing most accurately the general practice of States.”). Lauterpacht notes that a prior requirement of ‘legitimacy’ passed out of use with the dissolution of the Holy Alliance, and that “[w]henever revolutionary origin has been regarded as a reason for refusing recognition, it has been treated as a defect which can be cured by subsequent popular approval.” Id. at 830. See also Bunsh, supra n. 14, at 42 (“Thus viewed, it may be suggested that the principle of effectiveness is in modern practice the predominant and governing legal criterion for recognition of revolutionary régimes. All other considerations are usually regarded by States generally either as an affirmation of the principle of effectiveness or merely as peripheral or political and as forming no part of the legal criteria for recognition.”).

17 See Lauterpacht, supra n. 10, at 835–836 (“Recognition has often been refused on the ground that the new government has been unwilling either to give an undertaking to fulfill international obligations contracted by its predecessor or to desist from its own illegal conduct. This particular test of recognition, which must be distinguished from that of ability to fulfill international obligations, is of comparatively recent origin.”) (footnote omitted). Lauterpacht draws a distinction between the ability to fulfill a State’s international obligations, on the one hand, and willingness to do so, on the other, because “[i]t would seem that ability to fulfill obligations is merely one aspect of the question of effectiveness.” Id. at 833 n. 49.

18 See Lauterpacht, supra n. 10, at 841 (“In the turmoil and uncertainty following upon the upheavals of the revolution, popular approval, properly expressed, is deemed to be evidence of the true authority of the government, of the obedience accorded to it, and of its probable permanence and stability.”). Lauterpacht went on to note, however, that the United States changed its policy in the wake of the Communist revolutions in Eastern Europe, which resulted in dictatorships unlikely to hold free elections: ‘Instead of inquiring whether the revolutionary Government had received confirmation by a freely expressed popular vote, the inquiries were directed to the question whether there was active resistance to the rule of the new authority.’ Id. at 837.

19 Some commentators have questioned the legal or theoretical basis for such additional requirements. See, e.g., Bunsh, supra n. 14, at 36–37 (“States have now come to realise the unsoundness of the old practice of withholding recognition from a revolutionary government merely because they disapprove of the method by which it achieved, or is sustaining itself in, power – however much it might be in effective control of the country – while at the same time leaving unscathed the competence of established régimes equally guilty of barbarous suppression of opponents and minorities.”); Lauterpacht, supra n. 10, at 839 (“The test of willingness to fulfill international obligations is, it has been submitted, of doubtful juridical soundness and controversial practical value when conceived as a condition of recognition.”); Thomas Baty, So-Called “De Facto” Recognition, 31 Yale L.J. 469, 470 (1922) (“The very essence of recognition is that the recognizing state thereby declares that it has satisfied itself that the recognized authority possesses the distinguishing marks of a state. To say that one recognizes that it has them, subject to their being subsequently proved, is a contradiction in terms. To say that one recognizes that it has them, subject to its conduct being satisfactory in other particulars, is sheer nonsense. It is like telling a pupil that her sum is right if she will promise to be a good girl.”).

20 In addition to the requirements of effective control, consent of the people, and willingness to comply with international law obligations, Whiteman notes that “[o]ther factors increasingly borne in mind, as appropriate, for example, are the existence or nonexistence of evidence of foreign intervention in the establishment of the new regime; the political orientation of the government and its leaders; evidence of
that the revolutionary movement be administering the government with the assent or consent of the people, without substantial resistance to its authority, and have indicated that it is willing and able to comply with the State’s obligations under treaties and international law. This more cautious approach helps ensure that a revolutionary movement has solidified its control before recognition is extended. Such an analysis is highly fact-specific and at least nominally divorced from political considerations. As a presidential prerogative, however, recognition is still occasionally subject to overriding political needs.

intention to observe democratic principles, particularly the holding of elections; the attitude of the new government toward private investment and economic improvement. Importantly, also, the interest of peoples, as distinguished from governments, is of concern. These, and other criteria, depending upon the international situation at the time, have been considered, with varying weight. See, e.g., 1 Green Haywood Hackworth, *Digest of International Law*, Ch. III, § 4, at 73. 2 Whiteman, *U.S. Digest*, Ch. III, § 4, at 73.

See, e.g., 1 Green Haywood Hackworth, *Digest of International Law*, Ch. III, § 33, at 233 (1940) [hereinafter Hackworth, *U.S. Digest*] (quoting a telegram dated Oct. 12, 1932, from Secretary of State Stimson to Ambassador Calbertson, regarding the potential recognition of the Oyanedel government in Chile) (‘Please give the Department your opinion concerning the stability of the new government. The Department desires to be informed especially as to whether it has the general acquiescence of the people, whether its orders are carried out by the administrative authorities throughout the country, and whether there are any subversive movements.’).


See 2 Whiteman, *The Policy of the United States in Recognizing New Governments During the Past Twenty-Five Years*, 25 Proc. Am. Soc’y Int’l L. 120, 129–130 (Apr. 23–25, 1931) (‘If any feature of our policy on recognition has had greater emphasis than others it would seem to be the requirement that a new government, before it can claim the right to recognition, should show evidence of ability and willingness to perform its international obligations. If it is unable to perform such obligations, it has not reached that degree of stability which other Powers are entitled to expect before entering into international relations with it. If, on the other hand, it is able but unwilling to perform its obligations, it has failed to adopt that standard of international conduct which is supposed to characterize the relations between states.’); 1 John Bassett Moore, *A Digest of International Law* § 52, at 151 (1906) [hereinafter Moore, *U.S. Digest*] (quoting a letter dated June 14, 1879, from Secretary of State Evarts to Mr. Baker, regarding the Venezuelan Revolution of 1879 led by Guzmán Blanco) (‘When radical changes have taken place in the domestic organization of the country, or when they seem to be contemplated in its outward relations, it is often a matter of solicitude with this government that some understanding should exist that the rights acquired by our citizens, through the operation of treaties and other diplomatic engagements, shall not be affected by the change. In other words, while the United States regard their international compacts and obligations as entered into with nations rather than with political governments, it behooves them to be watchful lest their course toward a government should affect the relations to the nation. Hence it has been the customary policy of the United States to be satisfied on this point; and doing so is in no wise an implication of doubt as to the legitimacy of the internal change which may occur in another state.’).

2 Whiteman, *U.S. Digest*, Ch. III, § 4, at 41 (quoting a telegram dated Sept. 20, 1943, from Secretary of State Hull to Freling Foster to the effect that ‘[y]our statement that “The President of the United States may, if he chooses, order the official recognition of a foreign government without recourse to Congress” is correct,’ and informing him that ‘[g]enerally speaking, recognition is an Executive act.’).

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Taking these various factors into consideration, it is possible that a revolutionary movement may demonstrate effective control over only a portion of the State’s territory. In that case, it is necessary to distinguish between a general and a local de facto government.

A general de facto government has control over all, or virtually all, of the territory of the State and is able to bind the State in all matters.26 In this respect, it is just like any other government, regardless of whether it has been recognized or not.27 As noted above, there may, however, be other implications of a government’s unrecognized status, such as an inability of the State to avail itself of another State’s municipal courts.28

The case of a local de facto government is more complicated. Such a government exercises effective control, but only over a limited portion of a State’s territory. The question then becomes whether a local de facto government is capable of binding the State. Generally speaking, a local de facto government can bind future governments, but only to a limited extent; these limits are geographic, substantive, and temporal.

With respect to geography, the power of a local de facto government to bind the State is, unsurprisingly, coextensive with the territory under its control.29 The Central & South American Telegraph Co. Case provides an example of the application of this rule with potential relevance for contemporary concession agreements.30 There, the claimant had entered into a concession agreement with the Government of Chile to lay a submarine telegraph cable from Valparaiso, Chile to Iquique, Chile, and from Iquique to Chorillos, Peru.31 After the cable had been laid, a civil war broke out in Chile, during which the Congressionalist faction took

26 See Woolsey, supra n. 9, at 547 (quoting the Day Case, from the U.S.-Venezuela Claims Commission of 1889, to the effect that “it may also be said with great confidence that a government de facto, when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is styled a government de jure”).
27 See supra n. 9 and accompanying text.
28 See supra n. 2.
29 See Borchard, supra n. 6, at 344 (“A local de facto government] may seize property belonging to the state and may use it. It may receive money due the state and give receipts in the name of the state. This, however, only applies to debts payable within the territory and period of occupancy”) (footnote omitted).
30 See Central & South American Telegraph Co. Case (U.S.-Chile Claims Comm’n), Decision of the Commission, in 3 Moore, History & Digest, 2938.
31 See Central & South American Telegraph Co. Case, supra n. 30, at 2938.
control of Iquique. That regime then ordered a temporary break in the use of the cable, and the company brought a claim for the resulting losses.\(^3\) The commission held that the Congressionalist regime constituted a de facto government in Iquique and therefore was authorized to exercise all government authority in that region, including under Article IX of the concession agreement, which reserved to the government the right to suspend the service or use of the cable in case of danger to the security of the State.\(^3\)

The claim was accordingly rejected.\(^3\) Despite the expansive approach taken in *Central & South American Telegraph Co.* Case,\(^3\) the weight of authority suggests significant substantive limitations on, or at least uncertainty regarding, the authority of a local de facto government. Most certain is the ability of a local de facto government to collect taxes, customs duties, and other sums due to the State within the territory it controls during the period of its occupancy.\(^3\) As such, successor governments may not require aliens who have already satisfied these obligations to pay the new government a second time.\(^3\) The U.S. Supreme Court, for example, recognized this principle in *United States v. Rice.*\(^3\)

During the War of 1812, British forces occupied the town of Castine, Maine and collected customs duties on goods imported there. The property in question was imported and the duties paid during the British occupancy; the owners then sold the goods to Rice. By the time Rice went to Castine to collect the goods, the war had ended and the United States had retaken control of Castine. The U.S. customs officer required Rice to pay customs duties a second time before releasing the

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\(^3\) See *Central & South American Telegraph Co.* Case, supra n. 30, at 2939, 2942.

\(^3\) See *Central & South American Telegraph Co.* Case, supra n. 30, at 2942.

\(^3\) The commission, believing that the party of the Congressionalists had the character of a de facto government, possessing in the territory subject to its dominion the right to exercise jurisdiction according to the laws enacted and engagements accepted by and for the country[,] recognizes its right to regulate its relations with the claimant conformably to the general provisions of the [concession agreement], and more especially according to its Article IX, which reserves to the government the right of suspending the service of the cable in case of danger to the security of the state. Consequently the majority of the commission declares groundless the claims of the company . . . based on those acts of the de facto government which the Government of Chile was authorized to do by the said article of the concession.” The decision of the commission was unanimous on this point. See id. at 2943. The majority of the commission went on to award the claimant damages for various losses not excused by the security provision in Article IX. See id. at 2942–2943.

\(^35\) See Borchard, supra n. 6, at 343 (noting that a temporary or local de facto government “may prescribe the revenues to be paid and collect them”); *Central & South American Telegraph Co.* Case, supra n. 30, at 2942.

\(^36\) See Borchard, supra n. 6, at 343–344 (“Foreigners must persecute submit to the power which thus exercises jurisdiction, and a subsequent de jure government cannot expose them to penalties for acts which were lawful and enforced by the de facto government when done . . . The collection of taxes and customs duties within the territory and during the period of occupancy of the local de facto government relieves merchants and tax-payers from a subsequent second payment upon the same goods to the succeeding de jure government.”).

\(^37\) In the Guastini Case, Guastini, a merchant in El Pilar, Venezuela was required to pay an annual license fee of 200 bolivars. For approximately a year, revolutionary forces controlled El Pilar and required Guastini to pay the license fee to them. When the prior government regained control of El Pilar, its agents forced him to pay the license fee a second time. Guastini brought a claim for a refund of the double payment. The Commission granted his request: “Money paid, therefore to the de facto authorities in the shape of public dues must be considered as lawfully paid, and receipts given by them regarded as sufficient to discharge the obligations to which they relate. Any other view would compel the taxpayer to determine at his own peril the validity of the acts of those exercising public functions in a regular manner.” *Guastini Case* (Italy-Venez. Claims Comm’n), Opinion of the Umpire, in Kaltson, *Venezuelan Arbitrations*, 750.

\(^38\) 17 U.S. (4 Wheat.) 246 (1819).
property. Rice then filed suit for the return of his money. The Supreme Court agreed with Rice that the customs officer had exceeded his authority:

Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. . . . The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. 38

This principle has been applied even in the extreme case in which a local de facto government held control of the territory in question for only a few weeks. 39

Less certain is the ability of a local de facto government to bind the State in other respects. A local de facto government may not alienate any portion of the public domain, and may only sell the fruits thereof to the extent they accrued during the period of occupancy. 40 A local de facto government may become the owner of movable property, and the succeeding government will take mortgaged property subject to any liens created in good faith. 41 As a general rule, however, a succeeding government is not liable for debts contracted by a displaced local de facto government. 42 In this respect, some awards make a distinction between

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38 17 U.S. at 254–255.
39 See Bluefields Case (U.S. v. Nic.), in 1 Moore, U.S. Digest, 49. There, an insurrectionary movement under General Reyes took control of certain territory for a few weeks, during which time it collected duties owed under Nicaraguan law from local American merchants. When the titular government regained power, it demanded the duties a second time. The United States entered into a diplomatic discussion with Nicaragua, maintaining that a second exaction was unwarranted given that General Reyes’ forces constituted a local de facto government at the time the first payments were made. Although Nicaragua disputed the de facto character of Reyes’ regime, it nevertheless ceased its demands for payment. See id. at 51.
40 See Borchard, supra n. 6, at 344.
41 See Borchard, supra n. 6, at 344–345 ('A local de facto government may become the owner of movables, which it may sell and hypothecate. A succeeding government takes such mortgaged property as rightful owner subject to the liens thus created in good faith. '); United States v. McRae, (1869) 8 L.R. 69, 75–76 (Ch.) (where the United States sought an accounting from an agent of the Confederacy, requiring the United States to take the place of the Confederacy, such that the United States would be entitled to any moneys owed but also be liable for any sums due); United States v. Proseau, (1863) 71 Eng. Rep. 580, 581–582 (Ch.) (where the United States sought the return of cotton entrusted to Proseau by the Confederacy, holding that the United States could only take the cotton subject to the terms of the original contract); Hullet & Co. v. King of Spain, (1828) 6 Eng. Rep. 488 (Ch.) (agreeing with the King’s assertion that a Don Machado remained his agent, despite the intervening constitutional government, and upholding his request that Hullet prove any claims it may have against sums entrusted to Machado and deposited with Hullet or return those sums in whole). But see Barrett Case (U.K.-U.S. Claims Comm’n), Decision of the Commission, in 3 Moore, History & Digest, 2901 ('Persons contracting with the so-called Confederate States voluntarily assumed the risk of such failure, and accepted its obligations, subject to the paramount rights of the parent state by force to crush the rebel organization, and seize all its assets and property whether hypothecated by it or not to its creditors. Such belligerent right of the United States, to seize and hold was not subordinate to the rights of creditors of the rebel organization, created by contract with the latter; and when such seizure was actually accomplished, it put an end to any claim of the property which the creditor otherwise might have had.').
42 See Borchard, supra n. 6, at 345. ('As a general rule, however, a succeeding de jure government is not liable for debts contracted by a displaced local de facto government. A person dealing with a local de facto government assumes the risk of his enterprise.') (footnote omitted); Standard-Vacuum Oil Co. Claim (U.S. v. Russia), Award (Jan. 26, 1959), 30 I.L.R. 168, 169 (1966) ('Debts incurred by unsuccessful revolutionary Governments were not binding upon the Governments which they sought to overthrow, and accordingly the Soviet Government was not liable on the contracts concluded by the Kolchak Government.'
so-called ‘personal’ and ‘impersonal’ acts by a local de facto government and consider that only the latter are binding on the State. It is not always clear where the personal/impersonal line should be drawn, but tribunals have interpreted this concept to mean that a successor government could not be liable for debts incurred for the personal benefit of the revolutionaries or for the pursuit of the revolution itself; rather, a successor government would only be liable for debts incurred in the normal administration of government.

Professor Borchard summarized the case law thus:

The temporary de facto government may legislate on all matters of local concern, and in so far as such legislation is not hostile to the subsequent de jure government which displaces it, its laws will be upheld. A military occupant as a general rule may not vary or suspend laws affecting property and private personal relations or those which regulate the moral interests of the community. If he does, his acts in so doing cease to have legal effect when the occupation ceases.

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43 See, e.g., Hopkins Case (U.S.-Mex. Claims Comm’n), Opinion (Mar. 31, 1926), 4 R.I.A.A. 41, 43–44 (1951) (distinguishing between ‘personal’ acts, such as ‘voluntary undertakings to provide a revolutionary administration with money or arms or munitions and the like’, for which a succeeding government is not liable, and ‘impersonal’ acts, such as the sale of the postal money orders at issue: ‘It is clear that the sale by the Mexican Government to and the purchase by the claimant Hopkins of postal money orders falls within the category of purely government routine having no connection with or relation to the individuals administering the Government for the time being’); Peerless Motor Car Co. Case (U.S.-Mex. Claims Comm’n), Opinion (May 13, 1927), 22 Am. J. Int’l L. 180, 181 (1928) (unanimously rejecting Mexico’s argument that it should not be required to pay the contract price for ambulances purchased by a displaced local de facto regime and holding instead that the contract was an ‘unpersonal’ act for which the succeeding government was liable).

44 See, e.g., 1 Tormo, RESTATEMENT § 207, comment h, at 97 (‘[A State] is responsible as well for the conduct of any revolutionary regime that has control over part of the state’s territory as regards ordinary domestic legislation, administrative acts, or judicial decisions, but not for acts having as their principal objective furthering or maintaining that regime’s control’); O’Connell, supra n. 9, at 91 (‘[T]he distinction between “personal” and “impersonal” acts of government is not strictly between acts incidental to a legitimate exercise of sovereign power, and acts of a delictual character because, on the one hand, the State is liable for such wrongful actions on the part of the de facto governmental authorities as the cancellation of concessions, and, on the other, it is not liable for contracts for the supply of arms to the revolutionary government, although this is no less legitimate an exercise of governmental authority than the purchase of school desks or stationery’); Brown, supra n. 12, at 630 (‘Even the acts of local de facto governments in the exercise of the normal functions of civil administration – with reasonable limitations and exceptions – are to be considered valid’).

45 Borchard, supra n. 6, at 344 (footnote omitted). An example of this ‘general rule’, and an exception to it, can be found in the U.S. Supreme Court jurisprudence arising out of the U.S. Civil War. In Williams v. Brufty, the plaintiffs alleged that Brufty owed them money for goods they had sold him; he countered that the debt had been confiscated and extinguished by the Confederate government because the plaintiffs were citizens of the Union. See 96 U.S. 176, 177–178 (1877). The Supreme Court rejected Brufty’s argument because it considered the Confederacy to have amounted to no more than a local de facto government. As such, ‘[t]he validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.’ Id. at 186. In the Steamship case, by contrast, the U.S. Supreme Court, while ‘not intend[ing] to impugn the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases’, nevertheless upheld the contract at issue on equitable grounds. New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 395 (1874). There, the military government established in New Orleans by the federal authorities had entered into a ten-year lease with the Steamship Company, whereby the company had exclusive use of a certain section of the waterfront, on the condition that it pay rent, build certain improvements, and turn the land and improvements over to the city in good condition upon the termination of the lease. The company had complied with the terms of the lease and expended significant
In this respect, a local de facto government has been analogized to a usufructuary, such that excessively onerous contracts may not be enforced against successor governments.\textsuperscript{46} A third limitation on the power of local de facto governments to create obligations binding on the State is temporal; such a government may only bind successors while it exercises effective control. This limitation appears to apply to de jure as well as de facto governments, whether general or local,\textsuperscript{37} but has particular relevance in the context of local de facto governments, which are by definition more precarious given their control over only a limited portion of the State’s territory, usually under circumstances of an active revolution. In the \textit{Trinh} case, for example, the U.S. Court of Appeals for the Sixth Circuit refused to deem binding on the successor North Vietnamese government a pledge by the South Vietnamese government to the effect that the National Bank would guarantee the return of all money legally deposited with local branches of foreign banks, because the South Vietnamese government had been on the verge of falling at the time of the declaration.\textsuperscript{48} As the Court concluded:

In so holding, we are not unmindful that, under basic principles of state succession, a promise of a former state is generally binding on the successor state. However, in these circumstances, where revolutionary forces were closing in on Saigon and the South Vietnamese government was squarely faced with its own imminent demise – a demise which became a reality only days later – we do not believe that a statement by the South Vietnamese government purporting to accept

\[\text{\textsuperscript{46}}\text{See Everett P. Wheeler, \textit{Governments De Facto}, 5 Am. J. Int’l L. 66, 70 (1911) (\textquoteleft\textquoteleft In such cases, however, the rights of the conqueror are not unlimited. He may collect taxes for the purpose of defraying the expenses of the government which he carries on, and he may take possession of and manage the domain of the nation of which he has thus become the possessor, but he is bound to conduct this as a usufructuary only, and has not the right of an absolute owner.\textquoteright\textquoteright)}. Wheeler provides as an example the Prussian occupation of certain portions of France, during which the Germans sold a large amount of timber from public lands. After the peace treaty was signed, the French government refused to permit the German vendee to cut any more timber, arguing that the terms of the sale \textquoteleft far exceeded the right of \textquoteleft the German government\textquoteright\ as a usufructuary, and that the force of the transfer was spent when the possession terminated. Id. The German government acquiesced to France’s position.\textsuperscript{47}

\[\text{\textsuperscript{47}}\text{See, e.g., Lauterpacht, supra n. 10, at 822 & n. 11 (\textquoteleft\textquoteleft So long as the revolution has not been fully successful and so long as the lawful government, however adversely affected by the fortunes of the civil war, remains within national territory and asserts its authority, it is presumed to represent the State as a whole. . . . But, as in other matters, so also in this case good faith prescribes limits to the operation of a general rule. Thus it is doubtful whether political or commercial treaties of a far-reaching character may properly be concluded with a government thus situated. There is force in the contention that, notwithstanding the general rule as to the continuity of the State, the successful revolutionary government would not be bound by such treaties concluded \textit{durante belli} as being \textit{in fraudem} of the general interests of the nation\textquoteright\).}\]
In reaching this decision, the Sixth Circuit emulated Chief Justice Taft in his resolution of the famous Tinoco Claims over half a century earlier. Those claims arose out of the Tinoco regime, which came into power in Costa Rica by revolution in 1917 and controlled the State for almost three years. One of the claimants, the Royal Bank of Canada, asserted that a substantial sum had been deposited by the Tinoco regime, that the Government of Costa Rica then drew against this account for governmental purposes, but that the succeeding government had improperly refused to repay the loan. Noting that ‘the whole transaction here was full of irregularities’, Taft denied any liability on the part of the successor government. The money involved had been deposited with the Royal Bank a mere month before the ‘retirement’ of Frederico Tinoco, the president, and his brother José, and in a denomination not previously in circulation in Costa Rica. By the time the loan was made, it was clear that the Tinoco regime was crumbling and that Tinoco no longer had the authority to act for the State. Moreover, the money was paid to Frederico Tinoco ‘for expenses of representation of the Chief of State in his approaching trip abroad’ and to José Tinoco ‘as Minister of Costa Rica to Italy for four years’ salary and expenses of the Legation of Costa Rica in Italy. Taft considered these justifications patently implausible and concluded that the Bank should have realized that it was providing the Tinocos money for essentially personal purposes, for which the subsequent government could have no liability:

The case of the Royal Bank depends not on the mere form of the transaction but upon the good faith of the bank in the payment of money for the real use of the Costa Rican Government under the Tinoco régime. It must make out its case of actual furnishing of money to the government for

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49 850 F.2d at 1166 (citations omitted).
50 Accordingly, Taft determined that the Tinoco regime constituted a general de facto (and after recognition by various other States, de jure) government. See Tinoco Claims, 1 R.I.A.A. at 390. Taft articulated the test of a general de facto government as whether the revolutionary government has ‘really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place... [and whether] it [is] discharging its functions as a government usually does, respected within its own jurisdiction.’ Id. at 382.
51 See 1 R.I.A.A. at 389. The Aguilar-Amory claim concerned the allegedly improper nullification of the claimant’s concession agreement to explore for and exploit oil deposits in Costa Rica. See id. at 376. Taft rejected the claim on the ground that the concession had not been granted in conformity with then-existing law. See id. at 397–398.
52 1 R.I.A.A. at 394.
53 See 1 R.I.A.A. at 388. Indeed, the Royal Bank agreed not to put the bills into circulation in recognition that ‘the circulation of such irregularly prepared bills might produce confusion.’ id. at 388-89, and Taft noted that the bills ‘were most informal and did not comply with the requirements of law as to their form, their signature or their registration.’ Id. at 394.
54 See 1 R.I.A.A. at 393 (‘It became perfectly clear from the mob violence and disturbances in June and the evidences of unpopularity of the Tinoco régime, that it was in a critical condition, and an agent of the Royal Bank testifies that the retirement of the Tinocos “was known as a positive thing about to take place” [when the loans in question were made].’).
55 1 R.I.A.A. at 393–394 (quotation marks omitted).
its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose. . . . It must have known that Jose Joaquin Tinoco in the fall of his brother’s government, which was pending, could not expect to represent the Costa Rican Government as its Minister to Italy for four years, that the reasons given for the payment of the money were a mere pretense, and that it was only, as in the case of his brother Frederico, an abstraction of the money from the public treasury to support a refugee abroad.56

As a result, Taft rejected the claim.57

A final consideration worth noting is a limitation not on de facto governments so much as on would-be claimants: tribunals have historically refused to enforce contracts entered into in violation of the claimant’s home State’s domestic law.58 In the Jarvis Case, for example, the claimants were heirs of a U.S. national who had rendered aid to General Páez in the latter’s attempt in 1849 to overthrow the government of Venezuela. Although initially unsuccessful, Páez managed to become the head of State over a decade later, at which point he issued to Jarvis the bonds in question, totalling $81,000, in recognition of the services Jarvis had rendered.59 When the subsequent Venezuelan government refused to pay the bonds, the heirs brought a claim before the U.S.-Venezuela Mixed Claims Commission.60 The Commission, however, rejected the claim on the ground that Jarvis had violated U.S. law, specifically the treaty of amity between the United States and Venezuela, in rendering aid to Páez.61 Although treaties of amity are no longer en vogue, these precedents could, for example, be relevant to the extent a claimant has invested in a host State in violation of its home State’s sanctions regime.

56 1 R.I.A.A. at 394.
57 José Tinoco was later killed in a riot, and Costa Rica then sued his estate for the half of the Royal Bank loan that had been paid out to him. Tinoco’s widow settled the suit by transferring to the government a mortgage for the full value of the claim. Because “[t]he Government of Costa Rica in repudiating any obligation to the Royal Bank for paying $100,000 to Jose Joaquin Tinoco, of course, deprived itself of any just claim to real ownership of the mortgage upon his estates for that amount,” Taft ex aequo et bono ordered Costa Rica to transfer its interest in the mortgage to the Royal Bank. See 1 R.I.A.A. at 394–395.
58 See, e.g., Brannan Case (U.S.-Mex. Claims Comm’n), Opinion of the Umpire, in 3 Moore, History & Digest, 2757–2758 (“[T]here can be no doubt that the enlistment, equipment, and transportation of troops to Mexico for service in the Mexican army were violations not only of neutrality but of the laws of the United States. The umpire can not believe that this international commission is justified in countenancing a claim founded upon the contempt and infraction of the laws of one of the nations concerned.”); Raborg Case (U.S.-Peru Claims Comm’n), Opinion of the Commission, in 2 Moore, History & Digest, 1614 (disallowing the U.S. claimant’s claim under a contract with the Vivanco revolutionary authorities on the ground that the contract was void because entered into in violation of the U.S.-Peru Treaty of Amity); De Waal v. Houtwijk, (1824) 130 Eng. Rep. 326, 326 (C.P.) (rejecting the plaintiff’s suit in part on the ground that ‘it was contrary to the law of nations (which in all cases of international law is adopted into the municipal code of every civilized country), for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government, and that no right of action could arise out of such a transaction’);
60 Jarvis Case, supra n. 59, at 146.
61 Jarvis Case, supra n. 59, at 150 ("The opportune service rendered by Jarvis in 1849 in violation of law created no legal obligation on the part of Páez, much less on the part of the Government of Venezuela.").
Consideration of historical examples of revolutionary regimes is helpful in discerning factors that may be applied more generally in determining when a revolutionary movement has succeeded in establishing effective control so as to become a local or general de facto government. As will be seen, these factors include the ability of the regime to control the State’s territory (whether a portion of that territory in the case of a local de facto government or all or virtually all of the territory in the case of a general de facto government); the lack of significant resistance to the regime; the ability of the regime to govern effectively without the support or intervention of other States; whether the regime has succeeded in reviving the machinery of State or put in place a new structure, such as by appointing ministers and providing basic services for the populace; and whether the regime generally appears to be stable, with a reasonable prospect of remaining in control of the State. As noted above, recognition by other States is not determinative, but inasmuch as recognition represents those States’ considered opinion regarding the effectiveness and stability of the revolutionary regime, it can be a helpful indicator that a local or general de facto government has succeeded in establishing itself.

(i) Sicily (1848)

In King of Two Sicilies v. Willcox, the English Court of Chancery described in some detail the accomplishments of a revolutionary movement that succeeded in gaining control of Sicily in early 1848 and governed until it fell in April 1849. As the Court recounted, the revolutionary forces were able to take control of ‘all the towns, castles and fortresses in the island except the citadel of Messina, which was impregnable, and defeated all the Plaintiff’s troops and garrisons in Sicily, except a few troops who took refuge in the citadel of Messina.’ Having taken possession of virtually the entirety of the island, the revolutionaries then established a provisional government, which summoned the general Parliament of Sicily. That Parliament in turn issued a decree in April 1848, declaring that the King had forfeited the throne of Sicily and that Sicily adopted a constitutional form of
By a subsequent decree, the president "appointed a minister of foreign affairs and commerce, a minister of war and marine, a minister of finance, a minister of worship and justice, a minister of the interior and public safety, and a minister of public instruction and public works." In light of these accomplishments, both France and the United Kingdom recognized the constitutional government, with the latter accepting envoys from Sicily as well.

(ii) Syria and Lebanon (1942)

France had a U.N. mandate to govern Syria and Lebanon after World War I. "Free French" officials affiliated with General Charles de Gaulle and led by General Georges Catroux took over the administration of the territories during World War II while simultaneously proclaiming Syria and Lebanon’s independence. French officials appointed a president of Lebanon and elections were held in August 1943. Once the Chamber of Deputies had been constituted, the Chamber chose a new president, who formed a Cabinet. The new, nationalist government then laid out its proposed reforms, which "promised extensive and sweeping reforms in the administration of the Government, in the transformation of the form of the Government from a mandatory into an independent and self-governing institution, economic and social reforms, hygienic and cultural development." Acting on its understanding that the French mandate had ended, the new Lebanese government proceeded to act independently with respect to matters strictly local in character. When, however, the Lebanese government passed legislation officially eliminating the need for consultation with or approval by the mandatory power, the local French representative stated that the territories could not be considered independent until the United Nations formally terminated the mandate, ordered the arrest of all government members who had voted for the legislation, dissolved the government, and invited a former prime minister to create a new government. Under strong international protest, the original government was later restored.

Despite the restoration of the nationalist Lebanese government, the United States decided not to recognize the new regimes in Syria and Lebanon in light of the fact that French officials had "refused to surrender any significant authority" to those governments and "the Governments which have been set up in Beirut and Damascus have been hand-picked by the Free French, and would doubtless be

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69 See Khadduri, supra n. 68, at 607–608.
70 Khadduri, supra n. 68, at 608.
71 See Khadduri, supra n. 68, at 611–612.
72 See Khadduri, supra n. 68, at 613–614.
unable to maintain their positions without foreign support. The State Department further noted that

[j]n practice General Catroux and other local authorities in the Levant States appear to be conducting themselves as though the mandate were continuing in force almost unimpaired, to the displeasure and disillusionment of Syrian and Lebanese leaders. The Bureau Diplomatique of the Free French Délégation Générale still exists, and is the practical office through which the Consul General in Beirut must continue to function to secure effective action.

As the State Department concluded: 'It could not, therefore, be said that either the Syrian or the Lebanese Government is "in possession of the machinery of the state" or "in a position to fulfill all the international obligations and responsibilities incumbent upon a sovereign state." 

(iii) Croatia (1941–45)

After World War II, the United States and Yugoslavia entered into the U.S.-Yugoslavia Claims Settlement Agreement of 19 July 1948, which provided for 'the full settlement and discharge of all claims of nationals of the United States against the Government of Yugoslavia on account of the nationalization and other taking by Yugoslavia of property which occurred between September 1, 1939 and the date hereof.' Socony Vacuum Oil Co., a U.S. corporation, then brought a claim for approximately $11,325,000 in damages resulting from the confiscation of its property in Yugoslavia by the Independent State of Croatia at some point between 1941 and 1945. The key issue was thus whether a taking by the Independent State of Croatia could be considered a taking 'by Yugoslavia' for purposes of the Claims Settlement Agreement. Socony put forward various arguments in support of its claim, including the arguments that the government of Yugoslavia should be considered a successor government to that of Croatia and that Yugoslavia should be responsible for the taking because at the time, it had de facto control over a large part of Yugoslavia, including Croatia.

During the upheaval of World War II, a Croat political dissident, Ante Pavelic, proclaimed an independent Croat State, and on 17 April 1941, he formed his own government. Shortly thereafter, the Croat Cabinet of Ministers issued a decree

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73 2 Whiteman, U.S. Digest, Ch. III, § 4, at 76 (quotation marks omitted).
74 2 Whiteman, U.S. Digest, Ch. III, § 4, at 77 (quotation marks omitted).
75 2 Whiteman, U.S. Digest, Ch. III, § 4, at 77. Questions also arose as to the willingness of the would-be Syrian and Lebanese governments to recognize all of the United States’ existing treaty rights, ‘particularly the fiscal immunities granted to American philanthropic, educational, and religious institutions’. Id. at 79. The United States ultimately recognized the independence of Syria and Lebanon on September 19, 1944. See Khadduri, supra n. 68, at 615 n. 43.
77 See 1954 I.L.R. at 55.
78 See 1954 I.L.R. at 56.
79 See 1954 I.L.R. at 55.
80 See 1954 I.L.R. at 57.
establishing a Kingdom of Croatia. From that point until Italy’s surrender in September 1943, ‘Italy actively participated in the affairs of Croatia although its civil administration was carried out primarily by Croatians.’ After Italy’s surrender, Germany stepped in and took over the supervision of Croatian affairs. When German troops retreated from the territory in May 1945, Pavelic fled with them and the Independent State of Croatia ceased to exist. Over the course of 1944, a substantial part of Croatia had been wrested from foreign control by local rebels, who were recognized by the Government-in-Exile as being in de facto control and with whom the Government-in-Exile came to a compromise that ultimately resulted in the creation of the Federal People’s Republic of Yugoslavia after the war. That government then nullified by decree all legal provisions ‘enacted by the occupiers and their helpers’ and ordered all property taken during the occupation returned to the original owners.

The Commission determined that Croatia could not be considered a State to which Yugoslavia could have succeeded. In reaching this decision, the Commission emphasized Croatia’s lack of actual independence and characterized it as a ‘puppet state’:

Croatia embraced approximately one-third of the total area of Yugoslavia and approximately one-third of its population. At all times during the period of its existence as a so-called independent state, forces headed by Mihalovic and Tito conducted organized resistance within it. At no time during its 4-year life was Croatia’s control of its territory and population complete. It was created by German and Italian forces and was maintained by force and the threat of force and as soon as the threat subsided Croatia ceased to exist.

On similar grounds, the Commission rejected Socony’s argument that the current government of Yugoslavia should be considered a successor to the Croatian government.

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1954 I.L.R. at 57 (quotation marks omitted).
See 1954 I.L.R. at 57.
See 1954 I.L.R. at 57–58.
1954 I.L.R. at 59 (quotation marks omitted).
See 1954 I.L.R. at 59.
See 1954 I.L.R. at 58, 60.
See 1954 I.L.R. at 62 ('Claimant contends that the present Government of Yugoslavia is a “successor” to the Government of Croatia and as such is liable for the acts of its predecessor government under the familiar and generally accepted principle of international law that successor governments are liable for the acts of their predecessors, such as the taking of property of foreign nationals. We are in complete agreement with claimant’s position as to the liability of successor governments but find no basis for application of the principle to the instant question because we are of the opinion, for the reasons heretofore given, that the Government of Yugoslavia is not factually or legally a successor to the Government of Croatia') (quotation marks omitted). The fact that the government of Yugoslavia ‘could perform certain legal acts by virtue of its de facto control over territory and because private parties could perform valid acts during its control’ was similarly rejected as a basis for holding Yugoslavia liable for takings by Croatia. See id. (quotation marks omitted).
As an alternative basis for its holding, the Commission considered the effect of Croatia’s acts as those of a local de facto government. The Commission noted that “[n]o case has been cited in argument, and we think none can be found, in which the acts of a portion of a state unsuccessfully attempting to establish a separate revolutionary government have been sustained as a matter of legal right.” Although the Commission recognized that “a local de facto government can, of course, perform valid acts pertaining to the civil administration of the occupied territory such as the collection of taxes, seize property belonging to the state, receive money owed the state, etc.;” the Commission was concerned here only with invalid acts, such as the use of and damage to foreign owned property, for which the State could not be held liable.

III. THE ‘ARAB SPRING’ AND INTERNATIONAL INVESTMENT ARBITRATION

(a) A Region in Flux

Conditions in the Middle East are changing rapidly, making a definitive analysis of the status of the (would-be) governing regime in any particular country challenging. That said, an examination with respect to a few States of the facts available as of the date of publication can provide a basis for discussion, and the arbitral jurisprudence and historical examples described above suggest certain considerations investors may wish to keep in mind under similar circumstances.

(i) Syria: A Regime on the Verge of Collapse

Civil unrest in Syria began in March 2011, triggered by protests in Dara’a, a small southern city, against the torture of students who had put up anti-government graffiti. Although there were initially hopes that the protests might lead to government reform, President Bashar al-Assad instead responded with a severe
crackdown that the United Nations estimated had left more than 5,000 dead and 14,000 detained by the end of that year. International criticism followed, including U.S. and EU sanctions on the president and various other government officials and a condemnation by the U.N. Security Council of the ‘widespread violations of human rights and the use of force against civilians by the Syrian authorities.’ Syrian opposition leaders announced the formation of an elected opposition council in mid-September, intended to support the uprising and facilitate unified communication with the international community.

Divisions both international and internal to the revolutionary movement, however, have complicated efforts to remove President Assad from power. In particular, Russia, backed by China, has used its veto power on the U.N. Security Council to block any call for President Assad to step down; instead, the Security Council issued a ‘presidential statement’ in late March 2012 in which it expressed its ‘gravest concern at the deteriorating situation in Syria, which has resulted in a serious human rights crisis and a deplorable humanitarian situation.’ The Security Council also expressed its support for a plan offered by Kofi Annan, serving as a joint U.N.-Arab League envoy, that aimed at the ultimate creation of a democratic government in Syria. President Assad, however, had already rejected efforts earlier that month by Mr Annan to encourage the resolution of the conflict through negotiations with the opposition. Moreover, despite President Assad’s formal acceptance of a proposed ceasefire in late March 2012 and his
establishment of April 10 as the deadline for the withdrawal of troops from in and around major population centres, the security forces remained firmly in place as of that date. The ceasefire that was to follow the withdrawal began on schedule, but was subject to increasingly frequent violations. In response, the United States and Turkey announced plans in March 2012 to begin providing not only humanitarian aid but also ‘non-lethal’ assistance, such as communications equipment and medical supplies, to the rebel groups. Both of those countries, in addition to several others (including members of the Arab League), closed their embassies in Syria in protest of the continued assaults by government forces on civilians. Parliamentary elections held in early May 2012 were heralded by the Assad regime as an indication of democratic progress but were widely mocked and boycotted by the public, and Mr. Annan recognized at the same time the continuing ‘serious violations’ of the ceasefire by the government. The massacre of over a hundred villagers by pro-government forces in late May resulted in widespread protests and the expulsion of top Syrian diplomats by the United States and ten other nations. Although the Security Council had previously approved a contingent of military observers to monitor the conditions of the ceasefire, the United Nations announced in mid-June 2012 that it was suspending the mission as a result of the increasing violence, which included several attacks on the observers themselves by pro-government forces.

103 See Anne Barnard, U.S. and Turkey to Step Up “Nonlethal” Aid to Rebel Groups in Syria, N.Y. Times, Mar. 26, 2012, at A4; see also Steven Lee Myers, U.S. Joins Effort to Equip and Pay Rebels in Syria, N.Y. Times, Apr. 2, 2012, at A1 (reporting that a group of Arab countries, including Saudi Arabia, Qatar, and the United Arab Emirates, had offered $100 million to the Syrian Free Army to cover salaries for the fighters and encourage government soldiers to defect).
108 See Neil MacFarquhar, supra n. 102.
Turning to the resistance, the Syrian National Council, the primary exile opposition group, has suffered from significant internal divisions, which resulted in the resignation of several prominent members and sparked fears that it would be unable to create a single opposition military command under its control.\textsuperscript{110} Many of the rebels inside the country have joined a loose federation called the Free Syrian Army, but the connection between the Syrian National Council and the Free Syrian Army is tenuous at best.\textsuperscript{111} Given the predominance of the Alawite (Shiite) sect in the government and the fact that the majority of the population is Sunni, the risk that the already volatile situation will explode into an all-out sectarian civil war cannot be ignored.\textsuperscript{112} The influx of heavier weapons, including attack helicopters and anti-tank missiles, both to the government and to the rebel forces suggests that such an escalation may be inevitable; June 2012 appears to have been the deadliest month so far in the year-and-a-half-long conflict, with almost 1,800 civilians killed.\textsuperscript{113} A group of nine States convened in Geneva by Mr. Annan to consider possible means to end the crisis was unable to agree on a transition plan that called for President Assad’s ouster, but did reach consensus in calling for the formation of a national unity government that would oversee the drafting of a new constitution and elections.\textsuperscript{114} Given the similarities between this plan and the previous plan underlying the ceasefire, however, which was largely ignored on the ground, it is unclear whether the agreement will truly provide a roadmap for a peaceful transition.\textsuperscript{115} The ability of the opposition forces to create a unified movement capable of transitioning into a general government is also unclear.\textsuperscript{116} These questions have taken on new urgency in light of the Red Cross’ classification of the conflict as a civil war in mid-July 2012\textsuperscript{117} and the intensification of the fighting, including a deadly bombing by rebel forces, also in July, that killed three members of President Assad’s inner circle.\textsuperscript{118} It is, therefore, unclear at this point what the outcome in Syria will be, but assuming President

\textsuperscript{110} See Barnard, supra n. 96.
\textsuperscript{111} See Barnard, supra n. 96; C.J. Chivers, Fresh from Syria, Commanders of Rebels Unite in Frustration, N.Y. Times, July 14, 2012, at A1 (describing a meeting of various rebel commanders that was often heated but that revealed a common distrust of the Syrian National Council).
\textsuperscript{116} See MacFarquhar & Saad, supra n. 96 (reporting that the opposition groups had succeeded in drafting a transition plan and the outlines of a new constitution, but only after two days of querulous, and occasionally violent, negotiations).
\textsuperscript{118} See David D. Kirkpatrick & Kareem Fahim, Blast Strips Assad of a Valuable Family Member and a Pair of Powerful Loyalists, N.Y. Times, July 19, 2012, at A13.
Assad loses control over at least some portion of the Syrian territory,119 there is a real possibility of a local de facto government, or governments, developing.

(ii) Libya: Obstacles on the Path of Transition

After a sustained campaign, rebel forces succeeded in ousting Colonel Muammar al-Qaddafi, who was killed on 20 October 2011, and declared the liberation of Libya.120 The revolutionaries had already established the Transitional National Council (TNC), which by September 2011 had been recognized by some 70 nations as the legitimate interim government of Libya and had been accepted as Libya’s representative by the United Nations.121 As early as February 2011, the TNC had laid out a program intended to create a new, representative government within 18 months of liberation, according to which a geographically representative assembly would elect a group to write a new constitution and name a transitional government. The draft constitution would then be put to a referendum, followed by elections for a new parliament and government.122 The TNC received significant international support; in addition to military assistance during the revolution, recognition as the new government of Libya, and the release of billions of dollars in blocked Libyan funds to the TNC, representatives of approximately 60 States met with the TNC in Paris in September 2011 to assist the transitional government in restoring stability.123

Although the TNC thus appeared to have established itself as a general de facto government (if concededly also a government in transition), the TNC nevertheless continued to face obstacles to full control over certain areas of dissent.124 For example, many local militia leaders abandoned their prior pledge to give up their weapons and stated an intention to ‘preserve their autonomy and influence

123 See Erlanger, supra n. 121. During the conference, the TNC announced that as part of the economic reconstruction of the country, it would honour existing energy concession contracts and favour in future deals States that had aided the revolution. See id. The U.N. Security Council also ordered the release of more than $40 billion in frozen bank accounts to help the TNC rebuild Libya. See Associated Press, U.N. Orders Libyan Assets Unfrozen, N.Y. Times, Dec. 17, 2011, at A7.
124 Libya also highlights the continuing political nature of the recognition process; it is almost certain that the TNC did not qualify as a general de facto government when the United States (and various other States) recognized the regime in mid-July 2011. Thus, although recognition can be helpful in establishing whether a revolutionary movement qualifies as a government, it is clearly not determinative (whether from an objective or judicial perspective).
political decisions as “guardians of the revolution.” There were reports of internecine fighting among militia groups. One militia group, which held one of Col. Qaddafi’s sons prisoner, was able to force the interim prime minister to appoint its commander as the new defence minister. Although the TNC ordered the militias to leave Tripoli by the end of December 2011, they lacked the moral authority, or military power, to require them to do so. Indeed, representatives of approximately 100 militias in the western part of the country announced a new federation allegedly intended to prevent “an attempt to hijack the revolution.” The Chairman of the TNC himself has recognized the risk that civil war could result from a failure to rein in the various militia groups.

The ability of the TNC to solidify its control and ensure the stable transition to a permanent representative government was further tested in the lead-up to recent elections. Tribal chiefs and militia leaders from eastern Libya banded together to demand their own autonomous government and a loose federal structure. Militias continued to engage in armed confrontations on the streets of Tripoli, detained and tortured suspected Qaddafi loyalists, and even kidnapped two members of the TNC for two days. Libya’s interim prime minister’s offices were attacked by truckloads of armed men, believed to be militiamen from the mountains outside Tripoli. Various militia leaders sought to enter politics, raising fears that they might use their firepower to improperly influence the

125 David D. Kirkpatrick, In Libya, Fighting May Outlast the Revolution, N.Y. Times, Nov. 2, 2011, at A4; accord id. (‘Noting reports of sporadic clashes between militias as well as vigilante revenge killings, many civilian leaders, along with some fighters, say the militias’ shift from merely dragging their feet about surrendering weapons to actively asserting a continuing political role poses a stark challenge to the council’s fragile authority.’).

126 See Kirkpatrick, supra n. 125; C.J. Chivers & Clifford Krauss, At Least Six Are Killed as Libyan Militias Clash on Coastal Highway near Tripoli, N.Y. Times, Nov. 14, 2011, at A12 (‘The uprising to overthrow the Qaddafi family held many of these disparate groups together. Now that the common enemy is vanquished, though, competition for turf, resources and power threatens to pull some of the groups into persistent conflict, as do allegations that some of the armed groups have suspect pasts. The risks appear to be intensified by the weakness of the transitional government, which has yet to appoint important ministers or to wield strong influence, much less control, over the militias.’).


132 See David D. Kirkpatrick, Abduction and Hotel Attack Spotlight Libya’s Disorder, N.Y. Times, Mar. 26, 2012, at A8 (‘The abduction and the hotel attack are new blows to the public prestige of the council, once a symbol of hope for the revolt against Col. Muammar el-Qaddafi. Since his ouster, the council has been criticized for failing to control the freewheeling militias that sprang up as the government collapsed. Brigades from Zintan and Misurata are still a major presence in the capital.’); David D. Kirkpatrick, Libyan Militias Turn to Politics, a Volatile Mix, N.Y. Times, Apr. 3, 2012, at A1 [hereinafter Kirkpatrick, Libyan Militias] (‘Without a national army or police force, though, many civilians worry that the militias could bully voters, suppress votes or otherwise dominate the process, leaving Libya mired in internecine violence, torn by regional tensions or – as a recent poll suggests many Libyans may now expect – vulnerable to the rise of a new strongman.’).

133 See David D. Kirkpatrick, Offices of Premier Attacked in Libya, N.Y. Times, May 9, 2012, at A5.
These concerns ultimately led the TNC to postpone from June 19 to July 7 the elections intended to select a national assembly to govern while drafting a new constitution. Despite setbacks such as the sacking of election commission offices in eastern Libya, however, the voting process went surprisingly smoothly. A coalition led by Mahmoud Jibril, the former interim prime minister and a Western-educated political scientist, won a majority, and the interim national assembly took power from the TNC on 8 August 2012, in the first peaceful transition in Libya’s modern history. It remains to be seen whether the new government will succeed in unifying the country or whether Libya will devolve into fiefdoms ruled by militia leaders as local de facto governments.

(iii) Egypt: A Post-Revolutionary Regime in Peril

The revolution in Egypt, which began on 25 January 2011, ended after a mere 18 days of protests with the ouster of long-time dictator Hosni Mubarak. The military then took control of the country, establishing a six-month timetable in which to draft constitutional amendments, submit them to a referendum, and elect a new government. The military shortly thereafter convened a panel of jurists to revise the Egyptian constitution in line with the goals of the revolution. The caretaker government that was later established also sought to reassure the public that the transition to full civilian rule would be rapid. A referendum passed by popular vote in March 2011 included the necessary constitutional amendments, and the military council stated that a presidential election would be held by November 2011.

Unfortunately, the apparently orderly transition to an elected civilian government did not last, and protests again erupted amid concerns that the military intended to remain in power indefinitely. These fears were substantiated by the military’s efforts to adopt a ‘declaration of basic principles’
prior to any election or constitutional referendum that would expand the military’s powers at the expense of future elected government officials. As protests against the military government developed, so did counter-protests, with encounters occasionally ending in violence and culminating in the military’s forcible evacuation of protesters from Tahrir Square in August 2011. A month later, tens of thousands of protesters returned, resulting in a riot that left almost 500 people injured. Although the military sought to ease tensions by pushing back the timeline for presidential elections, permitting foreign elections observers, and relinquishing any intention of unilaterally inserting provisions into the constitution, a subsequent protest by Coptic Christians over a recent attack on a church erupted in a violent conflagration involving Copts, Muslims, the military, and riot police. Members of different religious groups had previously clashed violently, on some occasions leaving hundreds injured and raising the spectre of long-term sectarian violence. The riots and armed skirmishes have only been aggravated by the widespread failure of policing that has resulted in a general increase in crime. A wave of renewed protests, resulting in a days-long struggle between protesters and the military in Tahrir Square, raised questions regarding the efficacy of the military council.

Parliamentary elections held in late 2011/early 2012, while not without problems, enjoyed a strong turnout. The Muslim Brotherhood took almost half the seats in the new government, and an ultraconservative Islamist bloc won another 25%. Initially, the Muslim Brotherhood announced that they were largely in accord with the ruling military council on the broad outlines of the new

151 See David D. Kirkpatrick, Sectarian Clash in Egypt Kills a Dozen and Leaves 2 Churches in Flames, N.Y. Times, May 9, 2011, at A10.
156 See David D. Kirkpatrick, Amid New Clashes in Cairo, Civilian Advisory Council Suspends Its Work, N.Y. Times, Dec. 17, 2011, at A11 (noting violence surrounding the second round of parliamentary elections and the decision of a new civilian advisory council established by the military to suspend its operations in protest over the military’s assault on peaceful protestors).
charter, but after renewed protests against military rule in late January and early February 2012, the Muslim Brotherhood called for the military council to hand power over to a newly formed coalition government immediately. Tensions between the military council and the Muslim Brotherhood have continued to simmer, exacerbated by the latter’s decision to nominate one of its members as a presidential candidate. This move, a violation of a prior promise by the Muslim Brotherhood, may have been intended to ensure control over the drafting of the new constitution, which had been delayed until after the upcoming presidential elections. The decision of the presidential election commission confirming the disqualification on technical grounds of three leading nominees, including the Muslim Brotherhood’s original candidate, reignited fears that the military council intended to control the election process in a manner calculated to preserve its own power and led to massive protests in Tahrir Square. The elections on 23 May 2012, which were largely peaceful and orderly, resulted in a runoff between Mohamed Morsi, the Muslim Brotherhood’s replacement candidate, and Ahmed Shafik, a former air force general and President Mubarak’s final prime minister. Just two days before the scheduled election, however, a panel of judges issued a ruling that dissolved the popularly elected Parliament in a surprising move widely seen as an attempt by the secular elite to forestall an Islamist-controlled government. The military council then went on to issue an interim constitution that granted itself broad powers, as well as seizing control of the process of writing a permanent constitution. After a delay of a week, the military recognized Mr. Morsi as Egypt’s new president, which, however, did little

159 See David D. Kirkpatrick, Clashes Continue in Aftermath of Egypt Soccer Riot, and More Are Said to Die, N.Y. Times, Feb. 5, 2012, at A12 (describing days-long violent protests that erupted in Cairo due to the police’s failure to prevent a deadly riot at a soccer match); David D. Kirkpatrick, Egypt’s Military Seeks Advice on Early Handing of Power to Civilians, N.Y. Times, Jan. 30, 2012, at A6 (noting renewed protests against the ruling military council).
165 See Liam Stack, Egyptians Worried over Election Fill Square, but Unity Is Elusive, N.Y. Times, Apr. 21, 2012, at A6; Kareem Fahim & Mayy El Sheik, Deadly Clashes in Egypt Throe the Presidential Race into Disorder, N.Y. Times, May 3, 2012, at A5 (“The confusing, lethal episode has widened a rift between Egypt’s military rulers and protesters who are pushing for a speedy transition to a civilian government, with the protesters convinced that their assailants were in the employ – or at least doing the bidding – of the military.”).
to clarify the status of the office going forward or its relationship to the military.\textsuperscript{170} The uncertainty only deepened as Mr. Morsi sought to recall the dissolved Parliament,\textsuperscript{171} only to be quickly rebuffed by the constitutional court, which reaffirmed its earlier ruling as final and binding.\textsuperscript{172} The Parliament nevertheless met briefly to approve the referral of the matter of the Parliament’s dissolution to the Court of Cassation.\textsuperscript{173} In early August 2012, Mr. Morsi forced the retirement of several high-ranking military officials, including the defence minister and the army chief of staff, and nullified the military’s pre-election constitutional declaration that had severely hobbled the presidency.\textsuperscript{174} The response from the military remains to be seen. The central question going forward, then, appears to be whether and how the Muslim Brotherhood, as embodied in the president and the Parliament, will be able to come to an accord with the military regarding a transfer of power.

\textbf{(b) Implications for International Investors}

Taking these three States as exemplars, they represent a spectrum of possible scenarios, from a recognized government teetering on the verge of collapse to a transitional revolutionary regime attempting to rein in unruly local militias to a newly established government seeking to wrest control from an interim caretaker regime. This section addresses issues that may arise with respect to business dealings with a revolutionary or post-revolutionary government and with respect to international investment arbitration, assuming a dispute arises out of a foreign investment in a State governed by such a regime.

\textbf{(i) Business Dealings with Revolutionary Regimes}

In the case of a general government, whether de jure or de facto, an investor may be confident in the ability of the government to bind its successors. Accordingly, a future government may not claim that taxes, customs duties, or sums due under a concession agreement that have already been paid to the prior government must be paid again, nor may the future government seek to avoid contractual obligations entered into by the prior government.\textsuperscript{175} The one exception, discussed above, is when the government is on the verge of falling and enters into obligations for the personal benefit of outgoing officials or otherwise in prejudice of a future government’s rights.\textsuperscript{176} This exception could be of relevance in the case of Syria, for example, should the Assad regime eventually topple. Any contract entered into or renegotiated in the period shortly before the fall of the government could be

\textsuperscript{175} See supra section 2.
\textsuperscript{176} See supra section 2.2 (discussing the \textit{Trinh} case and the \textit{Tinoco} Claims).
subject to examination by an arbitral tribunal should the post-revolutionary government refuse to honour the agreement. A similar fate may befall such contracts in the cases of Libya and Egypt, depending on the approach taken by the new regime. Arbitral jurisprudence suggests that an investor’s ability to demonstrate that the contract was part of a normal course of business and did not personally benefit any officials of the prior regime may be essential to the tribunal’s determination.

Given the speed with which a caretaker government was established in Egypt, it seems unlikely that any local de facto governments existed. In Libya, the rebels may have succeeded in establishing a local de facto government in various regions, but the fact that the revolutionaries were fighting under the banner of the TNC and joined together in the creation of a provisional government suggests that any obligations undertaken by a local de facto government will be honoured by the future general government. Should Syria devolve into a protracted civil war, however, there may be a risk that local de facto governments of some duration will evolve, raising the question of whether those governments’ obligations will bind any future general government. As discussed in Part 2, the extent of the authority of a local de facto government is in many respects ambiguous. Generally speaking, such governments may accept taxes, customs duties, or other payments due to the State with respect to the territory under their control, and a future general government may not require their payment a second time. Some jurisprudence suggests that they may also wield the authority of the State with respect to contracts concerning State property within their control, but this right is far from certain and investors should approach contract (re)negotiations with a local de facto government with great caution.

(ii) International Arbitration: Jurisdictional Implications

Assuming a dispute arises with respect to a foreign investment in a State governed by a revolutionary regime, an additional set of considerations may become relevant. If there is a bilateral investment treaty in force, for example, a question may arise as to the implications of a finding by an arbitral tribunal that the regime purporting to represent the State does not in fact constitute an effective government for purposes of international law. With respect to jurisdiction, at least, such a finding is unlikely to be fatal to the investor’s claim.

As an initial matter, it is the State that has bound itself to comply with the obligations imposed by such a treaty and that has consented to international arbitration in the case of a dispute. A government, whether post-revolutionary or otherwise, is not free to choose which State obligations it will honour and which

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177 See, e.g., Goetz v. Republic of Burundi, ICSID Case No. ARB/95/3, Award ¶ 81 (Feb. 10, 1999) (“To the consent of the interested States – the Republic of Burundi and Belgium – resulting from their signing of the investment treaty is added that of the parties to the dispute: the consent of the Republic of Burundi derives from its ratification of the Treaty; that of the claimants derives from the lodgement of the claim for arbitration.”).
Accordingly, an investment tribunal’s jurisdiction over a State respondent will not be affected by the lack of an effective government. There may nevertheless be practical implications for the conduct of any arbitral proceedings. If the revolutionary regime has been sufficiently successful in stabilizing the country and consolidating its control so as to permit it to participate in the proceedings, it will almost certainly qualify as a general de facto government, obviating any potential jurisdictional issues. If, on the other hand, the regime is still focused on the more pressing issues of restoring public order and establishing its authority, it is unlikely that its representative will appear in the arbitration, and the tribunal may proceed on the basis of a default. The third possibility (and the least likely, it would seem) is that a government representative appears but that the effectiveness of the government somehow comes under challenge. There would be little incentive for the respondent to raise the issue, first because a finding of ineffectiveness would not dispose of the claim and second because a revolutionary regime seeking to present itself to the international community as the legitimate new government is unlikely to undermine its own position in such a fashion. The claimant might, however, seek such a ruling from the tribunal in an attempt to exclude the respondent’s representative or its pleadings, on the premise that a failure of the State to present an authorized representative should be considered a failure to appear. Yet even assuming the

178 See supra nn. 1–4 and accompanying text.
179 See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), art. 45 (“(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party’s assertions. (2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so”; ICSID Arbitration Rule 42 (detailing procedural mechanism for declaring a default and resolving the claim); 2010 UNCITRAL Arbitration Rules (UNCITRAL Rules), art. 30 (“If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause: . . . (b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant’s allegations . . . ”).
180 The UNCITRAL Rules, unlike the ICSID Convention and Arbitration Rules, do not explicitly require that the non-defaulting party request the tribunal to find a default, but it is unclear how willing a tribunal would be to make such a determination sua sponte on the ground of lack of effectiveness under circumstances in which both parties considered the government effective. See supra n. 179; see also UNCITRAL Rules art. 17(1) (“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.”); Christoph Schreuer, The ICSID Convention: A Commentary, 722 (2d ed. 2009) (“During the Convention’s drafting, it was suggested that, upon default by one party, the tribunal should proceed to adjudicate on the claim and render its award. This idea was opposed by several members of the Legal Committee, who thought that proceedings should continue only at the request of the other party.”) (citations omitted).
181 See [Redacted] v. Slovak Republic, UNCITRAL Award ¶ 61 (Mar. 5, 2011) (rejecting the claimant’s objection that, due to lack of valid representation in the proceedings since their start, the Respondent had “failed to appear at the hearing” and “failed to submit its Statement of Defence”; and as a result should be determined to be in default) (italics omitted). Regardless, under either the ICSID or the UNCITRAL regime, a claimant’s evidentiary burden is not lessened by a respondent’s default. See David D. Caron et al., The UNCITRAL Arbitration Rules: A Commentary, 716 (2006) (“Application of [Article 30] has no effect on the parties’ evidentiary burdens, although it may alter the arbitral tribunal’s general approach to gathering
tribunal found a lack of effectiveness, the result would most likely be a default proceeding (including consideration of any arguments or evidence offered by the would-be government representative), not a finding of lack of jurisdiction.\textsuperscript{182} Assuming the tribunal correctly followed the default procedures provided for under the governing arbitration rules, the mere fact of using such procedures should not provide a basis for a later annulment or set aside.\textsuperscript{183} In order to avoid these potential complications, however, an investor would be well advised to wait until the new government has established itself before initiating an arbitration, or at least as long as possible in light of any relevant limitations periods.

\textsuperscript{182} Although not explicitly based on a lack of effectiveness, various tribunals have used default procedures, modified where appropriate, when a government is unable to participate fully in an arbitration. See, e.g., Goetz v. Republic of Burundi, ICSID Case No. ARB/95/3, Award ¶¶ 56-51 (Feb. 10, 1999) (finding a default under Rule 42 for failure to comply with deadlines set by the tribunal, despite Burundi’s stated willingness to participate in the arbitration); American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award ¶¶ 4.06-4.08 (Feb. 21, 1997) (taking into consideration Zaire’s written pleadings but proceeding to a decision on the merits despite Zaire’s absence from the hearing – which Zaire explained was ‘due to the “unfortunate and disastrous” consequences triggered by the disturbances which happened to take place in the country’ – after Zaire declined the tribunal’s offer of a supplemental hearing with all costs to be borne by Zaire) (italics omitted); S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo, ICSID Case No. ARB/77/2, Award (Aug. 8, 1980) (implementing the grace period procedure envisaged by Rule 42(2) in light of repeated failures by the Congo to comply with the relevant deadlines (the result of an ongoing civil war) but making no determination of default and ultimately accepting out-of-time submissions by the government); Humppura California Energy Ltd. v. Republic of Indonesia, UNCITRAL, Interim Award (Sept. 26, 1999), reprinted in XXV Y.B. Com. Arb. 11, 165–169 (2000) (finding a default by Indonesia where the latter failed to prevent a State-controlled entity from obtaining an anti-arbitration injunction from an Indonesian court that Indonesia then argued prevented it from participating in the arbitration).

\textsuperscript{183} See, e.g., Caron et al., supra n. 181, at 716 (As a general matter, once the arbitral proceedings are initiated and the jurisdiction of the arbitral tribunal is established, the parties are bound by the final outcome – whether or not they participate.”); Goetz v. Republic of Burundi, ICSID Case No. ARB/95/3, Award ¶ 55 (Feb. 10, 1999) (“The State which defaults or fails to put forward its memorial “must accept the consequences of its decision, the first of which is that the hearing will go ahead without it; it remains however a party to proceedings and the eventual judgment binds it . . . “) (quoting Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 24 (June 27)) (omission in original). The due process requirement that each party be permitted a full and fair opportunity to present its case weighs in favour of a tribunal’s consideration of any submissions a respondent may wish to provide, even if there are questions regarding the government’s effectiveness. See, e.g., Caron et al., supra n. 181, at 716 (“While challenges to default awards are typically rejected by the courts, there are nevertheless pitfalls associated with the enforcement of such awards. Under the New York Convention, a national court may refuse to recognize or enforce an award that has been rendered without permitting a party a full and fair opportunity to present its arguments and evidence.”); Schreuer, supra n. 180, at 710 (“A tribunal’s failure to abide by the rules of Art. 45 may expose the resulting award to annulment in accordance with Art. 52. Non-compliance with the evidentiary rule of Art. 45(1) may lead to the charge that the tribunal has manifestly exceeded its powers (Art. 52(1)(b)) or that the award has failed to state the reasons on which it is based (Art. 52(1)(c)). Non-observance of the procedure provided in the second sentence of Art. 45(2) may constitute a serious departure from a fundamental rule of procedure (Art. 52(1)(d));” (citation omitted).
(iii) International Arbitration: Substantive Implications

Once a tribunal is satisfied with respect to its jurisdiction over the parties, the question then becomes one of liability. Liability, of course, depends on the applicable body of law. As noted above, to the extent municipal law governs, any entity holding itself out as the government is bound by that law unless and until it is revised.\textsuperscript{184} Under international law, however, the proper subject is the State, as embodied by its government in satisfaction of certain international law criteria such as the principle of effectiveness.\textsuperscript{185} Whether a revolutionary movement has succeeded in establishing itself as a government for purposes of international law is therefore crucial to a determination of liability under international law, for example in the form of an investment treaty.

If, on the one hand, the pre-revolutionary government succeeds in putting down the rebellion, it will not be held responsible for damages caused by the unsuccessful revolutionary movement, absent a showing of bad faith or negligence on its part. This rule, expressed in numerous mixed claims commission awards,\textsuperscript{186} has been codified in Article 10 of the International Law Commission’s (ILC) Draft Articles on State Responsibility (Draft Articles).\textsuperscript{187} Exceptions are extremely limited.\textsuperscript{188} Under Article 9 of the Draft Articles, for example, if the general government is unable to exercise its authority in a certain region and someone else, such as a local de facto government, steps into the void, the local de facto government’s acts may be attributed to the State ‘if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.’\textsuperscript{189} The ILC goes on to caution that ‘[such] cases occur only rarely, such

\textsuperscript{184} See supra nn. 2–4 and accompanying text.
\textsuperscript{185} See, e.g., ILC 2001 Draft Articles on State Responsibility, art. 10 comment (5) (‘The State] is the only subject of international law to which responsibility can be attributed.’); id., Commentary to Chapter II, comment (4) (‘The attribution of conduct to the State as a subject of international law is based on criteria determined by international law . . . .’); supra Section 2.2.
\textsuperscript{186} See supra nn. 5–6 and accompanying text.
\textsuperscript{187} See ILC 2001 Draft Articles on State Responsibility, art. 10, comment (3) (‘Ample jurisprudence for this principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions and arbitral tribunals have uniformly affirmed what Commissioner Nielsen in the Solís case described as a “well-established principle of international law”, that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State.’) (footnotes omitted).
\textsuperscript{188} See ILC 2001 Draft Articles on State Responsibility, art. 10, comment (2) (‘In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.’). Certain bilateral investment treaties contain a provision under which each State commits to compensate foreign investors for losses resulting from civil unrest on a national or most-favoured-nation treatment basis. See, e.g., Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, art. IV, Mar. 11, 1986, S. Treaty Doc. No. 99-24. Such a voluntary undertaking should not be considered an additional exception to the rule that a State is not liable for the acts of unsuccessful insurgents.
\textsuperscript{189} Note that the ILC was careful to preserve the distinction between a local de facto government and a general de facto government: ‘It must be stressed that the private persons covered by article 9 are not equivalent to
as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative.\(^{190}\) Moreover, by limiting the attributable acts to those ‘in fact exercising elements of the governmental authority’, the ILC may be said to have preserved the earlier distinction between impersonal or administrative acts of a local de facto government, which arbitral tribunals generally upheld, and personal acts or those in support of the revolution, for which the State was not liable. Should President Assad manage to retain power, then, Syria will not be internationally responsible for the acts of the insurgents, except perhaps under the limited circumstances envisaged by Article 9 of the Draft Articles (a showing of negligence on the part of the government in seeking to assert its authority over the rebels hardly seeming likely given the circumstances).\(^{191}\)

If, on the other hand, the revolutionary movement succeeds in establishing a general de facto government, it will be liable under international law for all of the acts of the revolution from its inception and for the acts of the prior established government.\(^{192}\) As such, the post-revolutionary governments of Egypt or Libya could be held liable under relevant investment treaties for any breaches committed by the prior regimes or by revolutionary forces, even if such a breach occurred before the rebels succeeded in establishing a de facto government, whether (initially) local or (ultimately) general.

IV. CONCLUSION

Given the recent proliferation of investor-State arbitration and the potential for dramatic change in the near future in an area of the world home to valuable natural resources, it is increasingly possible that questions regarding the existence of a de facto government may arise. This article aims to shed some light on this issue through an examination of general principles of international law and

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\(^{190}\) ILC 2001 Draft Articles on State Responsibility, art. 9, comment (1).

\(^{191}\) Even assuming that Syria could be held liable for the acts of a local de facto government under article 9, it seems unlikely that such routine administrative acts could rise to the level of a breach of an investment treaty.

\(^{192}\) See ILC 2001 Draft Articles on State Responsibility, art. 10, comment (5) (‘In such a case [i.e., a successful revolution], the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. . . . The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government’); infra nn. 7–8 and accompanying text. Because ‘[t]he basis for the attribution of conduct of a successful insurgentional or other movement to the State under international law lies in the continuity between the movement and the eventual Government’; however, ‘the term “conduct” only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity’; ILC 2001 Draft Articles on State Responsibility, art. 10, comment (4).
historical precedents. Although the recognition (or refusal of recognition) by other States can be a useful indicator as to whether the factual basis for effective control exists, that recognition in and of itself is not conclusive. If a regime effectively controls all or virtually all of the territory of the State and appears stable, it constitutes a general de facto government that may be treated as any other government. If, however, the regime controls only a portion of the State’s territory or otherwise lacks the capacity to function as a stable, independent government, an investor may find itself in a difficult position. On the one hand, the investor has a business interest in maintaining good relations with the new regime; on the other, it may have legitimate concerns about paying money to or negotiating a new contract with an entity that is not actually capable of binding the State. Under such circumstances, each investor must of course consider its own circumstances, but the jurisprudence suggests caution, especially in regard to contract negotiations. The investor is on somewhat safer ground with respect to taxes or payments owing in territory under the regime’s control, but in an area of the law that is fraught with uncertainty and is highly fact-dependent, there can be no guarantees. Should a dispute arise, an investment arbitration tribunal may be faced with determining the effectiveness of the regime in question, whether as of the alleged breach or as of the arbitral proceedings. Although the outcome of such an analysis should not affect the tribunal’s jurisdiction, the investor’s ability to recover may well turn on the status of the revolutionary regime and the resultant attributability of the impugned acts to the State.
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‘Interaction between courts and arbitrators in Uruguay’

by SOLEDAD DÍAZ MARTÍNEZ *

In the past seven years Uruguay’s economy has shown an average growth of 6.2% in its GDP and a dramatic increase in foreign investment. Although arbitration is the preferred dispute resolution method in businesses transactions, in Uruguay arbitration practice is just starting to develop. Lack of a modern arbitration law and sophisticated judges, poses some obstacles for this development. However, recent decisions – particularly compared to those in some Latin American countries – allow a rather optimistic approach. This article summarizes the past decade case law regarding the attitude of local court towards arbitration, focusing mainly on exequatur of foreign awards; enforcement of arbitration clauses and appeals for nullity of the awards rendered in Uruguay.

I. INTRODUCTION

The right balance between Courts and arbitration is gradually being achieved in Uruguay. This might sound optimistic considering that there had been some inauspicious decisions. But a global analysis of the case law of the past decade encourages the belief that Uruguayan courts have finally begun to understand arbitration and usually respect the jurisdiction of the arbitrators. However, interaction between judicial proceedings and arbitration still faces serious problems. Inexperienced judges and lack of proper procedural regulation lead to an inefficient and untimely cooperation with the arbitrators and in some cases to an unacceptable intrusion.

Notwithstanding the above, the review of the last decade decisions in arbitration matters in Uruguay allows an optimistic approach. In fact, in Latin America, arbitration has grown significantly during the last years.1 Most countries have

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1 See C. De Los Santos, El arbitraje internacional como instrumento de protección de las inversiones españolas en Latinoamérica, 11 Cuadernos de Energía 58 (January 2006). For accurate figures of this situation as of 2010, see G.S. Tawill, Strengthening International Arbitration’s Presence in the Americas, The Arbitration review of the Americas 1 (2010). As the author of this article points out, with

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ratified the 1958 New York Convention on Recognition and Enforcement of Awards (hereinafter ‘NY Convention’) and more than ten countries have passed internal arbitration acts following the UNCITRAL Model Law (hereinafter the ‘Model Law’). The progress is far from being continuous though, and arbitration in Latin America faces many challenges ahead. Some countries have shown backwards in their government approach towards investment arbitration, certain judicial decisions staying arbitration proceedings may suggest a sort of revival of the ‘Calvo Doctrine’ or an interventionist or even hostile attitude towards arbitration.

Fortunately, only one decision of this kind was rendered in Uruguay and it was revoked by the Court of Appeals in a ruling that clearly states that injunctions to stop or prevent an arbitration proceeding from beginning cannot be issued. Recent decisions reveal a wide acceptance of arbitration (at least by superior Courts). Foreign awards are normally enforced if the requirements of the NY Convention are met and appeals against awards are generally dismissed.

Nonetheless, Uruguay is one of the few Latin American countries that has not passed an arbitration law. And even if this has not resulted either in a hostile attitude towards arbitration from Uruguayan courts or in a more interventionist approach. It has, however, caused uncertainty and delay in different stages of judicial proceedings related to an arbitration, mainly before lower courts.

II. OVERVIEW OF URUGUAYAN REGULATION ON THE INTERACTION BETWEEN COURTS AND ARBITRATORS

Uruguay is a party of the NY Convention, it is also a party of the 1975 Panamá Convention on International Commercial Arbitration (hereinafter ‘Panamá

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2 It is the case of Brazil, Panamá, Ecuador, Perú and Bolivia, among others. See De Los Santos, El arbitraje internacional como instrumento de protección de las inversiones españolas en Latinoamérica, 11 Cuadernos de Energía, 36 (February 2006).

3 In 2009, Ecuador announced its withdrawal from the ICSID jurisdiction by denouncing the 1965 Washington Convention. The same had done Bolivia in 2007.

4 C. De Los Santos, El arbitraje internacional como instrumento de protección de las inversiones españolas en Latinoamérica, 11 Cuadernos de Energía, 39 (February 2006). See G. Parodi, El caso Yaciretá – o como retroceder 80 años – análisis y comentarios, Revista Internacional de Arbitraje (January–June 2006), Bogotá, 238, 239 and 253. In Paraguay, the Decision of the Supreme Court 285 dated, May 25, 2006, in Gunder v. KIA Motors Corporation, Case number 3804 considered inapplicable a commercial arbitration clause designing Korea as the site of the arbitration for being contrary to the local regulation on distribution and agency contracts. See also J.C. Hamilton, ¿Se acabó el arbitraje en América Latina? La evolución del arbitraje en el Perú y en América Latina, El Arbitraje en el Perú y en el Mundo, SOTO COAGUILA, C.A. (Director) MENDOZA, K., (Coordinator), Lima, 2009, 634 and 636.

5 See section 3.1. of this article.

and of the Mercosur Agreement for International Commercial Arbitration (hereinafter the ‘Mercosur Agreement’).\(^7\) Pursuant to these regulations Uruguayan Courts can only interact with arbitration if:

(a) appointment of arbitrators, production of evidence or provisional remedies are requested to a judge;\(^8\)
(b) Uruguay was the seat of the arbitration and the award is being challenged;
(c) at the beginning of a judicial proceeding the defendant claims that the matter is subject to arbitration and the judge shall determine whether there is a valid and binding arbitration clause.

Courts may also intervene in arbitration matters analyzing the validity of the arbitration agreement and the regularity of the arbitration proceedings if recognition and enforcement of an award rendered outside of Uruguay is sought (against a corporation or individual with assets located in Uruguay).\(^9\)

In general terms, Uruguayan courts have been respectful to foreign and local awards.\(^10\) Case law has repeatedly stated that if parties acting had freely agreed to arbitrate a certain matter, the arbitration agreement shall be binding and no intervention of Courts to set it aside or prevent it from developing would be appropriate.\(^11\)

However – and in spite of the ratification of the abovementioned conventions and the Courts generally adequate approach – arbitration faces some obstacles in Uruguay due to: (a) lack of proper local procedural regulation (resulting from the failure of Uruguay to pass a modern arbitration law mirrored in the Model Law); (b) lack of expertise of judges (and many litigators). As will be shown, this may cause problems (or delays) on different occasions, such as when a stay of the proceeding is requested due to the existence of an arbitration agreement or when judicial assistance is sought at the beginning or during an arbitration. We will deal with these issues in sections 3 and 4 of this article.


\(^8\) In domestic arbitration they can also assist to compel a party to arbitration, executing the ‘arbitration deed’, pursuant to Arts 477 and 478 of the General Code of Procedure. This is because in domestic arbitration, not governed by the NY Convention, formal requirements shall be fulfilled to have a valid arbitration ‘deed’ drafted by a notary public and executed by the respondent or by a judge, if the respondent refuses to do so.


\(^10\) In the Decision of the Civil Court of Appeals Term 4, 161/2003 dated June 18, 2003 it is stated that ‘total involvement of national courts in arbitration is pernicious but it is also pernicious its total disregard: state courts are support and second-instance control authorities in arbitration’ (translated by the author).

III TIMELY ASSISTANCE, PROVISIONAL REMEDIES AND INTERFERENCE

The level of involvement of Courts in arbitration proceedings may vary, depending mainly on two factors: the laws governing arbitration and the interventionist leanings of the courts.

In countries where regulations mirroring the Model Law were passed – such as Spain, Bolívia or Brazil among others – local arbitration laws set out the general principle that no court shall intervene except where so specifically provided.\(^\text{12}\)

Uruguay does not have a similar provision. Two draft regulations on commercial arbitration have been under analysis of the parliament in the past 7 years. Both were very similar and inspired in the Model Law, but none of them has been approved yet. However, recent decisions have applied this criterion adequately.\(^\text{13}\)

Case law shows that the interference with arbitration is due more to the lack of proper regulation and expertise of lower judges, than to an interventionist leaning of the Courts.

As mentioned, the Uruguayan General Code of Procedure recognizes the possibility to obtain assistance from a local Court to: (a) appoint the arbitrators; (b) produce evidence; (c) obtain provisional remedies and (d) enforce the award. Unfortunately, as there are no suitable rules to achieve speedy proceedings or prevent a party from appealing certain decisions and delay the beginning of the arbitration, assistance can be deficient.\(^\text{14}\)

In addition, domestic arbitration requires formalities to begin the arbitration that if not complied with voluntarily can delay its initiation.\(^\text{15}\) Ad Hoc arbitration may face inconveniences related to the impossibility of obtaining the constitution of the panel on time. Even ICC or other institutional arbitration may face delays or challenges since the regulation on the proceeding to remove arbitrators is not clear regarding whether proceedings in the respective institutions rules shall be exhausted first.

Courts frequently fail to support arbitration due to lack of expertise of lower judges. Even if justices of superior courts have shown a reasonable acceptance of

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\(^{12}\) Section 5 of the Model Law on Commercial Arbitration, dated 1985 and modified in 2006. This Model Law sets out, in Arts 8, 9, 11, 13, 14, 16, 27, 34 and 36, guidelines as to when courts are allowed to intervene during an arbitration proceeding. Among local regulations based on the Model Law is sec. 7 of the Spanish Arbitration Law (Number 60/2003) (see J.L. González-Montes Sánchez, La asistencia judicial al arbitraje, 7 (Reus 2009)). See also: S. Barona Vilar, Comments to the Arbitration Law (Madrid 2004).

A similar result is achieved in the US (as a result of the Federal Arbitration Act). See Joseph L. Daly, Arbitration: The Basics, 5 The J.Am. Arb. 7–9 (2006), for an historical perspective on the US Courts attitude towards arbitration.

\(^{13}\) See for example Decision 223/2008 of the Civil Court of Appeals 'Term 6', in Revista Uruguaya de Derecho Procesal, 1-2/2009, 250.

\(^{14}\) For example, there is no such a provision similar to the Section 17 of the British Arbitration Act that regulates the power of one party to appoint a sole arbitrator when the other party is in default and refuses to do so. See H. Heilbron QC, Dispute Resolution Guides. A Practical Guide to International Arbitration in London, 51 (Informa 2008).

\(^{15}\) Additionally, Uruguay (as Argentina) still keep in their legislation the ‘arbitration deed’ which shall be executed by a notary public (or a judge if one of the parties opposes to do so) and is additional to the arbitration clause and necessary for all domestic arbitrations.
arbitration – as we will show below – adequate mechanisms to allow timely solutions to different problems that usually arise at the beginning and in the course of the proceedings and to prevent discussions (or appeals) that may diminish the advantages of an arbitration agreement shall be adopted.

(a) Injunctions and Provisional Remedies

The principle of interim protection of rights is currently accepted in almost all legal systems. It is also widely acknowledged that the request for provisional remedies before or during an ongoing arbitration proceeding cannot be construed as a waiver to the arbitration clause.

In arbitrations involving parties from Uruguay and other Mercosur countries, it is specifically established. Also, Uruguayan case law had accepted that principle before, based on the general regulation of the General Code of Procedure. Judges have granted provisional remedies prior to the constitution of the arbitration panel. However, no provision exists as to whether arbitrators can request the assistance of judges to obtain provisional remedies or can directly order injunctions against the parties before or during arbitration. Neither is it clear the limit between the judges and the arbitrator’s jurisdiction in terms of modifying or revoking provisional remedies. And there is either no provision as to whether during the arbitration the parties can obtain provisional remedies from courts without prior request to the arbitrators.

On the other hand, what reveals a good attitude of Uruguayan upper Courts towards arbitration is that no provisional remedies against arbitration – such as the Yaciretá case in Argentina – have been upheld on appeal. In 2008 a Court of Appeals confirmed that it is not possible to obtain an injunction against the beginning of an arbitration proceeding. The decision is also relevant as it stated that arbitration provided the same level of procedural fairness as a judicial proceeding and that pursuant to the arbitration clause, the arbitration panel was the sole body to decide whether it was competent. The downside of this case it that the decision of the Court of Appeals lifting the injunction came almost a year after it was granted, due to the general delay of Uruguayan judicial proceedings.

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19 Decision 155/95 of the Civil Court of First Instance ‘Term 1, Anuario de Derecho Comercial, Tome VII, 446.
(b) Awards Are Enforced without Reviewing Their Merits

Awards rendered in Uruguay are enforced directly without requiring any other proceeding, in the same way that Courts’ decisions are enforced. Most available recent decisions have granted exequatur. And in all cases the Supreme Court only verified whether: (a) the respondent had agreed to an arbitration; (b) the matter could be submitted to arbitration; (c) the respondent had been given proper notice of the beginning of the arbitration and had a reasonable opportunity to defend himself and produce evidence; (d) the award does not clearly contradicts ‘public policy principles’.

Courts can review neither the grounds for the arbitrators’ decision nor whether correct law was applied and construed properly, pursuant to the New York Convention. And the Supreme Court applies the ‘public policy’ exception strictly. It is generally connected to due process issues, such as lack of notice of the arbitration proceedings, lack of adequate possibility to present a case and file evidence, or rendering an award on aspects not submitted to the arbitrators.

Notwithstanding the above, enforcement can be problematic since the Uruguayan legal system is rather formal, mainly written, and exequatur of an award can take approximately a year (and likely two more years shall be added to obtain enforcement). Additionally, due to the low number of award exequaturs requested per year, there is not sufficient case law as to assess whether in a certain case the Supreme Court – to whom exequatur shall be requested – will consider that all the requirements of section V of the NY Convention are met.

IV. STAY OF PROCEEDINGS IS USUALLY GRANTED IN THE PRESENCE OF A VALID ARBITRATION AGREEMENT, BUT NOT ALWAYS TIMELY

In the case of Uruguay, and that might be an aspect in which it detaches from some Latin American countries, no ‘constitutional issues’ against arbitration have

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22 Section 377 of the General Code of Procedure.
24 R. Santos Belandro, Arbitraje Comercial Internacional, 183 (AEU, Montevideo).
26 See Decision 196/97, of the Supreme Court of Justice, in La Justicia Uruguaya, Case 13365, Tome 116. Also, Courts of Appeal have applied similar criteria (Decision of the Civil Court of Appeal Term 6, in La Justicia Uruguaya, Case 11354, Tome 100, 1990 and Decision 161/03 of the Civil Court of Appeals Term 2º, in La Justicia Uruguaya, Case 14744, Tome 128, 2003).
27 It shall be requested to the Supreme Court filing the originals or certified copies of all documents to show that requirements of section V of the NY Convention are present, consularized in the Uruguayan consulate where the award was issued – since Uruguay is not a member of the Apostille Convention – and translated into Spanish by a sworn translator.
risen. Even if there is not specific provision to ‘stay litigation’ or ‘compel arbitration’, courts – based on the general provisions of lack of jurisdiction of the General Code of Procedure – reach a similar effect. Complying with section II of the NY Convention they remand the parties to arbitration when the defendant demonstrates that a valid arbitration agreement precludes plaintiff from bringing a judicial action.

All matters that can be settled can be subject to arbitration. The Supreme Court and some Courts of Appeals, although there might still be some debate between scholars, have accepted that labor matters can be arbitrated. Family matters cannot be submitted to arbitration but, on the other hand, case law is consistent in allowing arbitration of all corporate and commercial matters.

To analyze the validity of the arbitration clause, Courts have applied the criteria of international Conventions (such as NY and Panama) instead of applying the older and more formal requirements of internal law for domestic arbitration.

However, there is no clear case law as to what formalities an arbitration clause shall fulfill to be considered ‘written’. As it happens in many other countries, controversy frequently raises as to whether a party has validly consented to arbitration.

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31 Article 476 of the General Code of Procedure.
34 Case law and Scholars differ as to whether certain corporation matters (such as the challenging of the shareholders meeting or the removal of officers or members) can be submitted to arbitration. In Argentina, there had also been some debate, which after decision 4/2001 of the General Inspection of Justice, appears to be solved. See M.B. Nodt Taquela, ‘Avances del proyecto de Ley Argentina de arbitraje respecto de la ley modelo de UNCITRAL’, Avances del Derecho Internacional Privado en América Latina, Libro Amoroso, Jürgen Samtleben, Montevideo, 2002, 727.
35 Decision of the Civil Court of Appeals Term 4, 161/2003 dated Jun. 18, 2003. In this case the Court stated that subordinating an international arbitration proceeding to the law of the seat is a subsidiary criterion, which in the case was considered inapplicable. The NY and Panama Conventions eliminated for international arbitration the extreme formalities required by Uruguayan internal procedural law.
36 For example, sec. 9 of the Spanish Arbitration Law (inspired in the Model Law) gives a modern and broad definition of the arbitration clause, that comprises agreements incorporated by reference, electronic documents, and agreement included in form contracts (see J.L. González-Montes Sánchez, El control judicial del arbitraje, 32 [La Ley 2006]).
arbitration. Case law has enforced arbitration agreements established in form contracts (even drafted in English) provided that the party was or could have been aware of its existence if it had acted diligently. On the other hand enforcement of the arbitration clause is not granted if no executed arbitration agreement (or document incorporated per reference) exist. In the past, Courts had maintained the same criterion as to the arbitration clauses included in the back of the maritime bill of lading (and separated from the transportation contract) as they have not regarded them as agreements under the requirements of the NY Convention.

Even if it is accepted by scholars that an arbitration clause is a separate agreement and that the validity of the contract containing the clause shall be determined by the arbitrators – and the kompetenz-kompetenz principle is clearly set, at least within the scope of the Mercosur Agreement – Courts have not always applied this criterion properly.


38 Decision of the Supreme Court Number 85/2009, dated May 9, 2008, in the case 1-10/2007. In this recent case it was held that: 'it is not possible to consider fulfilled the requirements of the aforementioned Conventions when the contracts containing the arbitration clause or the obligation to submit the controversy to arbitration are not signed by the defendant (nor contained in an exchange of letters or telegrams), either in its original or a certified copy' (translated by the author).

39 See Decisions 186/2008 of the Civil Court of Appeals Term 5th, dated Apr. 2, 2008, in Revista Uruguay de Derecho Procesal, 1–2 (2009), 252. It should be noted that in this case the wording of the arbitration clause referred only to the discrepancies aroused from the ‘performance’ of the contract, which allowed the Court...
Additionally, due to the general procedural regulation inconvenient arise frequently. The allegation that a proceeding shall be stayed due to the existence of an arbitration clause shall be made together with a full response to the complaint (and the filing or listing of all evidence intended to be produced\textsuperscript{43}). This determines that the parties may have to actually prepare for a case as if it would go to trial at the same time than as alleging the proceeding shall be stayed. Moreover, whether the appeal against the decision that incorrectly dismisses the motion to stay the proceedings suspends the proceedings until decided is not crystal clear. Some Courts consider that the case shall move forward and that only while hearing on the appeal of the final decision can the Court of Appeals reexamine if there was a valid arbitration clause, but not before that stage.

V. RECENT DECISIONS REJECT APPEALS AGAINST AWARDS RENDERED IN URUGUAY

An appeal based on ‘nullity’ of the award is the sole procedural instance to vacate an award rendered in Uruguay (even if the parties had agreed that a foreign procedural law governs the appeals against the award).\textsuperscript{44} Uruguayan Courts have also considered that it cannot be waived by the parties and neither can the parties agree that the competent forum to decide on the nullity of the award is one of a foreign country.\textsuperscript{45} No such a remedy as an ordinary appeal, ‘amparo’ or constitutional proceeding against an award is available. Like in most countries, and pursuant to the NY Convention, the proceeding does not apply to awards issued outside of Uruguay.

In this appeal the Court can only analyze whether there was a valid applicable (and enforceable) arbitration clause and whether the proceeding was carried out pursuant to what the parties had agreed.\textsuperscript{46} Most available decisions, both in domestic and international arbitration, dismissed requests for nullity.\textsuperscript{47} So far, no award has been vacated on grounds that
the law was not applied or construed properly, or that the applicable law was not the one chosen by the parties. There is no such a ‘manifest disregard of the law doctrine’\textsuperscript{48} or a precedent as the famous ‘Cartellone’ case in Argentina where an award was considered unreasonable or unfair.\textsuperscript{49}

While hearing an appeal for nullity, Courts only verify procedural matters and whether the dispute had fallen within a valid arbitration clause. And except if international public policy is involved – which Uruguay Courts have usually interpreted narrowly and related to procedural aspects – Courts cannot consider the merits of the dispute. According to this, in 2003, while dismissing an appeal against an ICC award, a Court stated that the appeal for nullity ‘is aimed at repairing the procedural defects of an arbitration, it reviews the proceeding followed not the resolution of the merits of the dispute’.\textsuperscript{50}

VI. URUGUAYAN COURTS AND ICSID AWARDS: A RELATIONSHIP YET TO BE TESTED

No award can actually avoid all potential conflict with local jurisdictions. Not even the ICSID awards, as although they escape from judicial annulment (since they can only be vacated by an ICSID Ad hoc Committee) and exequatur proceedings, their enforcement can be denied based on the scope of the concept of Sovereign Immunity from Execution of the court of the country where assets to enforce the award are located.\textsuperscript{51}

\textsuperscript{48} See decision of the Civil Court of Appeals, Term 4º, 8/2009 dated Feb. 6, 2009.
\textsuperscript{49} See H. Méndez, ‘Impugnación judicial de laudos arbitrales. El caso “Cartellone”- un lamentable retroceso’, El Arbitraje en el Perú y en el Mundo, 563 (C.A. Soto Coaguila (Director) & K. Mendoza, (Coordinator), Lima 2009). However, it shall be stated that later Argentinean decisions, have interpreted more accurately the scope of review in an appeal for nullity, although still analyzing whether the award was ‘arbitrary’ or ‘unreasonable’ (see Decision of the Commercial Court of Appeals of Argentina, Chamber D, dated Aug. 8, 2007, in the case ‘Mobil Argentina S.A. v. Gasnor S.A.’).

The same conclusion reach the Decisions 5/2001 of the Civil Court of Appeals Term 6º, dated Feb. 14, 2001 and 102/2002 of the Civil Court of Appeals Term 5º, in Revista Uruguaya de Derecho Procesal, 4/2003, case 228, 595. In both cases the awards subject to appeal were domestic, and therefore the appeal for nullity was decided according to the rules of secs 499 and 472 of the General Code of Procedure. However, the grounds of the Courts for the decision fully apply to international arbitration.

This is because even the Washington Convention has set in its Section 54 a specific and simpler rule to obtain the enforcement of these awards (that they shall be complied with or enforced as if they were a local judicial decision)\textsuperscript{52}, Section 55 of the same Convention maintained the sovereign immunity privilege.\textsuperscript{53} This concept will be then construed and applied by local judges pursuant to their own regulations.

In Uruguay, no judicial decision has been rendered in a proceeding to enforce an ICSID award against assets belonging to a sovereign state or state-owned entity. However, decisions on other matters against sovereign entities revealed that Uruguayan Courts consider the immunity from execution – as opposed to the immunity of jurisdiction – broadly, comprehending acts performed ‘\textit{iure imperii}’ as well as those performed ‘\textit{iure gestionis}’ (according to the classic distinction).\textsuperscript{54} So far, no ICSID award against Uruguay has ever been issued. In fact, the country is now involved in its first Investment Arbitration before ICSID, resulting from the complaint brought by Philip Morris due to recent regulations on tobacco packages,

\textsuperscript{52} See sec. 54 of the 1954 Washington Convention. C.F. Dugan et al., \textit{Investor-State Arbitration}, 699 (Oxford University Press 2008). This principle has been recognized by American, French, and British case law. For example, in \textit{LETCO v. Liberia}, the Court of the District of Columbia ruled that any member of the Washington Convention (and not only the Respondent in the arbitration proceeding) requested enforcement of an ICSID award is obliged to grant it pursuant to sec. 54 of the Convention (see decision in ICSID Reports, vol. 2, 387). In that case, the award was even certified and filed in the exact same way as if it had been a local decision. In another case the \textit{Cour d’Appel} from Paris stated that for the enforcement of the award, the Washington Convention:

lays down a simplified procedure for obtaining an exequatur and restrict the function of the court designated for the purposes of the Convention by each Contracting State to ascertaining the authenticity of the award . . . . (Decision of the \textit{Cour d’Appel} dated June 26, 1981, ICSID Reports, vol. I, 571).


the immunity from enforcement enjoyed by a foreign State in France is a matter of principle; that in exceptional circumstances it can be set aside when the assets against which enforcement is sought have been assigned by the State to an economic and commercial activity governed by private law . . . .

SOABI has not demonstrated that the award will be enforced assets assigned by the State of Senegal to en economic or commercial activity and that, therefore, there can be no objection to the immunity for enforcement . . . . enforcement in France will be contrary to public international order in that it would be contrary to the principle of immunity.


cigarette branding and marketing.\textsuperscript{55} Once the award is rendered, we will eventually have the opportunity to assess if there is a negative change of attitude towards investment or commercial arbitration, or both, which at this point seems unlikely.

\textsuperscript{55} Request for arbitration before ICSID was filed on February 19, 2010 by FTR Holdings SA (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos (Uruguay) against Oriental Republic of Uruguay.
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