**INTERNATIONAL ARBITRATION- LAURENCE SHORE AND CHRISTIAN LEATHLY**

**TABLE OF CONTENTS**

**CLASS 1 WHAT IS INTERNATIONAL ARBITRATION?**

* Unctad, Introduction To International Arbitration……………………………….
* Gary Born, International Commercial Arbitration, Second Edition, §§1.01-1.03………………………….
* Ana Carolina Weber, Carmine A. Pascuzzo S., et al., Challenging the “Splitting the Baby” Myth in International Arbitration, Journal of International Arbitration, (Kluwer Law International 2014, Volume 31 Issue 6) pp. 719 – 734………………………………………………………………………………

**CLASS 2** **The Arbitration Agreement I: Formation, Validity and Scope**

* New York Convention, art. II…………………………………………
* UNCITRAL Model Law, arts.2,5, 7, 8………………………………………………………
* U.S. FAA, 9 U.S.C §§ 2, 3, 4, 202, 206 and 303………………………………………….
* English Arbitration Act, §5, 6(1)……………………………………………………………
* IBA Guidelines for Drafting International Arbitration Clauses (2010)………………….
* ICC recommended arbitration clauses………………………………………
* ICDR……………………………………………….
* LCIA…………………………………………
* UNCITRAL ………………….
* Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991) (Facts and Part I, Subparts A-C) imp…………………………………………………………………………….
* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (Parts I and II of Justice Blackmun’s majority opinion; Part I of Justice Steven’s dissent) …………………………………………………
* Fiona Trust & Holding Corporation & Others v Yuri Privalov & Others [2007] EWCA Civ 20 (HL)……………………………………..
* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)………….
* Simon Foote and James Herbert, The Obligation of Arbitrators to Address all Issues that fall from Determination, but no more, Asian International Arbitration Journal…………………………………………………….
* First Options of Chicago v. Kaplan, 514 U.S. 938 (1995)…………..

**CLASS 3** **The Arbitration Agreement II: Separability or Autonomy and Applicable Law**

* UNCITRAL Model Law, arts. 8, 16(1)……………………………
* New York Convention, arts. II, V………………………………………….
* Swiss Statute on Private International Law (1987), art. 178………………..
* ICC Rules, art. 6(9)……………………………………………………..
* Alexandre, Belohlavek, "The Law applicable to the arbitration agreement and the arbitrability of a dispute"…………………………
* All-Union Foreign Trade Ass’n v. JOC Oil Co. Ltd…………..
* Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967)……………………………….
* Premium Nafta Products Ltd. v. Fili Shipping Company Ltd., [2007] UKHL 40………………………………………..
* HSF model arbitration clauses…………………..
* Klaus Peter Berger, Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?, International Arbitration 2006: Back to Basics?? 301…………………
* Sulamérica Cia Nacional De Seguros S.A. v Enesa Engenharia…………….
* Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazione v. Achille Lauro…………………………

**CLASS 4**

**FUNDAMENTALS OF ARBITRATION: KOMPETENZ-KOMPETENZ AND ARBITRABILITY**

* New York Convention, arts. II, V(1)(a) & (c)…………….
* UNCITRAL Model Law, art. 16 ……………………….
* ICC Rules, art. 6 ………………………………………..
* William W. Park, "The Arbitrator’s Jurisdiction to Determine Jurisdiction", International Arbitration 2006: Back to Basics……………
* Redfern and Hunter on International Arbitration (Fifth Edition)……
* Award in All-Union (previously assigned) ……….
* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (previously assigned)……………………………………………………
* Contec Corp. v. Remote Solution, Co., 398 F.3d 205 (2d Cir. 2005) ……..
* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) ……..
* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) ……………
* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (previously assigned) ……………………………………………….
* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth…………….
* Roby v. Corp. of Lloyd’s, 996 F.2d 1353 (2d Cir. 1993) (Background; Parts I.B., II, and III)……………………………………………
* Summary of Lufuno Mphaphuli & Associates (Pty) Ltd. v. Nigel Athol Andrews and Bopanang Construction CC (South Africa 2009)……..
* Dissent in rent a centre…………………………………..

**CLASS 5 ARBITRATION IN PRACTICE**

* IBA Guidelines on Conflict of Interest in International Arbitration  James Carter, Reaching Consensus on Arbitrator Conflicts: The Way Forward, 6 Disp. Res. Int'l 17 (2012)
* Philippe Fouchard, "Relationships Between the Arbitrator and the Parties and the Arbitral Institution," in Varady, Barcelo & von Mehren, International Commercial Arbitration (1999), 312-320  IBA Guidelines on Party Representation red, orange list
* ICC Rules
* LCIA Rules 2014
* AAA-ABA Code of Ethics
* Redfern and Hunter on International Arbitration (Fifth Edition), §5.06-5.84
* Gerhard Wegen, "Chapter 26: Transaction Counsel as Arbitration Counsel and as Witness?" in Stories from the Hearing Room: Experience from Arbitral Practice

**CLASS 6 TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION**

* IBA Rules on the Taking of Evidence in International Arbitration, Rules 9.2 and 9.3……………………………………………………
* LCIA Rules, Art. 30……………………………………….
* ICC Rules, Art. 22(3) ……………………………………….
* Pierre Tercier and Tetiana Bersheda, "Document Production in Arbitration: A Civil Law Viewpoint", The Search for "Truth" in Arbitration, ASA Special Series No. 35, 2011………………………………………………….
* Queen Mary International Arbitration Survey 2015……………………
* ASA President's Message, 1/2011, The problem with predictability, and 2/2012, Managing uncertainty (available on Kluwer Arbitration) ……..
* Fabian von Schlabrendorff and Audley Sheppard, "Conflict of Legal Privileges in International Arbitration: an Attempt to find a Holistic Solution", Global Reflections on International Law, Commerce and Dispute Resolution : Liber amicorum in Honour of Robert Briner, ICC, 2005 influence on privleges, ………………………………………………………………..
* Redfern and Hunter on International Arbitration (Fifth Edition), §2.145-2.176 on confidentiality ………………………………………………………..
* Kaj Hober and Howard Sussman, "Chapter 5: Fundamentals of Cross Examination in International Arbitration", Cross-Examination in International Arbitration……………………………………………………………..

**CLASS 7 PROCEDURAL STEPS UNTIL AWARD**

* UNCITRAL Model Law, arts. 18-27…………………
* FAA, §7………………………………………….
* English Arbitration Act, ss33-45……………………….
* ICC Rules, arts. 16-28………………………………..
* LCIA Rules, arts. 14-22………………………………..
* UNCITRAL Rules, arts.17-31…………………………….
* CIETAC Rules, arts.11-21………………………………….
* IBA Rules on the Taking of Evidence in International Arbitration………
* UNCITRAL Notes on Organizing Arbitral Proceedings……………….
* Example of Redfern Schedule ……………………………………………..
* Doug Jones, "Chapter 11: Improving Arbitral Procedure: Perspectives from the Coalface" in Stories from the Hearing Room: Experience from Arbitral Practice …………………………………………………….

**CLASS 8 CHALLENGES, INTERVENTIONS AND CONSOLIDATION**

Challenges of arbitrators

Challenge and replacement of an arbitrator

Termination of an arbitrator's mandate

Truncated tribunals

S.A. Auto Guadeloupe Investissements (AGI) c/ Columbus Acquisitions Inc, Cour d’appel de Paris, Pôle 1 – Chambre 1, n° 13/13459 skim………………………………………………………………..

Groupe Antoine Tabet c/ la République du Congo, Cass. Civ. 1re, n° 11-16444 of 25 June 2014………

Redfern and Hunter on International Arbitration (Fifth Edition), Chapter 4. The Establishment and Organisation of an Arbitral Tribunal (from 4.91 to 4.155) ………………………………………………..

Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007)……………………………………………………………………….

Sierra Fishing Company and others v Hasan Said Farran and others [2015] EWHC 140 (Comm) (http://www.bailii.org/ew/cases/EWHC/Comm/2015/140.html) ………………………………………….

Vivian Ramsey, Chapter 17: Two out of Three: The Effect of Truncated Tribunals in Domitille Baizeau and Bernd Ehle (eds), Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider), (Kluwer Law International 2015) pp. 139 – 144 ……………………………………….

Interim measures and interaction with national courts:

 Key points in the arbitral process where parties interact with national courts

 Choice of national courts/role of courts

 Court's appointment/disqualification of arbitrators

 Provisional measures in aid of arbitration

 Anti-suit injunctions and parallel proceedings

 Expedited and emergency arbitration procedures

 Interim measures

Reading:

 E. Gaillard, Anti-suit Injunctions Issued by Arbitrators, International Arbitration 2006: Back to Basics? 235 (Albert Jan van den Berg ed., 2007) (ICCA Congress Series No. 13/Montreal 2006)

 Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335, F.3d 357 (5th Cir. 2003)

 Global Arbitration Review, "UNITED STATES: The rise of the emergency arbitrator", 23 February 2015

 Andrea Carlevaris and Jose Ricardo Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases", ICC International Court of Arbitration Bulletin Vol. 25 (1) 2014

Multi-Party and Multi-Contract Arbitration

 Joinder and intervention of third parties

 Consolidation of different arbitrations

 Equal treatment in the appointment of arbitrators

 Comparison of different arbitration rules and laws

 Pros and cons of multi-party arbitration

Reading:

 Redfern and Hunter on International Arbitration (Fifth Edition), §2.186-2.218

 "Dealing with Multi-Party and Multi-Contract Arbitration Issues", 11 June 2012 (HSFnotes / Arbitration)

 HSF model joinder/consolidation provisions

 Irene Welser and Alexandra Stoffl, Chapter II: The Arbitrator and the Arbitration Procedure, Multi-Party Arbitration – A Strategic Analysis with Focus on the Nomination of Arbitrators in Gerold Zeiler , Irene Welser , et al. (eds), Austrian Yearbook on International Arbitration 2015, Austrian Yearbook on International Arbitration, Volume 2015, pp. 277 – 290 (available on Kluwer Arbitration)

**CLASS 10 SET-ASIDE AND APPEAL OF AWARDS**

*Key Topics:*

 Differences between an annulment/set aside (pursuant to the local law of arbitration) in the court of the seat and denial of enforcement in other jurisdictions (pursuant to the New York Convention)

 Brief comparison between the grounds of vacation (FAA), set aside (UNCITRAL Model Law) and denial of enforcement (New York Convention)

 Requirements for challenge

 Grounds for setting aside

 Consequences of challenge claims

 Waiver of the right to challenge an award

*Reading:*

 FAA

 UNCITRAL Model Law, chs. VII-VIII

 New York Convention, arts. III-V

 Gary Born, *International Commercial Arbitration*, Second Edition, §§25.01-25.04

 *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan* [2010] U.K.S.C. 46 (\*skim read only\*)

 *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, French Court of Appeals, 17 February 2011

 2015 School of International Arbitration – 30th Freshfields Lecture by Lord Mance (November 4, 2015)

 *Telenor v. Storm LLC, 524 F. Supp. 2d 332 (S.D.N.Y. 2007)* (introductory paragraph and Part II.A.2.a.; review also Part II.A.2.b.)

 *BG Group, PLC v. Republic of Argentina,* 134 S.Ct. 1198, U.S. (2014)

 *Iran Aircraft Industries v. Avco Corp.,* 980 F.2d 141 (1992)

 *Termo Río S.A. v. Electranta S.P.,* 487 F.3d 928 (D.C. Cir. 2007) (except Part E)

**CLASS 11**  **RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS I**

*Key Topics:*

 Recognition and enforcement of foreign awards under the New York Convention

 Pre-requisites for enforcement

 Grounds for refusing enforcement:

o Incapacity to enter into arbitration agreement/invalidity of such agreement

o No notice/inability to present case (due process)

o Award deals with disputes beyond their scope

o Corruption or undue means

o Evident partiality or corruption

o Misbehaviour, no extension of hearings in due circumstances, not hearing important evidence

o Excess of powers

o Arbitrability

o "Public policy" exception in the US and elsewhere

*Readings:*

 New York Convention, art. V

 Gary Born*, International Arbitration: Cases and Materials (2011)* Chapter 16, Section A at 1125-1130 (including *Parson*) and Notes at 1131-1136 (posted); Section B.1 at 1136-1147 (including *MinMetals*)

 Emanuel Gaillard, “The Representations of International Arbitration”, *New York Law Journal* (Oct. 4, 2007) La

 Summary of *Yukos Capital S.A.R.L. v. OAO Rosneft* (Netherlands Supreme Court) (25 June 2010)

 *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974) pub policy means- international pub policy, doesnt mean foreign relations policy of the US

 *MGM Productions Group v. Aeroflot Russian Airlines*, 2003 WL 21108367 (S.D.N.Y. 2003), aff’d, 91 Fed. App’x. 716 (2d Cir. 2004) (read both decisions)

*Baxter Int’l Inc. v. Abbot Labs.,* 315 F.3d 829 (7th Cir. 2003) (Judge Easterbrook’s majority opinion and the four paragraphs of Judge Cudahy’s dissent starting with "*The growing fondness for arbitration..*.")

 *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd.* [2000] 1 QB 288 (C.A.) (England) (pp. 288-290, 294C-296D, 310C-311B, 314H-317C).

**CLASS 12 RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS II**

*Key Topics:*

 Grounds for refusing enforcement (continued)

 Annulled awards and enforcement of awards even when they are annulled

 Possibility of expand/reduce grounds of annulment by contract

*Reading:*

 Jan Paulsson, Enforcing Arbitral Awards Notwithstanding Local Standard Annulment (LSA) carefully

 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (“COMMISA”) v. PEMEX–Exploración y Producción (“PEP”),* --- F.3d ----, 2nd Cir. (N.Y.), August 02, 2016

 Manu Thadikkaran, *Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?*, Journal of International Arbitration, Kluwer Law International 2014, Volume 31 Issue 5) pp. 575 – 608 skim

 Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards, Under the Federal Arbitration Act,* St. John's Law Review, Volume 76, Summer 2002 just see the conclusion and reasoning, get the answer

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| **CLASS 1: WHAT IS INTERNATIONAL ARBITRATION?** |

* **UNCTAD, INTRODUCTION TO INTERNATIONAL ARBITRATION**
* **Why need a third party involvement?**
* it is frequent that parties are not able to discuss, or negotiate, a mutually agreeable solution
* involve third persons in a private capacity to solve, or to help them solve, the dispute; arbitration is the most prominent of the private dispute settlement mechanism
* There is no official definition of “**arbitration**”.
* **Article II, paragraph 1, Convention on the Recognition and Enforcement of Foreign Arbitral Awards:** Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration.
* **Principal Characteristics of Arbitration:**
1. a mechanism for the settlement of disputes
2. consensual
3. private procedure
4. leads to a final and binding determination of the rights and obligations of the parties
* **Mechanism for settlement of disputes**
* if there is no dispute, there can be no arbitration
* as in litigation, it is common for the parties to settle their dispute after the arbitration has commenced and once the parties have reached an agreement to settle the dispute, there is no longer any dispute for the arbitral tribunal to consider
* **Article 30, Model Law:**
1. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in form of an arbitral award on agreed terms
2. An award on agreed terms shall state that it is an award which has the same status and effect as any other award on the merits of the case
* **Consensual**
* must be founded on the agreement of the parties (consented to arbitrate the dispute)
* authority of the arbitral tribunal is limited to that which the parties have agreed
* the award rendered by the tribunal must settle the dispute that was submitted to it and must not pronounce on any issues or other disputes that may have arisen between the parties
* **Article V, New York Convention:**
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked if that party furnishes to the competent authority where the recognition and enforcement is sought
2. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration
* in most cases, arbitration is only **semi-consensual**; most arbitration agreements in the form of an arbitral clause in the principal contract
* claimant in dispute may wish to turn to the courts, but it can be precluded by the respondent
* **Article II, New York Convention:** The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being informed.
* claimant may commence the arbitration, but respondent may refuse to participate; the arbitral tribunal may continue the proceedings and make the award on the evidence before it
* compulsory arbitration – introduced in 1958 by the Soviet Union and other countries. The term “arbitral award” was defined to include not only awards made by arbitrator appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted
* **Private Procedure**
* Arbitration is not part of the State system of courts

* fulfills the same function as litigation; end result is an award that is enforceable by the courts, usually following the same or similar procedure as the enforcement of a court judgment
* current trend is to allow the parties and the arbitral tribunal full autonomy in the conduct of the proceedings subject to **Article 18, Model Law**: The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.
* courts may set aside an award or refuse to recognize or enforce it
* **Confidentiality**
* private nature of arbitration leads to confidentiality
* parties, arbitrators, witnesses, experts, and supporting personnel will not reveal anything about the arbitration, including its existence

Exception: if one of the parties had invoke the aid of the court in regard to the arbitration or to set aside or enforce an arbitral award

* **Article 30, LCIA Arbitration Rules:** Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.

* **impetus for change re: confidentiality of arbitration procedures:**
1. involvement of State or State entity where issues raised are often of public interest
2. very popularity of international commercial arbitration which results in strong desire to know the legal determinations of arbitral tribunals in respect both of arbitral law and procedure and the substantive law governing international commercial relations
* **Final and binding determination of parties’ rights and obligations**
* **Rule 28(6), ICC Arbitration:** Every Award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any Award without delay.
* A procedure that does not lead to a final and binding determination of the rights and obligations of the parties is not arbitration.
* Austria Case:

“Since the Domain Name Dispute Resolution Procedure does not lead to a final and binding decision, it is not an arbitral proceeding and the costs involved could not be recovered from the losing party as “procedural costs”.

* Article III of New York Convention requires the currently 135 Contracting States to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…”
* **Other Dispute Settlement Mechanisms**
* **Alternative Dispute Resolution or Amicable Dispute Resolution (ADR) procedures:** (a) conciliation, (b) mediation, (c) mini-trial, (d) expert evaluation (e) dispute board
* ICC ADR does not lead to a decision or award which can be enforced at law
* ADR procedures are intended to lead an agreement between the parties that would settle the dispute
* the agreement resulting from ADR is in the nature of a contract where, should there be subsequent non-fulfillment of its terms, enforcement of agreement would be by litigation or arbitration, assuming a suitable arbitration clause
* **Pros and Cons of ADR**
* Both litigation and arbitration are backward looking with principal function to allocate responsibility and the cost for something that went wrong in the past
* ADR is forward looking with principal goal the resolution of the dispute in such a way that the parties can continue their relationship in harmony
* However, when procedures do not lead to a solution, parties in ADR still have to resort to litigation and arbitration which will only increase costs and delay in the final resolution of the dispute
* **1923 Protocol on Arbitration Clauses**
* parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial mattes or any other matter capable of settlement by arbitration
* each Contracting State reserves the right to limit the obligation to contracts which are considered as commercial under its national law
* 1958 New York Convention essentially repeated the provision
* **1958 New York Convention**
* not by itself limited to arbitration in respect of commercial disputes
* limitation applies only if a State makes the necessary declaration and only 44 of the current 135 Contracting States have done so
* in those 44 countries, the application of the Convention is dependent on what is considered as commercial under the national law
* **1961 European Convention on International Commercial Arbitration**
* first international instrument to refer to international commercial arbitration
* limited in application to arbitration agreements concluded for the purpose of setting disputes arising from international trade
* **1985 Model Law**
* transactions referred to in the footnote: (a) any trade transaction for the supply or exchange of goods or services; (b) distribution agreement; (c) commercial representation or agency; (d) factoring; (e) leasing; (f) construction of works; (g) consulting; (h) engineering; (i) licensing; (j) investment; (k) financing; (l) banking; (m) insurance; (n) exploitation agreement or concession; (n) joint venture and other forms of industrial or business co-operation; (o) carriage of goods or passengers by air, sea, rail or road
* **Foreign Arbitration vs. International Arbitration**
* Foreign arbitration – refers to an arbitration conducted in another state, whether commercial or not, and whether the parties are from the same country, from different countries or that one or all are from the same country; eve a domestic arbitration in that country is a foreign arbitration in another country and the latter would be called upon to apply the New York Convention to enforcement of a clause calling for arbitration such country and to the enforcement of any award that would result.
* **Aiding foreign arbitration**
* many modern arbitration laws provide that the courts will aid arbitrations taking place in a foreign State
* **Domestic Arbitration vs. International Arbitration**
* modern view is that arbitration is governed by the law of the place in which it takes place
* the distinction between domestic and international arbitrations is a matter of national law
* one way to look at it is to consider the types of disputes that may be submitted to arbitration
* New York Convention applies to “foreign” awards

**Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (U.S. Supreme Court 1985):** Anti-trust claims could be submitted to arbitration when they arose in an international dispute, “even assuming that a contrary result would be forthcoming in a domestic context.”

* **International Arbitration**
* **2 basic methods of defining an international arbitration:**
1. consider the transaction— does it involve a transaction that is either in a State other than the place of arbitration or that takes place in two or more States
2. consider the parties— do they come from different States
* two **natural persons** who are citizens of different States; but a long-term resident of a State might be considered to be from that State for the purposes of determining whether an arbitration is international even though he is a citizen of a different State
* **juridical person** would often be considered to be from the State under the law of which it was organized; if the juridical person is a wholly or subsidiary owned subsidiary of a foreign natural or juridical person the subsidiary might be considered to have the nationality of its parent
* **4 Situations to constitute an arbitration international (Model Law):**
1. the parties to the arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States
* if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement
1. the place of arbitration, if determined in or pursuant to, the arbitration agreement, is situated outside the State in which the parties have their places of business
2. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is situated outside the State in which the parties have their places of business
3. the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country (Note: modern doctrine is that parties are free to choose the place of arbitration and that would itself effectively be a choice of the applicable arbitration law)
* Model Law: it is relevant only if a State adopts the Model Law with a scope of application restricted to international commercial arbitration; characterizing an arbitration as international means that the national based on the Model Law, rather than the national law for domestic arbitrations, would apply to it.
* **Why parties choose international commercial arbitration?**
* **General Reasons:**
1. Permits the parties to choose persons with specialized knowledge to judge their dispute
* the freedom to choose arbitrators with specialized knowledge is not available in those States that have restrictive arbitration laws that permit only lawyers to serve as arbitrators
* **Specific Reasons:**
1. Arbitrators are chosen for a specific dispute; the continuity in the procedure handled by the arbitrator permits the arbitrators to become thoroughly familiar with the matter in dispute
* procedure in arbitration is flexible and can be adapted to the needs of the particular dispute
* most modern arbitration laws leave the details of the procedure to be followed to the agreement of the parties or to the arbitral tribunal with the single requirement that the parties must be treated with equality and each party must be given a full opportunity of presenting his case
1. arbitration is not subject to appeal on the merits; what parties lose in legal security they gain in the reduced amount of time required to reach a final decision and reduced costs
2. faster decisions and lower costs – parties can have a relatively speedy arbitration at lower costs
* **Particularly, for international commercial arbitration:**
1. avoids litigating in a foreign court with unfamiliar procedure and with the inconvenience and expense that it entails
2. arbitration reduces inequalities; arbitration may possibly be administered by an arbitration organization located in a third country
3. avoids partiality of the courts when a State is a party to the dispute (Note: this prompted increase in number of bilateral investment treaties)
4. comparative ease of enforcement of an award as compared to the enforcement of a judgment of a foreign court

- unless there is a treaty between the State in which the judgment was issued and the State in which enforcement is sought, the requested court is under no international obligation to enforce the judgment

* **International Commercial Arbitration**
* It is a dispute settlement procedure that, like litigation in the State courts, leads to a final and binding result that will be given execution by the courts.
* Fundamentally consensual means of dispute resolution, i.e., unless the parties have agreed to arbitrate, there can be no valid arbitral determination of their rights.
* **New York Convention**
* permits a State to declare that it will apply the Convention only in regard to matters that it considers commercial under its own law
* 135 parties have agreed that they will “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure” in force in the State; subject to the condition that those rules may not contain “substantially more onerous conditions or higher fees or charged on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”
* **requirements for the enforcement of the award:**
1. duly authenticated original award or a duly certified copy thereof; and
2. original agreement referred to or a duly certified copy thereof; if not in an official language of the State where the award is relied upon, a certified translation into the appropriate language

**History of International Commercial Arbitration**

 NY Convention, UNCITRAL model rules 1985 Investment treaty arbitration to protect investor, International Centre for Settlement of Investment Disputes (ICSID), 1950s Bilateral Investment Treaties- 1965 Washington Convention and ICSID. CLOUT (Court Law On UNICTRAL Text). Parties decide institutions that will govern their arbitration- then they have to follow the rules of those institution. Eg- ICC rules. Ad hoc arbitration- without any arbitration institution. UNCITRAL arbitration rules 1976 to govern ad hoc arbitration Iran US claims Tribunal-1981, 1999 International Corporation for Assigned Names and Numbers made a policy for settlement of domain name disputes.

* **UNCITRAL Arbitration Rules**
* adopted by the UN Commission on International Trade Law in April 1976; specifically designed for use in ad hoc common law/civil law arbitrations; Guidelines for Administering Arbitrations issued in 1982
* have been widely used and have become the model on which many institutional arbitration rules are based.
* **Model Law**
* adopted in 1985; permits the parties to conduct the arbitration as they wish; arbitration may be institutional or it may be ad hoc; subject to the binding rule in Article 8 that “the parties be treated with equality and each party shall be given a full opportunity of presenting his case”, “the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”
* has been the basis of most arbitration statutes adopted since then.
* **Washington Convention** – for investment arbitration; World Bank introduced in 1965 the Convention on the Settlement of Investment Disputes between States and Nationals of Other States; investment disputes could be submitted to arbitration under the auspices of the Investment Centre for Settlement of Investment Disputes (ICSID)
* **BITs** – bilateral investment treaties; BITs between two States that are party to the Washington Convention typically provide that investor can choose ICSID arbitration and that the BIT itself is considered to fulfill the requirement in ICSID Article 25 of consent to arbitration by the host State

Note: Arbitration conducted under the Washington Convention is enforceable under the provisions of the Washington Convention itself

* If one of the States that enter into a BIT is not a party to the Washington Convention, the foreign investor cannot be offered the possibility of ICSID arbitration; but may be conducted under the ICSID Additional Facility Rules.

Note: BITs usually provide that arbitration under the ICSID Additional Facility Rules, UNCITRAL Arbitration Rules or the rules of other arbitral institutions should be held in a country that is a party to the New York Convention.

* **Institutional Arbitration Rules**
* When parties choose an arbitration institution, the arbitration takes place in accordance with the rules of that organization.

Note: Many arbitration organizations have indicated that they are willing to administer arbitrations where the parties have agreed on the use of the UNCITRAL Arbitration Rules

* Rules of various arbitration institutions constitute the third level of legal rule governing international commercial arbitration. Such rules set forth:
1. procedures for the commencement of the arbitration
2. appointment of arbitrators
3. conduct of the proceedings
4. issuance of the award
* **Ad hoc Arbitration Rules**
* Some arbitration take place without any reference to an arbitration institution and are referred to ad hoc arbitrations
* Major disadvantage – while at the time of concluding the contract the parties may expect any dispute they might have to be settled in a friendly manner, at the time the dispute ripens they may be less inclined to cooperate, and they may even find it difficult to commence the arbitration
* Inherent difficulties have been overcome by the UN Economic Commission for Europe (ECE) Arbitration Rules and UNCITRAL Arbitration Rules
* The least involvement of the institution comes from being named as the “appointing authority”. If the parties are unable to appoint the arbitrator or one or more of the arbitrators in a three-member tribunal, the Rules authorize the appointing authority to do so. If a challenge is made to an arbitrator, the challenge will be heard by the appointing authority.
* **Gary Born, International Commercial Arbitration, Second Edition, §§1.01-1.03**
* **International Commercial Arbitration** – a mean by which international business disputes can be definitively resolved, pursuant to the parties’ agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral judicial procedures that provide the parties an opportunity to be heard.
* **Basic Forms of Contract Dispute Resolution:**
* **Forum Selection Clauses**
* an agreement which either permits or requires its parties to pursue their claims against one another in a designated national court
* can be either:

(i) exclusive (requiring all litigation between the parties be resolved solely in their contractual forum, and nowhere else) or

(ii) non-exclusive (permitting litigation between the parties in their contractual forum, but not prohibiting substantive claims from being brought in other national courts which possess jurisdiction

* **Arbitration Agreements** – a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute
* **Objectives of International Arbitration Agreements**
1. **Neutrality** – provides a neutral form for dispute resolution, detached from either the parties or their respective home state governments
* Essential aspects of neutrality:
1. the composition of the arbitral tribunal as it permits the parties to play a substantial role in selecting the members of the tribunal, including the right to choose a sole or presiding arbitrator whose nationality is almost always different from that of the parties involved (thus reducing the risks of partiality or parochial prejudice) which results in the constitution of a genuinely-international tribunal
2. use of internationally-neutral procedures and rules
3. **Centralized Dispute Resolution Forum** – ability to avoid the endemic jurisdictional and choice-f-law difficulties attending international civil litigation; offers the promise of a single, centralized dispute resolution mechanism in one contractual forum, thus, avoiding multiplicitous litigation in different national courts, protracted jurisdictional disputes, inconsistent decisions and enforcement uncertainties

Note: neutral, centralized dispute resolution is a vital precondition to international trade and investment.

1. **Enforceability of Agreements and Awards** – provides for the enforceability of arbitration agreements and arbitral awards; aims, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards.
2. **Commercial Competence and Expertise of Tribunal** – provides a maximally, competent, expert dispute resolution process; offers a more expert, experienced means of resolving commercial disputes through the appointment of commercially-experienced decision-makers
3. **Finality of Decisions** – absence, in most cases, of extensive appellate review of arbitral awards; judicially review of arbitral awards in some countries is narrowly confined to issues of procedural fairness, jurisdiction and public policy; results to significant reduction in both litigation costs and delays

Note: However, dispensing with appellate review also means that a wildly eccentric, or simply wrong, arbitral decision cannot readily (if ever) be corrected.

1. **Party Autonomy and Procedural Flexibility** – parties have autonomy to agree upon the substantive laws and procedures applicable to their arbitrations; parties to a commercial agreement are free to choose the law which is to govern their contractual relationship enabling the parties to dispense with the technical formalities and procedures of national court proceedings and instead fashion procedures tailored to particular disputes; parties are free to agree upon the existence and scope of discovery or disclosure, the modes for presentation of fact and expert evidence, the length of the hearing, the timetable of the arbitration and other matters.
2. **Cost and Speed** – offers a relatively cheaper, quicker means of dispute resolution than national court proceedings
3. **Confidentiality and Privacy of Dispute Resolution Process** – provides a confidential, or at least substantially private, dispute resolution mechanism, thus, preventing aggravation of the parties’ dispute; arbitral hearings are virtually always closed to the press and the public, and in practice, both submissions and awards often remain, or at least private

Note: parties sometimes affirmatively desire that certain disputes and their outcomes be made public; where a company has a standard form contract, used with numerous counter-parties, it may want interpretations of the contract to become publicly-known, and binding through precedent

1. **Facilitation of Amicable Settlement** – arbitral proceedings generally require some degree of procedural cooperation between the parties.
2. **Disputes involving States and State entities** – provides a means of overcoming or mitigating difficulties in disputes involving states resulting from doctrines of sovereign or state immunity, the act of state doctrine and similar obstacles to obtaining and enforcing judgments; provides a more independent and impartial basis for resolution of disputes involving states and state entities or corporations than proceedings in the courts of that state
* **Ana Carolina Weber, Carmine A. Pascuzzo S., et al., Challenging the “Splitting the Baby” Myth in International Arbitration, Journal of International Arbitration, (Kluwer Law International 2014, Volume 31 Issue 6) pp. 719 - 734**
* practice of compromise when rendering decisions, approaching the issues much like mediators or conciliators (with added powers), instead of adjudicating claims in accordance with proven facts and applicable law
* practice of “dividing monetary damages down the middle”, or “triangulation”
* **3 possible causes:**
1. influence of the unilateral appointing system in the arbitral decision-making process (decision making process in arbitral proceedings is the result of a compromise between arbitrators, who occasionally bargain during the deliberation process espousing, explicitly or implicitly, the position of the party that appointed them
2. lack of or insufficient reasoning of arbitral awards
3. complexities in the determination of quantum issues
* must be assessed on a case-by-case basis and not as a trend or a characteristic of the international arbitration system; it is necessary to analyze more than the values involved and granted; the reasoning and content of the award should be scrutinized in depth
* an issue concerning social and psychological aspects of the deliberations and decision-making by the arbitrators

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| **CLASS 2: THE ARBITRATION AGREEMENT I: FORMATION, VALIDITY AND SCOPE** |

* **Article II, New York Convention:**
* Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
* “Agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Note:

1. Convention applies to: (a) arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought; and (b) arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. (Art. 1, par. 1)
2. “arbitral awards” include those made by: (a) arbitrators and (b) permanent arbitral bodies
* **UNCITRAL Model Law**
* **Article 7**
* **Arbitration Agreement** is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not; may be in the form of: (i) an arbitration clause in a contract, or (ii) a separate agreement
* **Arbitration agreement must be in writing** – if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means
1. met by an electronic communication if the information contained is accessible so as to be useable for subsequent reference (“electronic communication” means any communication that the parties make by means of data messages – information generated, sent, received or stored by electronic, magnetic, optical or similar events)
2. if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other
3. reference in a contract to any document containing an arbitration clause constitutes a written arbitration agreement if reference is such as to make that clause part of the contract
* **Article 8**
* where an action is brought on a matter which is the subject of an arbitration agreement, court shall, if a party requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration, unless the arbitration agreement is null and void, inoperative or incapable of being performed
* arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court
* **Federal Arbitration Act**
* **Section 2**
* written provision in: (i) any maritime transaction, or (ii) contract evidencing a transaction involving commerce to settle by arbitration a controversy arising out of such contract or transaction, or refusal to perform the whole or any part of it, agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract
* **Section 3**
* the court in which the suit is pending, upon satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement on application of one of the parties stay the trial of the action provided that applicant is not in default in proceeding with such arbitration
* **Section 4**
* court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, issue an order directing the parties to proceed to arbitration in accordance with the terms of the agreement if the making, or the failure, neglect or refusal to perform by the party alleged to be in default, is in issue, or issue is within admiralty jurisdiction, the court shall hear and determine such issue
* **Section 202**
* an arbitration agreement or arbitral award under the FAA falls under the New York Convention, except an agreement or award arising out of such relationship which is entirely between citizens of the U.S., unless that relationship
1. involves property located abroad,
2. envisages performance or enforcement abroad, or
3. has some other reasonable relation with one or more foreign states

(Note: a corporation is a citizen of the U.S. if it is incorporated or has its principal place of business in the U.S.)

* **Section 206 (with reference to New York Convention)**
* Court may direct that arbitration be held in accordance with the agreement at any place provided for, whether within or without the U.S.
* **Section 303 (with reference to Inter-American Convention on International Commercial Arbitration)**
* Court may direct that arbitration be held in accordance with the agreement at any place provided for, whether within or without the U.S. if place or appointment of arbitrators is not provided, court shall direct arbitration to be held and arbitrators to be appointed in accordance with Article 3 of the IAC
* **English Arbitration Act, 5,**
* apply only if arbitration agreement is in writing
* any other agreement between the parties as to any matter is effective only if in writing
* **agreement is in writing if agreement is:**
1. made in writing, whether signed or not
2. made by exchange of communications in writing, or
3. evidenced in writing – if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement
* where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing
* exchange of written submissions in arbitral or legal proceedings in which existence of agreement otherwise than in writing is alleged by one party against another party and not denied by such other party in his response to the effect alleged constitutes agreement in writing as between the parties
* **Sec 6(1) arbitration agreement** means an agreement to submit to arbitration present or future disputes, whether contractual or not
* **IBA Guidelines for Drafting International Arbitration Clauses (2010)**
* **Basic Drafting Guidelines**
1. Decide between institutional and ad hoc arbitration
2. Select a set of arbitration rules and use the model clause recommended for these arbitration rules as a starting point
3. Absent special circumstances, should not attempt to limit the scope of disputes subject to arbitration and should define such scope broadly
4. Select the place of arbitration based on both practical and jurisdictional considerations
5. Specify the number of arbitrators
6. Specify the method of selection and replacement of arbitrators and, when ad hoc arbitration is chosen, select an appointing authority
7. Specify the language of arbitration
8. Ordinarily specify the rules of law governing the contract and any subsequent disputes.
* **Recommended Arbitration Clauses**
* **ICC:**

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

Without emergency arbitrator

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply.”

Note:

1. Parties may also stipulate: (i) the law governing the contract; (ii) number of arbitrators; (iii) place of arbitration; and/or (iv) language of arbitration
2. Standard clause can be modified in order: (i) to take account of the requirements of national laws and any other special requirements that the parties may have (e.g., mandatory requirements at the place of arbitration and potential place of enforcement); (ii) make special arrangements where the contract or transaction involves more than 2 parties; (iii) combine several ICC dispute resolution services
* **ICDR:**

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”

OR

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules.”

[The number of arbitrators shall be [one/three].] [The place of arbitration shall be [CITY, COUNTRY].] [The arbitration shall be held, and the award shall be rendered, in [LANGUAGE(S).]

Note:

1. ICDR International Arbitration Rules apply where the parties have provided for arbitration of an international dispute by the AAA or the ICDR but have not specified whether the AAA Commercial Arbitration Rules or the ICDR International Arbitration Rules apply. The arbitration is subject to the ICDR IAR in effect at the start of the arbitration.
2. ICDR will appoint the arbitrator(s) or select seat, if parties have not provided or cannot reach an agreement.
3. ICDR appoints all of the arbitrator in case of 2 or more claimants or respondents, unless parties agree otherwise.
* **LCIA:**

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [    ].

The governing law of the contract shall be the substantive law of [    ]."

Existing disputes

"A dispute having arisen between the parties concerning [ ], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [    ].

The governing law of the contract shall be the substantive law of [    ]."

* **UNCITRAL:**

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.”

* **Cases**
* **Republic of Nicaragua v. Standard Fruit Company, et al., Nos. 88-2585, 80-15803, 937 F.2d 469 (US Court of Appeals, Ninth Circuit, July 1, 1991)**

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| **Facts:*** Standard Fruit Company (“SFC”) produces and purchases bananas in western Nicaragua. SFC is a wholly-owned subsidiary of Standard Fruit and Steamship Company, which purchases the bananas from SFC and transports and distributes them in the U.S. Steamship, which is in turn a wholly-owned subsidiary of C&C.
* From 1970 to 1982, SFC operated by entering into limited partnership agreements with landowners in Chinandega, Nicaragua on a 20-80 profit sharing; leasing the plantations from the landowners and assigning them to the partnerships; and partnership entered into an exclusive fruit purchase agreement with SFC, promising to sell all export-quality bananas from its plantation to SFC.
* As a result of political events in Nicaragua, the Nicaraguan government took control of the banana industry and among others, required SFC to transfer its 20% ownership share in the partnership to the government, to which SFC objected. Negotiations ensued until December 1980.
* On even date, Nicaragua promulgated a decree declaring the banana industry as a state monopoly and nullifying all pre-existing lease, partnership, and fruit purchase contracts. SFC understood it as an expropriation of its business and consequently, ceased all operations in Nicaragua.
* Nicaragua requested for a summit meeting with SFC and its parent companies to sort out the differences, which led to the execution of a Memorandum of Intent (“MOI”) which was signed by the 2 officers each of the parent companies, but not by SFC’s representatives.
* The MOI termed “an agreement in principle” envisioned the renegotiation and replacement of four operating contracts between SFC and the competent Nicaraguan national entity. It established the essential elements of the fruit purchase contract: price, term, and statement that it covers all first-quality bananas produced by Nicaraguan growers. Throughout the negotiations and for the next 22 months, SFC complied with the terms of the MOI as though it were bound by it.
* The MOI contained an arbitration clause stating that all disputes arising under the arrangements will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the London Arbitration Association (which was not in existence). However, there is a separate letter sent by the principal draftsman 3 weeks after the negotiations explaining the inconsistency (providing for arbitration but without finally fixing the forum or automatic method of transmitting disputes), i.e., essentially that neither side could remember the name of the arbitration body in London due to the circumstances at that time.
* Due to reasons not stated in the case problem, SFC sued the Nicaraguan government in the U.S. District Court for the Northern District of California (“DC”) based on diversity action, i.e., between a foreign state and U.S. corporation.

**Procedural History:*** Republic filed a motion to compel international arbitration of its breach of contract claim and to stay judicial proceedings pending arbitration.
* Applying a three-part test for arbitrability— whether: (a) the parties entered into a contract; (b) contract included an agreement to arbitrate disputes; and (c) disputes covered by the arbitration agreement included those before the DC, the DC denied the motion and granted summary judgment. It found that the MOI was not intended as a binding contract, arbitration provision was merely a provision declaring expectations of the parties that contracts to be negotiated in the future would include agreement to arbitrate, and scope of the clause was not broad enough to require arbitration of MOI’s enforceability.
* Both parties agree that federal substantive law (Federal Arbitration Act) governs the question of arbitrability.

**Relevant Issues:**First Issue: Whether the parties had entered into a contract “evidencing a transaction involving commerce” under the Federal Arbitration Act (“Act”) and committing both sides to arbitrate the issue of the contract’s validity.Second Issue: Whether the “paragraph IV” constitutes an agreement to arbitrate and thus, encompasses dispute.**Holding:**Firs Issue: Yes.Second Issue: Yes**Judgment:**DC’s judgment was reversed and case remanded for an order directing arbitration. Summary judgments are likewise reversed. Although **it was the court’s responsibility to determine the threshold question of arbitrability**, DC improperly looked to the validity of the contract as a whole and erroneously determined that the parties had not agreed to arbitrate the dispute. **It should have considered only the validity and scope of the arbitration clause itself.** It also ignored the strong evidence that both parties intended to be bound by the arbitration clause. All doubts over the scope of an arbitration clause must be resolved in favor of arbitration in light of the strong federal policy favoring arbitration in international commercial disputes.**Rule/Rule Explanation:**First Issue:* Determinations of arbitrability, like the interpretation of any contractual provision, are subject to de novo review. (Mediterranean Enterprises, Inc., v. Ssangyong Corp., 708 F.2d 1458, 1462-63 (9th Cir. 1983); In re Bubble Up Delaware, Inc., 684 F.2d 1259, 1264 (9th Cir. 1982)). The district court’s interpretation of the contract language is a question of law to be reviewed de novo. (United States v. City of Twin Falls, 806 F.2d 862, 869 (9th Cir. 1986), cert. denied 482 U.S. 914, 107 S.Ct. 3185, 96 L.Ed.2d 674 (1987))
* Section 2 embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable “upon such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. Sec. 2) The standard for demonstrating arbitrability is not a high one; in fact, a district court has little discretion to deny an arbitration motion, since the Act is phrased in mandatory terms. (Dean Witter Reynolds Inc. v. Byrd 470 U.S. 213, 105 S.Ct. 1238, 1241, 84 L.Ed. 2d 158 (1985))
* Under Section 4 of the Act, the district court must order arbitration if it is satisfied that “the making of the agreement for arbitration … is not in issue …” Therefore, the district court “can only determine whether a written arbitration agreement exists, and if it does, enforce it ‘in accordance with its terms.’” (Howard Elec. & Mech. V. Briscoe Co., 754 F.2d 847 849 (9th Cir. 1985)
* The “’liberal federal policy favoring arbitration agreements’ … is at bottom a policy guaranteeing the enforcement of private contractual arrangements. As with any other contract, the parties’ intentions control, but those intentions are generally construed as to issues of arbitrability.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985)
* Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967): courts may not consider challenges to a contract’s validity or enforceability as defenses against arbitration; demands that arbitration clauses be treated as severable from the documents in which they appear unless there is clear intent to the contrary. An arbitration clause may thus be enforced even though the rest of the contract is later held invalid by the arbitrator. Accord, Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1410 (9th Cir. 1990)
* Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir.1983), cert. denied, 464 U.S. 1070, 104 S.Ct. 976, 79 L.Ed.2d 214 (1984): The agreement to arbitrate and the agreement [to buy and sell motors] are separate. [Sauer’s] promise to arbitrate was given in exchange for [White’s] promise to arbitrate and each promise was sufficient consideration for the other.
* As regards issue of agency (which is essentially a legal one and must be decided by a court), where the parties admit to signing a document that contains an arbitration provision, all questions regarding the breach of the agreement must be referred to arbitration.

Second Issue:* Because of the presumption of arbitrability established by the Supreme Court, courts must be careful not to overreach and decide the merits of an arbitrable claim. [Court’s] role is strictly limited to determining arbitrability and enforcing agreements agreement to arbitrate, leaving the merits of the claim and any defenses to the arbitrator. (See Graphic Comm. Union, Dist. Council #2 v. GICU-Employer Retirement Benefit Plan, 917 F.2d 1184 (9th Cir. 1990); Camping Construction Co. v. D.C. ironwkrs., Local U. #378, 915 F.2d 1333 (9th Cir. 1990))
* Emphatic federal policy in favor of arbitral dispute resolution applies with special force in the field of international commerce. When international companies commit themselves to arbitrate a dispute, they are in effect attempting to guarantee a forum for any disputes. Such agreements merit great-defense, since they operate as both choice-of-forum and choice-of-law provisions, and offer stability and predictability regardless of the vagaries of local law: “The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2440, 41 L.Ed.2d 444 (1985)
* An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2440, 41 L.Ed.2d 444 (1985)
* As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-942
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* **Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)**

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| **Facts:*** Mitsubishi Motors Corporation (“Mitsubishi”), a joint venture between Chrysler International, S.A. (“CISA”), a Swiss corporation, and another Japanese corporation, manufactures automobiles and distributes the same through CISA dealers outside the U.S.
* In October 1979, a distribution agreement was executed between Soler Chrysler-Plymouth, Inc. (“Soler”), a Puerto Rican corporation, and CISA, and a sales (procedure) agreement was executed among Mitsubishi, CISA and Soler.
* The sales agreement contains an arbitration clause which requires all disputes or controversies arising between Mitsubishi and Soler and out of or in relation to the agreement or breach thereof be finally settled by arbitration in Japan pursuant to the rules of Japan Commercial Arbitration Association (“JCAA”).
* In 1981, when the new-car market slackened, Soler failed to meet its sales volume requirement. It also arranged for a transshipment of certain quantity of vehicles, which was refused by Mitsubishi and CISA. Settlement efforts failed and Mitsubishi eventually withheld shipment of additional vehicles.In March 1982, Mitsubishi sued Soler.

**Procedural History:*** The action against Soler was originally filed in the US District Court for the District of Puerto Rico (“DC”) in accordance with the Federal Arbitration Act (“Act”) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”).
* DC ordered the parties to arbitrate the issues and counterclaims, except on the anti-trust claims. Soler appealed.
* US Court of Appeals for the First Circuit (“CA”), among others, reversed the judgment of DC insofar as it had ordered submission of Soler’s anti-trust claims to arbitration, and affirmed the remainder of the judgment by directing DC to consider how the parallel judicial and arbitral proceedings should go forward.
* US Supreme Court (“SC”) affirmed in part insofar as the arbitration of statutory claims are concerned, but reversed in part with respect to the arbitrability of anti-trust claims.

**Issue:**Whether an agreement to resolve antitrust claims by arbitration when that agreement arises from an international arbitration is valid**Holding:**Yes**Judgment:*** DC ordered arbitration, but excluded federal antitrust issues relying on the earlier CA decision in American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (CA2 1968), where it was held that the rights conferred by the antitrust laws were “of a character inappropriate for enforcement by arbitration. However, it eventually ruled that the international character of the agreement required enforcement of the agreement to arbitrate even as to the antitrust claims, relying on Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-520, 94 S.Ct. 2449, 2455-2458, 41, L.Ed.2d 270 (1974), in which the SC ordered arbitration, pursuant to a provision embodied in an international agreement, of a claim arising under the Securities Exchange Act of 1934 notwithstanding its assumption, arguendo, that Wilko, supra, which held non arbitrable claims arising under the Securities Act of 1933, also would bar arbitration of a 1934 Act claim arising in a domestic context.
* CA affirmed in part, and reversed DC judgment insofar as it had ordered submission of Soler’s antitrust claims to arbitration.
* SC affirmed in part insofar as the arbitration of statutory claims are concerned, but reversed in part with respect to the arbitrability of anti-trust claims, and ruled that (a) that CA correctly conducted two-step inquiry, first determining whether the parties’ agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties’ agreement foreclosed the arbitration of those claims; and (b) anti-trust claims or issues are arbitrable.

**Rule/Rule Explanation (Justice Blackmun):*** An arbitration agreement can be construed to encompass statutory claims. There is no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. Nor is there any reason to depart from the federal policy favoring arbitration where a party bound by an arbitration agreement raises claims founded on statutory rights. (pages 3352-3355)
* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 S.Ct. at 941-942, 74 L.Ed.2d (1983): “\*\*\* The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.
* Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require the enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context. (see Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-520, 94 S.Ct. 2449, 2455-2458, 41, L.Ed.2d 270 (1974))
* The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. (see Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967))
* The party may attempt to make a showing that would warrant setting aside the forum-selection clause—that the agreement was “[a]ffected by fraud, undue influence, or overweening bargaining power”; that “enforcement would be unreasonable and unjust”; or that proceedings “in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.” (see The Bremen, 407 U.S., at 12, 15, 18, 92 S.Ct., at 1914, 1916, 1917)
* By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. (page 3354)
* Potential complexity should not suffice to ward off arbitration. Adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal. (page 3357)
* Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes those arising from the application of American antitrust law, the tribunal therefore should be bound to decide the dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. (page 3359)

**Dissenting Opinion (Justice Stevens):*** As a matter of ordinary contract interpretation, the antitrust claim is not arbitrable. The federal policy favoring arbitration cannot sustain the weight that the Court assigns to it. A clause requiring arbitration of all claims “relating to” a contract surely could not encompass a claim that the arbitration clause was itself part of a contract in restraint of trade. Nor should it be read to encompass a claim that relies, not on a failure to perform the contract, but on an independent violation of federal law. The matters asserted by way of defense do not control the character, or the source, of the claim that Soler has asserted.
* The plain language of the statute encompasses Soler’s claims that arise out of its contract with Mitsubishi, but does not encompass a claim arising under federal law, or indeed one that arises under its distribution agreement with Chrysler. Nothing in the text of the Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claim. Until today, all Court’s cases enforcing agreements to arbitrate under the Act have involved contract claims.
* There are 4 recognized exceptions: (i) claim of employment discrimination under Civil Rights Act of 1964; (ii) employee’s claim based on Fair Labor Standards Act; (iii) Federal Claims under Ku Klux Act of 1871; and (iv) claims arising under Section 12(2) of the Securities Act of 1933.
* A decision by Congress to create a special statutory remedy renders a private agreement to arbitrate a federal statutory claim unenforceable.
* Arbitration awards are only reviewable for manifest disregard of the law, and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator’s decision is virtually unreviewable.
* Arbitration clause should not be construed to include unexpressed statutory remedy
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* **Fiona Trust & Holding Corporation & Others v. Yuri Privalov & Others [2007] EWCA Civ 20 (HL)**

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| **Facts:*** The relevant 8 charter disputes are part of an overall charter dispute between Sovcomflot and its subsidiaries, on one hand, and a Mr. Nikitin, who is alleged to have bribed one or more directors or employees of Somvcomflot and their associated companies.
* The charter parties and other contracts were alleged to have been procured by bribery and contained terms highly favourable to the charterers: (i) commissions were paid to companies nominated by Mr. Nikitin, on ship purchases and both new and existing ship building business, (ii) Sovcomflot interests were deceived into making an enormous payment to acquire a debt owed to Russian bank, (iii) uncommercial sale and leaseback transactions were made for the benefit of Mr. Nikitin’s companies, shipbuilding options and shares in Sovcomflot companies were traded at a gross undervalue, and (vi) fictitious service contract was entered into designed to injure owners’ financial and commercial interests.
* Claimants sought damages in an action in England. There is also a claim that eight charter parties (subject of the proceedings) have been validly rescinded.
* Each charter party contains a “Law and Litigation” clause which provides for any dispute under the charter to be decided in England and confers either party the right to elect to such dispute referred to arbitration in accordance with the rules of the London Maritime Arbitrators’s Association.
* The charterers of the eight charter parties have sought to enforce their rights in arbitration and have appointed a sole arbitrator.
* The owners, via Sec. 72, Arbitration Act of 1996 (“Act”), sought to restrain the arbitration proceedings on the ground that owners have rescinded both the charter parties and the arbitration agreements contained in it for bribery and thus, there can be no arbitration.
* Charterers sought a stay from the court under Sec. 9 of the Act of the owners’ rescission claims, and any further time charter claims by owners.

**Procedural History:*** The High Court (Commercial Court) declined to stay the claims for rescission and granted interlocutory injunctions to restrain the arbitration proceedings pending the trial of the action.

**Relevant Issues:**First Issue: Whether a claim based on a charter party alleged to have been rescinded due to bribery constitute a dispute that can be determined by arbitration.Second Issue: Whether an arbitration clause is separable. Corollary, whether the assertion of invalidity goes to the validity of the arbitration clause.**Holding:**First Issue: YesSecond Issue: Yes**Judgment:**Judge’s order was partially set aside; owners’ claims for rescission of the charter parties was ordered stayed pursuant to Section 9(4), Act, and their application pursuant to Sec. 72 was dismissed.**Rule/Rule Explanation:**First Issue:* One must first decide what disputes are governed by the arbitration clause before considering the extent to which the arbitration agreement was separable from the main [charter] agreement.
* Any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words “arising out of” should cover “every dispute except a dispute as to whether there was ever a contract all”. Words “arising under the contract” should no longer be given a narrower meaning.
* One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favor of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen.
* A dispute whether the contract can be set aside or rescinded for alleged bribery does fall within the arbitration clause on its true construction. The case is different from a dispute “as to whether there were ever a contract at all”.

Second Issue:* Arbitration clauses are severable from the contracts in which they are contained.
* Ever since Heyman v Darwins Ltd., English common law recognized that an arbitration clause is a separate contract which survives the destruction (or other termination) of the main contract.
* Sec 7, Act, provides: Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.
* An allegation of invalidity of a contract does not prevent the invalidity question being determined by an arbitration tribunal pursuant to the (separate) arbitration agreement. It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contract.
* Harbour vs. Kansa at first instance [1992] 1 Lloyds Rep 81, Steyn J: Once it became accepted that the arbitration clause is a separate agreement, ancillary to the contract, the logical impediment to referring an issue of the invalidity of the contract to arbitration disappears. Provided that the arbitration clause itself is not directly impeached (e.g. by a non est factum plea), the arbitration agreement as a matter of principled legal theory capable of surviving the invalidity of the contract.
* It is not enough to say that the contract as a whole is impeachable. There must be something more than that to impeach the arbitration clause. Comments that “a party to a contract the making of which was induced by fraud would be surprised to be told that he is bound to have the issue tried by an arbitrator appointed under a clause in that contract” is no more than forceful comments. They did not carry the day. Bribery cannot be any different from fraud.
* While a transaction such as a contract procured by bribery is, as regards the principal, void as being unauthorized, it is no argument for saying that a separable arbitration clause cannot be invoked for the purpose of resolving the issue whether bribery occurred.
* If arbitrators can decide whether a contract is void for initial legality, there is no reason why they should not decide whether a contract has been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure. Illegality is a stronger case than bribery which is not the same as non est factum or the sort of mistake which goes to the question whether there was any agreement ever reached. It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular.
* If in a case where an arbitrator does have jurisdiction to decide a particular dispute, he is to be restrained from so doing and not stay of court proceedings is to be granted, there is likely to be a potential breach of the UK’s international obligations in relation to commercial arbitration under the NY Convention of 1957 as enshrined in the 1996 Act.
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* **Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)**

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| **Facts:*** Respondents John Cardegna and Donna Reuter (collectively, “John”) entered into various deferred-payment transactions with Buckeye Check Cashing (“Buckeye”) in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge. For each separate transaction, John signed a “Deferred Deposit and Disclosure Agreement” (“Agreement”) which contains arbitration provisions which allows the parties to arbitration as a means of resolving a dispute, and such binding arbitration shall be governed by the Federal Arbitration Act (“Act”).
* John brought a putative class action against Buckeye alleging that the latter charged usurious interest rates and that the Agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face.

**Procedural History:*** The action was filed before the Circuit Court, 15th Judicial Circuit, Palm Beach County, Florida (“CC”). Buckeye moved to compel arbitration and to stay proceedings pursuant to the provisions for arbitration contained in the Agreement. CC denied the motion.
* Buckeye appealed and the District Court of Appeal (“CA”) reversed and remanded.
* Borrowers appealed to the Florida Supreme Court (“FSC”), who quashed and remanded, ruling that borrowers’ claim that underlying contract was illegal and void ab initio had to be resolved by CC before arbitration of other disputes could be compelled. (Relying on Justice Black’s dissent in Prima Paint)

**Relevant Issue:**Whether a claim that purportedly usurious contract containing an arbitration provision was void for illegality is to be determined by the arbitrator, not the court.**Holding:**Yes. In this case, John challenged the Agreement, but not specifically its arbitration provisions, hence, the challenge should be considered by an arbitrator, not a court.**Rule/Rule Explanation (Justice Scalia):*** Regardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 and Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1
* Challenges to the validity of arbitration agreements that are made “upon such grounds as exist at law or in equity for the revocation of any contract,” within meaning of FAA provision stating that arbitration provisions are valid, irrevocable, and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract,” include specific challenges to the validity of the agreement to arbitrate and challenges to the contract as a whole, either on a ground that directly affects the entire agreement, such as a fraudulent inducement, or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.
* Three propositions of Prima and Southland:
1. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.
2. Second, unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.
3. Third, the arbitration law applies in state as well as federal courts.
* Challenges to the validity of arbitration agreements can be divided into two types: (a) one type challenges specifically the validity of the agreement to arbitrate; (b) the other type challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.
* In Prima Paint, guided by Sec. 4 of the Act, it was ruled that “if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.”
* In Southland, it was ruled that “the FAA created a body of federal substantive law which was applicable in state and federal courts.
* In either state or federal courts, unless a challenge involving a contract with an arbitration clause is to the contract’s arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.
* FAA provision stating that arbitration provisions in a contract are valid, irrevocable, and enforceable “save upon such ground as exist at law or in equity for the revocation of any contract” includes those grounds for revocation that render a contract void, as well as those that render a contract voidable.

**Dissenting Opinion (Justice Thomas):**FAA does not apply to proceedings in state courts. In state-court proceedings, the FAA cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law. |

* **First Options of Chicago v. Kaplan, 514 U.S. 938 (1995)**

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| **Facts:*** First Options of Chicago, Inc. (“First Options”) is a firm that clears stock trades on the Philadelphia Stock Exchange (“PSE”). Manual Kaplan, his wife, (“Kaplans”) and his wholly owned investment company, MK Investments Inc. (“MKI”) have trading accounts with First Options which were cleared by the latter.
* The parties entered into a “workout” agreement, (“Agreement”) embodied in four documents, which governs the “working out” of debts to First Options that MKI and the Kaplans incurred as a result of the October 1987 stock market crash.
* In 1989, after entering into the Agreement, MKI lost its investment, and First Options took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency.
* When First Options’ demands for payment went unsatisfied, it sought arbitration by a panel of the PSE.
* MKI, which had signed the only workout document containing an arbitration agreement, submitted to arbitration, but the Kaplans, who had not signed that document, filed objections with the panel, denying that their disagreement with First Options was arbitrable.
* The arbitrators decided that they had the power to rule on the dispute’s merits and ruled in favor for First Options.

**Procedural History:*** Kaplans filed an action before the U.S. District Court for Eastern District of Pennsylvania (“DC”) seeking to vacate the arbitral award. First Options requested its confirmation. In the end, DC confirmed the award.
* Court of Appeals for Third Circuit (“CA”) reversed and in finding that the dispute was not arbitrable, ruled that courts should independently decide whether an arbitration panel has jurisdiction over a dispute, and that it would apply ordinary standards of review when considering the DC’s denial of the motion to vacate the arbitration award.

**Relevant Issue:**First Issue:Whether the court has the primary power to decide whether the parties agreed to arbitrate a dispute’s merits. (Whether the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts.)Second Issue:Whether CA should apply ordinary standards when reviewing DC decisions upholding arbitration awards.**Holding:**First Issue: Yes. (First Options cannot show a clear agreement on the part of the Kaplans. The Kaplans’ objections to the arbitrators’ jurisdiction indicate that they did not want the arbitrators’ to have binding authority over them. This conclusion is supported by (1) an obvious explanation for their presence before the arbitrators; and (2) Third Circuit law, which suggested that they might argue arbitrability to the arbitrators without losing their right to independent court review.)Second Issue: Yes.**Judgment:**CA judgment was affirmed.**Rule/Rule Explanation (Justice Breyer):**First Issue:* Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute (see, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76), so the question “who has the primary power to decide arbitrability” turns upon whether the parties agreed to submit that question to arbitration. If so, then the court should defer to arbitrator’s arbitrability decision. If not, then the court should decide the question independently.
* (The Kaplans did not agree to arbitrate arbitrability.) Courts generally should apply ordinary state-law principles governing contract formation in deciding whether such an agreement exists. However, courts should not assume that the parties agreed to arbitrate arbitrability unless there is “clear and unmistakable” evidence that they did so. (See AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648)

Second Issue:* Courts of appeals should apply ordinary standards when reviewing district court decisions upholding arbitration awards, i.e., accepting findings of fact that are not “clearly erroneous” but deciding questions of law de novo­­; they should not, in those circumstances, apply a special “abuse of discretion” standard. It is undesirable to make the law more complicated by proliferating special review standards without good reason.
* A court of appeals’ reviewing attitude toward a district court decision should depend upon the respective institutional advantages of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result. Nothing in the Arbitration Act supports First Options’ claim that a court of appeals should use a different standard when conducting review of certain district court decisions.
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* **Simon Foote and James Herbert, The Obligation of Arbitrators to Address all Issues that fall from Determination, but no more, Asian International Arbitration Journal, (Kluwer Law International 2014, Volume 10 Issue 1) pp. 47 – 66**
* early, proactive and ongoing engagement with the issues is important; arbitrator must cover all the bases while not overstepping the jurisdictional mark
* a well-organized arbitration that utilizes the opportunities on its procedural path to focus on identification of the parameters and nature of the dispute, and affords the parties a proper opportunity to address each issue in accordance with the principles of natural justice, will mitigate the risk of an award that goes beyond its jurisdictional mandate or fails to deal with important issues.
* Rule of thumb: an arbitrator must deal with all issues that the parties have agreed to arbitrate, but not with issues they have not
* an award may be set aside or enforcement refused if:
1. it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
2. contains decisions on matters beyond the scope of the submission to arbitration; or
3. contravenes the rules of natural justice
* Techniques for the efficient identification of the issues at key stages of arbitration:
1. **Louis Drefus v. Tusculum (Superior Court of Quebec):**

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| **Facts:**In the arbitration proceeding, both parties agreed that the joint venture agreement continued to govern their relationship. Tribunal raised with the parties and found that the agreement had been frustrated applying the doctrine of frustration and that neither party could rely on it in respect of the buy-out provisions or to claim for damages for breach, despite both parties responding that the doctrine was inapplicable.**Ruling:**Award was annulled because the Court found that result was improperly fashioned according to the Tribunal’s own perception as to what was fair and equitable, rather than by respecting the scope of the mandate consented and agreed by the parties. The Tribunal dealt with a dispute which was not contemplated by the parties and decided matters beyond the scope of the Terms of Reference. |

1. **Todd Petroleum Mining v. Shell (New Zealand):**

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| **Facts:**Parties submitted to arbitration the issue of whether certain expenses incurred by a service company under a joint venture between Todd ad Shell for the exploitation of a gas and condensate filed were properly approved and incurred. In the interim award, Arbitrator found, among others, that as Shell had a casting vote in respect of the activities of the service company Todd’s claim for damages could not succeed since the same decision to incur the expenses at issue were likely to have been reached had the decision been taken correct. The parties went up to the High Court raising that the points covered by the interim award had not been put by the parties at the arbitration, or at least not fully made.**Ruling:**The relevant parts of the interim award were set aside and dispute remitted to the arbitrator for re-hearing. Court held that the effect on causation of Shell’s casting vote was not pleaded and was only raised as part of the background to the JVAs and in passing as an alternative rejoinder during oral argument at the end of the hearing. The absence of articulation of the issue, the disproportionality of the consequences of the finding relative to the limited context in which it was raised, and the one-sided way in which the issue was left with the arbitrator, cumulatively are sufficient for it to constitute a breach of natural justice. The finding that the parties were subject to the fiduciary obligations was a novel initiative of the Arbitrator’s during deliberations and had not been raised or commented on by either party. |

1. **PT Prima International Development v. Kempinski Hotels**

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| **Facts:**PT contracted Kempinski to manage a hotel in Indonesia for 20 years. After only 4 years of management, PT cancelled the agreement without cause. Kempinski initiated arbitration under the management contract and sought damages for lost profits. During the arbitration (but before the hearing), it emerged that Kempinski had mitigated its loss by securing a management contract with another hotel owner in Indonesia—a contract it would otherwise have been excluded from entering into due to the exclusivity clause in its agreement with PT. PT argued during the hearing that the new agreement limited the damages owed by PT to Kempinski. Kempinski accordingly argued that the issue of limitation of damages was not properly before the Tribunal despite the fact that the factual and legal relevance of the new agreement was canvassed fully by both parties in the course of the arbitral hearing.Kempinski argued before the Singapore Courts that PT as not entitled to rely on, and the Arbitrator was not entitled to consider, the new agreement because PT had not amended its pleading. The Singapore High Court agreed with Kempinsk and asset aside the award.**Ruling:**The Singapore Court of Appeal overturned this decision, and found that while a new dispute cannot be submitted to arbitration at a late stage without consent or leave new legal arguments or factual matters that go to the remedies sought by the claimant do not have to be formally pleaded, provided that natural justice is observed.As in Todd Petroleum Mining v. Shell, the Court approached the issue of the dispute that had been referred to arbitration in broad terms by reference to the relief sought: any new fact or change in the law arising in the course of the Arbitration which would affect Kempinski’s right to the remedies must fall within the scope of the parties’ submission to arbitration. The failure to amend pleadings did not affect the validity of the award. While pleadings provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator’s adjudication, any new fact or change in the law arising after submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded. |

1. **Overseas Mining Investment v. Commercial Carribean Niquel**

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| **Facts:**This matter arose out of an arbitration concerning the breakdown of a joint venture to mine nickel in Cuba. Overseas successfully argued in arbitration that CCN had wrongfully terminated the joint venture. The Tribunal awarded damages on the basis of loss of a chance to complete the venture.CCN sought to have the award set aside in the Paris CA and argued that the parties had not addressed the loss of a chance methodology but rather the claim and argument at the arbitral hearing was for lost profits. Paris CA favorably ruled. Overseas appealed to the Cour de Cassation, which upheld the CA.**Ruling:**The arbitrators had substituted the compensation based on lost profits claimed by Overseas, which they considered inadequate, with compensation based on the loss of the chance to see the project materialize, which Overseas did not raise, and that this substitution was not a mere method for evaluating the damage but modified the basis for compensation; the CA rightly concluded that in failing to invite parties’ comments on the issue, the arbitrators breached due process. |

1. **Castel Electronics v. TCL Air Conditioner Company**

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| **Facts:**The Tribunal had found TCL liable for breaching an exclusive distributorship for the sale of its air conditioners in Australia granted to Castel. The quantum issue then faced by the Tribunal was the appropriate percentage of sales made by TCL in Australia that Castel would have secured had TCL not made those sales. The parties acknowledged that this was a hypothetical exercise not amenable to precise calculation. Castel’s expert opined that 100% was the appropriate basis but the Tribunal rejected his evidence on the basis of a lack of appropriate expertise. TCLs expert contended with a different figure which was undermined by concessions that he had relied on incomplete data. The Tribunal took into account lay evidence that contradicted TCL’s expert and reached its own figure. Damages were assessed.TCL argued before the Federal Court that, having rejected the evidence of Castel’s expert, the Tribunal was not free to come to its own figure; it was bound to accept the evidence of TCL’s expert. TCL submitted that there was no evidence to support the Tribunal’s figure and that it had not been given an opportunity to comment on it.**Ruling:**Court held that TCL should not have been surprised by the adoption of a figure mid-way between the two experts: a reasonable litigant in TCL’s shoes would have understood the possibility of the Tribunal’s reasoning. This was not a case of introduction of ideas and evidence extraneous to the dispute, but rather a permissible exercise of the Tribunal’s judgment reasonably foreseeable as potential corollaries of the opinions and ideas traversed during the hearing. |

1. **Petrochemical Industries v. Dow Chemical**

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| **Facts:**PIC, the disappointed party, alleged that the tribunal had failed to deal with one of the principal issues On that basis, PIC challenged a $2 billion award in favor of Dow for consequential losses flowing from PIC’s failure to close an acquisition of certain petrochemical assets owned by Dow. The consequential losses were said to flow from the fact that, as a result of PIC’s failure to close, Dow was required to arrange short-term finance to complete another acquisition without recourse to the proceeds of the PIC deal, leading to vastly increased financing costs.The essential complaint made by PIC was that the Tribunal had failed to deal with the issue as to whether, in light of certain assurances given to PIC by Dow about the disconnectedness of the two transactions, PIC could be said to have assumed responsibility for consequential loss to Dow resulting from PIC’s failure to close on time.**Ruling:**English Commercial Court denied the application on the basis that the tribunal had dealt with the assumption of responsibility issue, admittedly succinctly, in a sentence which read: Accordingly, PIC should reasonably have been expected to be held liable for costs associated with its failure to close. Although it was not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked, the Court found that PIC could not complain about the composite disposal of the twin issues as to foreseeability and assumption of responsibility and that a tribunal does not have to set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration. |

* Defining and Dealing with the Issues in Dispute
* Request for Arbitration (Notice of Arbitration)
* This is an important document in establishing the parameters of the dispute that is submitted to arbitration.
* PT Prima Case: The disputes submitted for arbitration determine the scope of the arbitration. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission arbitration.
* Where an arbitration is taking place under a particular set of rules the request for arbitration must also comply with the various requirements contained in those rules, including any relevant requirements as to the level of detail that must be provided in the request.

🡪 Article 4, ICC Arbitration Rules requires that a request for arbitration incorporate:

1. a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
2. a statement of the relief sought together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims.
* answer 🡪 counterclaims 🡪 reply; in some cases, even before the tribunal has been constituted or soon thereafter, the parties will already have produced “mini-pleadings” which enable the crux of the dispute to be understood.
* Terms of Appointment and First Procedural Hearing
* In some smaller or less complex cases or those where time is a particular factor, terms of appointment that establish clearly the parameters of the dispute referred to arbitration may be appropriate.
* In ICC arbitrations, the Terms of Reference procedure is compulsory.
* It is common for Terms of Appointment (TOA) to provide for confirmation by the parties that the tribunal has jurisdiction to determine the dispute as described therein.
* In certain cases, TOA may act as a separate submission agreement that independently confers jurisdiction on the tribunal to determine disputes not covered by a pre-existing arbitration agreement.
* It is also common for TOAs either to include a preliminary list of issues, which may require updating during the course of the proceedings, or a more general provision which confirms the jurisdiction of the arbitrator(s) to determine all issues of fact and law arising from the parties’ pleadings.

🡪 Issues in an arbitration are not necessarily frozen or definitively determined by lists of issues or pleadings. However, it may also be possible and useful to circumscribe in the TOA or first procedural order the circumstances in which a party will be entitled to depart from its case as set out in the original submission to arbitration, or to supplement its case by adding new claims.

* The first procedural conference and resulting procedural order are an important opportunity to ensure that the particular parameters of any given case are understood and addressed from the outset.
* IBA Rules on Taking of Evidence in IA underlines the tribunal’s responsibility for defining the dispute as soon as practicable. Article 2(3) provides: The arbitral tribunal is encouraged to identify to the parties, as soon as it considers it be appropriate, any issues:

(a) that the arbitral tribunal may regard as relevant to the case and material to its outcome; and/or

(b) for which a preliminary determination may be appropriate.

* Where the issues have not been clearly particularized elsewhere, the first procedural order should being with a recitation of the dispute and the core issues involved to ensure that the parties and the arbitrator(s) are of the same understanding about the nature and scope of the dispute submitted to arbitration.
* At the first procedural conference, the parties and tribunal should also consider, and if appropriate provide for, pleadings, agreed statements of facts and issues, joint meetings of experts and pre-hearing submissions, all of which may assist to define the issues.
* Pleadings
* The most common procedure in international arbitration is the memorial procedure, in which the parties produce sequentially narrative submissions setting out their entire cases and appending all factual and expert evidence on which they rely.
* In PT Prima, the question as to whether or not a party has been given fair warning of its opponent’s case is not limited to an investigation into the parties’ pleaded cases; rather, the question will generally be considered in the context of considerations of natural justice with reference to the pleadings being just one way of identifying whether a party has been given an opportunity to meet its opponents case.

🡪 Because of Prima, SIAC Rules were amended to expressly empower a tribunal to decide, where appropriate, any issue not expressly or impliedly raised in the parties’ submissions provided such issue has been clearly brought to the notice of the other party and that the other party has been given adequate opportunity to respond.

* Agreed Statements of Facts, Chronologies and Joint Expert Reports
* It may be possible for the parties to supply an agreed statement of facts.
* In respect of expert evidence, it is often desirable to hold meetings between the experts, often without lawyers present, in which the experts are directed to seek to narrow the areas of disagreement between them.
* Agreed or Separate Lists of Issues
* It is common to direct the parties to supply an agreed list of issues for determination or, failing agreement, the list of issues for which each party contends in advance of the merits hearings.
* Note however that, as in Dow Chemical case, such list of issues will not necessarily be determinate as to whether a particular issue falls within the scope of the reference to arbitration.
* List of issues may provide the arbitrator with a clear map for the writing of the award and will improve the quality of the process and its ultimate product.
* One technique of utility, especially in complex cases, is an “Issues Schedule”; where the parties cannot agree on a complete list of issues, an issues schedule sets out all the issues proposed by each party in a column on the left margin; the next column records whether each issue is agreed or not agreed; the third column allows for brief reasons for disagreements to be noted; another column can be added to record the evidence and submissions references for each party that relate to each issue and perhaps another column (for internal use) for the tribunal to record its decisions on each issue

🡪 captures every issue each party contends is relevant, the areas of agreement and disagreement and the reasons for disagreement

* An arbitrator need not expressly decide all issues listed.
* Pre-hearing Submissions and Hearing
* A party must have a clear understanding of the issues for resolution at least by the time the hearing arrives.
* Pre-hearing submissions can be useful to summarize often voluminous memorials or evidence, to focus the parties’ attention on the key issues and to define each party’s theory of the case; often depart from earlier pleadings; new issues may be raised or existing issues omitted; useful to have included a direction in earlier procedural orders that pre-hearing submissions represent each party’s best case at the opening of the hearing.
* Arbitrators must fully comprehend the issues and must be proactive and vigilant to understand each party’s case and define the issues and arguments as they develop during the hearing.
* Post-hearings Briefs and Tribunal Deliberations
* Particularly in complex disputes, common for timetable to provide for filing of post-hearing submissions that set out each party’s final case taking into account the evidence that has emerged over the course of the arbitration.
* In highly complex disputes, some arbitrators go so far as to require parties to provide an exhaustive table setting out each proposition which must be established in order for that party to succeed on its case and the evidence relied on as establishing that proposition.
* Allowing time for deliberation as soon as practicable after the hearing (or in appropriate cases before the hearing—“Reed Retreat” approach) is particularly beneficial for arbitrators. Issues or arguments that occur to an arbitrator during this process can be advised to the parties before post-hearing briefs are due in order that the briefs be used as an opportunity to comment.
* Writing the Award: Dealing with all the Issues
* The essence of arbitration lies in the complete and final determination by the arbitrators of the dispute that has been submitted by the parties.
* The test to determine whether an arbitrator has exceeded his jurisdiction revolves around consideration as to whether or not the particular issue decided was “in play” as a result of the way in which a dispute was presented by the parties. But this does not mean that an arbitrator must expressly decide every issue that has been identified by the parties.
* **Guidelines:**
1. A tribunal does not fail to deal with issues if it does not answer every questions that qualifies as an “issue”. It can deal with an issue by making clear that it does not arise in view of its decisions on the facts or their legal conclusions.
2. A tribunal may deal with an issue by so deciding a logically anterior point that the issue does not arise.

🡪 example: a tribunal that rejects a claim on the basis that the respondent has no liability is not guilty of serious irregularity if it does not come to a conclusion on each issue (or any issue) about quantum; by their decision on liability, the tribunal disposes of (or deals with) the quantum issues

1. A tribunal is not required to deal with each issue seriatim it can sometimes deal with a number of issues in a composite disposal of them.
2. In considering an award to decide whether a tribunal has dealt with an issue, the approach of the court is to read it in a “reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it”
3. This approach may involve taking into account of the parties’ submissions when deciding whether, properly understood, an award deals with an issue. Although submissions do not dictate how a tribunal is to structure the disposal of a dispute referred to it, often awards do respond to the parties’ submissions and they are not to be interpreted in a vacuum.
4. An arbitrator must constantly measure the arbitral process, including the award, against the touchstone principles of natural justice.
* Observing Natural Justice
* Model law countries require a proper and equal opportunity for each party to present its case (which includes answering the other side’s case). All principal arbitral rules require the same.
* In some jurisdictions, an award will be contrary to public policy if a breach of natural justice occurred during the arbitral process or in connection with the making of the award.
* Principles of natural justice set out in New Zealand case of Trustees of Rotoaira Forest Trust v. Attorney-General:
1. Arbitrators must observe the requirements of natural justice and treat each party equally.
2. The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.
3. As a minimum, each party must be given a full opportunity to present its case.
4. In the absence of express or implied provisions to the contrary, it will also be necessary that:
5. each party be given an opportunity to understand, test, and rebut its opponent’s case;
6. there be a hearing of which there is reasonable notice;
7. the parties and their advisers have the opportunity to be present throughout the hearing; and
8. each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent’s case in cross-examination, and rebut adverse evidence and argument.
9. In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.
10. The last principle extends to the arbitrator’s own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.
11. An arbitrator is not bound to slavishly adopt the position advocated by one party or the other; arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert’s evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.
12. An arbitrator is under no general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticizing his mental processes before he finally commits himself.
13. It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that without adequate notice it might have been possible to persuade the arbitrator to a different result.
14. Once it is shown that there was significant surprise, it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.
* A simple test is whether it can be said that the parties had a proper opportunity to comment on each essential building block in the arbitrator’s reasoning. If not, the parties may not have been accorded due process. Where there is a real doubt that a party has had a reasonable opportunity to address a particular factual or legal point, the best approach must be to revert to the parties so as to preserve the enforceability of the award. A proper opportunity to put a case is all that is required—that is a reasonable opportunity, not every opportunity.

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| **CLASS 3: THE ARBITRATION AGREEEMENT II: SEPARABILITY OR AUTONOMY AND APPLICABLE LAW** |

* **UNCITRAL Model Law**
* **Article 8:**
* court before which an action is brought on a matter which is subject of an arbitration agreement
* upon request of a party not later than when submitting his first statement on the substance of the dispute
* refer the parties to arbitration
* unless it finds that the agreement is null and void, inoperative or incapable of being performed
* in such case, arbitral proceedings may be commenced or continued, and award made, during pendency of court proceedings
* **Article 16(1):**
* arbitral tribunal may rule on its own jurisdiction, including any objections on the existence or validity of arbitration agreement
* an arbitration clause shall be treated as an agreement independent of the other terms of the contract
* decision by arbitral tribunal that contract is null and void shall not by operation of law the invalidity of the arbitration clause
* **New York Convention**
* **Article II (SEE CLASS 2)**
* **Article V**
* Recognition and enforcement of the award may be refused by the competent authority where recognition and enforcement is sought on the following grounds:
1. parties were, under applicable law, under some incapacity, or agreement is not valid under the law to which the parties have subjected it or, failing any indication, under the law of the country the award was made;
2. party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
3. award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration (except: when decisions on submitted matters can be separated);
4. composition of arbitral authority or arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place;
5. award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;
* May also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
1. subject matter of the difference is not capable of settlement by arbitration under the law of that country;
2. recognition or enforcement of the award would be contrary to the public policy of that country
* **Article 178, Swiss Federal Code on Private International Law:**
* arbitration agreement is valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, (or with Swiss law)
* validity of an arbitration agreement may not be contested on grounds that principal contract is invalid or it concerns a dispute which has not yet arisen
* **Article 6(9), ICC Rules:**
* unless otherwise agreed, arbitral tribunal shall continue to have jurisdiction notwithstanding any allegation that the contract is non-existent or null and void, provided—arbitral tribunal upholds validity of arbitration agreement
* arbitral tribunal shall also continue to have jurisdiction even though the contract itself may be non-existent or null and void
* **Alexandre, Belohlavek, "The Law applicable to the arbitration agreement and the arbitrability of a dispute" in Yearbook of International Arbitration, M. Roth and M. Giestlinger (eds.), Intersentia / DIKE / NWV, Antwerpen-Zurich-Vienna-Graz, 2013, pp. 27-35.**
* **International arbitration:** where national law of place of arbitration lacks any definition, encompasses any and all cases in which the status of the parties or the subject matter of the dispute have a specific and non-negligible connection to another state different from the seat of arbitration.
* Differentiation between a domestic arbitral award (whether in an international case or in a case without any international dimension) and a foreign arbitral award is usually dependent on the place where the award is made (principle of territoriality of the award)
* **Four autonomous areas associated with determination of applicable law (and choosing lex arbitri):**
1. substantive law applicable to the merits of the dispute
2. procedural law and procedural rules (standards) applicable to the procedure
3. conflict-of-laws rules regulating the determination of the applicable law (both the substantive law applicable to the merits of the dispute and the procedural law applicable to the procedural issues)
4. law applicable to the assessment of validity and effects of the arbitration agreement.
* Arbitration is specific for the application of various intertwining rules governing the assessment of partial issues—procedural and substantive (usually relating to the merits):
1. personality of the parties
2. formal validity of arbitration agreement
3. validity of arbitration agreement according to substantive law
4. issues relating to the organizational-legal procedure
5. determination of conflict-of-laws rules applicable to the determination of the applicable substantive law
6. identification, application, and determination of the effects of the application of, or refusal to apply, the overriding mandatory rules (overriding mandatory rules applicable in seat of arbitration, place exhibiting closest connection to place of arbitration and/or subject matter of dispute, place of future enforcement of award)
7. determination of scope of domestic and international public policy and its effects
8. recognition and enforcement of arbitral award
* **Key Factor:** assessment of which law applies to the arbitration agreement (jurisdiction) and which procedural law shall apply 🡪 This means the determination of the conflict-of-law rules which identify the rules for the determination of the law applicable to the proceedings themselves and to all other issues relating to the proceedings (such rules are determinative for the examination, determination, and application of the substantive law with respect to the merits)
* Lex fori (law applicable to arbitration) / curial law / procedural law 🡪 procedural law applicable to arbitration
* Law applicable to substantive-law issues / law applicable to the merits / applicable law with respect to the merits 🡪 substantive law
* **Lex arbitri (lex loci arbitri)**: as a collection of laws, standards, and rules applicable to the arbitral proceedings, i.e., an exclusively procedural standard, is independent of the law applicable to the arbitration agreement.
* The determination of the procedural law applicable to arbitration and law applicable to arbitration agreement is closely related to the concept of the arbitration agreement, i.e., whether it is a procedural or a substantive category.
* Distinction should be made between the: (a) **law applicable to the arbitration agreement** as a consensual act of the parties excluding the jurisdiction of the courts; and (b) the **exclusively procedural lex arbitri** which could be identical to the law applicable to the arbitration agreement but be determined separately
* Applicable procedural law vs. the law applicable to the arbitration agreement:
* Whereas the determination of the law applicable to the arbitration agreement is in many respects similar to the assessment of the law applicable to the substantive contractual relationship (merits of the dispute), the issue of procedure is exclusively procedural, which is also controlled by the autonomy of the parties.
* The agreement on procedure can be included in the arbitration agreement, but it is not an essential term thereof. The arbitration agreement and the agreement on procedure are principally two different agreements.
* Arbitration agreement itself is a procedural contract in the broader sense and it is rather a substantive-law institution, albeit with future effects for the (potential) proceedings.
* Agreement on procedure is a procedural agreement, i.e., a procedural contract in the narrow sense.
* Whereas the arbitration agreement has, as a rule, inter parties effects and the arbitrators only accept the agreement and, if necessary, decide on the validity and interpretation thereof, the agreement on procedure, i.e., the agreement on the procedural standard applicable to the proceedings, signifies the active participation of the arbitrators within the framework of a particular procedural mechanism.
* Due to the fact that these are two autonomous levels of the parties’ expressions of will, albeit with mutual interactive effects, it is necessary to allow a conflict-of-laws autonomy with respect to the law applicable to the arbitration agreement as well as to the procedural law (conflict of laws status) applicable to the proceedings.
* One contact point between the law applicable to the arbitration agreement and the law applicable to the proceedings is the Issue of arbitrability—a condition for the validity of the arbitration agreement and a procedural condition (requirement) (i.e., a prerequisite for the possibility to conduct the proceedings) from the perspective of procedural standards. Both cases concern two different levels. However, both objective and subjective arbitrability principally influence the possibility of submitting a dispute to arbitration and also determine the future enforceability of the award.
* The existence, or conversely the absence, of arbitrability relates to the law applicable to the arbitration agreement. From the perspective of substantive law, the absence of arbitrability renders the arbitration agreement invalid. From the procedural perspective the absence of arbitrability constitutes an obstacle to the proceedings (hinders the proceedings).
* **HSF Model Arbitration Clause (See Separate Sheet)**
* **Klaus Peter Berger, Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?; International Arbitration 2006: Back to Basics?? 301 (Albert Jan van den Berg ed., 2007) (ICCA Congress Series No. 12/Montreal 2006) (except Part II, but concentrate on Part III)**
* The choice of the seat by the parties, or on their behalf by the arbitral institution or the arbitral tribunal, functions as an indirect choice of law:
1. for the law applicable to the arbitration procedure,
2. for the law applicable to the substantive validity of the arbitration agreement,
3. for the law that determines the arbitrability of the claims raised and the formal validity of that agreement.
* Transnational Conflict Rules: Art. V(1)(a) NY Convention, Art. VI(a) and (b) European Convention, Arts. 34(2)(a)(i) and 36(1)(a) German Arbitration Act, Ar. 1073 Dutch Arbitration Act, and Sec. 48 Swedish Arbitration Act; conflict rules for the determination of the law governing the substantive validity of the arbitration agreement
* NY Convention: in view of its transnational character, the rule applies irrespective of whether a tribunal or court deals with the question of the validity of the arbitration agreement in the pre-award stage or a court deals with this issue in the post-award stage in setting aside or enforcement proceedings; this means that in practice, the territorial connection of the arbitration law to the law of the seat of the arbitration prevails over any attempts to trans-nationalize the arbitration clause.
* Does the choice of law clause of the main contract extend to the arbitration clause contained therein?

🡪 Yes. The real choice—in the absence of any express or implied choice by the parties—appears to be only between the law of the seat and the law which governs the contract as a whole.

* But the view in the immediately preceding bullet ignores the doctrine of separability. **Since the parties usually fail to include a special choice of law clause for the arbitration agreement into their contract and absent any special indications hinting at a tacit choice of law for the arbitration agreement, the law of the seat of the arbitration should be applied to determine the substantive validity of the arbitration agreement**. This means that in most cases, the seat of arbitration is transformed from a subsidiary to the primary connecting factor for the determination of the law applicable to the arbitration agreement.
* English Courts have taken the approach that the law of the contract governs the arbitration agreement.

🡪 But what if the seat is in England but the arbitration agreement is governed by a foreign law?

The European Convention provides that in such a case the courts shall determine the substantive validity of the arbitration agreement by virtue of the rules of conflict of the court seized of the dispute, i.e., the court will apply the conflict rule of its own lex fori, which will almost certainly be the closest-connection or center-of-gravity test.

🡪 Two issues:

1. The application of the lex contractus to the arbitration agreement does not result from an extension of the parties’ choice of law clause but from the applications of the objective closest connection test.
2. If the seat of arbitration is later fixed by the parties or by the arbitral institution or the arbitral tribunal, then the law of that seat applies to the arbitration agreement; if this law is different from the law applicable to the main contract, then the subsequent choice of the seat leads to a change of the law applicable to the arbitration agreement
* **English Commercial Court explained the contractual character of arbitration:** An arbitration clause in a commercial contract is an agreement inside an agreement. The parties make their commercial bargain, i.e., exchange promises in relation to the subject matter of the transaction, but in addition agree on a private tribunal to resolve any issues that may arise between them.
* **Arbitration agreement is the “gateway to arbitration.”**
* Law applicable to the arbitration agreement involves determining:
1. law applicable to the parties’ capacity to conclude the arbitration agreement
2. law applicable to the arbitral procedure (lex loci arbitri)
3. law applicable to the arbitrator’s contrat (receptum arbitri)
4. law applicable to the contract between the parties and the administering institution
5. law applicable to the substance of the dispute
* **Substantive rules of private international law govern the subject matter arbitrability of claims that are in dispute in arbitrations which have their seat in that jurisdiction. These rules apply as soon as the seat of arbitration is fixed in that country.**
* **The seat serves as the connecting factor for these rules when the question is to be determined by the tribunal itself. However, when this issue is to be determined by a court in a country other than that where the arbitration had its seat (e.g., in recognition and enforcement proceedings), that court will determine that issue according to its own law. 🡪** confirmed by Art. V(2)(a) of NY Convention and Art. 36(1)(b)(i) of UNCITRAL Model Law on International Commercial Arbitration
* **The substantive validity of the arbitration agreement, i.e., the contractual arbitrability, is governed by the choice of law principles.**
* **Arbitral tribunals must determine the law applicable to the arbitration agreement whenever they have to ascertain the basis of their own jurisdiction, by virtue of the generally accepted principle of Kompetenz-Kompetenz.** Such an examination of the existence, validity or scope fo the arbitration agreement under the law applicable to it is required if one party challenges the jurisdiction of the tribunal for all or certain claims submitted to it or if one party requests arbitral interim relief which, as an annex to the tribunal’s decision-making power, requires the validity of the arbitration agreement as the basis of the tribunal’s jurisdiction.
* **Due to the territoriality principle, arbitral tribunals are under an obligation to apply the arbitration law at the seat of the arbitration.**
* **Cases when the law applicable to the arbitration agreement is to be determined by state courts:**
1. if party is sued before a state court and invokes the existence of an arbitration agreement
2. if party seeks interim relief or other measures of assistance from a state court under the applicable arbitration law in force at the seat of the arbitration or in another jurisdiction or in the post-award stage
3. if the losing party seeks to have the award set aside by the courts at the seat of the arbitration for lack of a valid arbitration agreement
4. if the winning party seeks to have the award enforced at the seat of the arbitration or in another jurisdiction
* **Submission Agreement:** a separate arbitration agreement dealing with an existing dispute which it submits to arbitration instead of dispute resolution before domestic courts; it is a freestanding contract.
* **In case of submission agreements, parties should choose a law to govern that agreement and should set out their choice in an appropriate clause. If no express choice of law is made, and a question arises as to the law governing the submission agreement, the general principles as to the choice of law will apply.**
* **In Favorem Rule:** principle applied to international arbitration agreements; serves to enforce the common intention of the parties to have their dispute decided before an international arbitral tribunal; “an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause. The invalidation of such an agreement would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under [our] laws and in [our] courts”.
* **Effects of In Favorem Rule:**
1. An arbitration agreement should be construed in good faith.
2. In determining the law applicable to the arbitration agreement, the tribunal should seek a solution that upholds the validity of the arbitration agreement (approach is known as “**favor negotii**” in general conflict of laws theory).
* **Law Applicable to Substantive Validity**
* **Closest-Connection or Center-of-Gravity Test:** a generally accepted principle of conflict of laws whereby an agreement to arbitrate is more closely connected with the law of the seat of the arbitration as the place of the performance of the arbitration agreement than with any other country.
* **Transnational Conflict Rule:** contained in Article V(1)(a) NY Convention, Art. VI(a) and (b) EU Convention, Arts. 34(2)(a)(i) and 36(1)(a)(i) UNCITAL Model Law, Sect. 1059(2)(1).a) and 1060(2) of the German Arbitration Act, Art. 1073 Dutch Arbitration Act, and Sec. 48 of Swedish Arbitration Act.
* **The choice of law clause of the main contract also extends to the arbitration clause, in the absence of any express or implied choice by the parties.** (Note: This appears to ignore the legal effects of the doctrine of separability of arbitration agreement and the main contract.)
* **If a tribunal has to deal with the formal validity of the arbitration agreement, it must apply the formal validity rule contained in the lex loci arbitri**; while addressed to courts, it is desirable that international arbitral tribunals do not without serious reasons depart from the formal validity rule laid down in Article II(2) of the NY Convention in order to ensure that the tribunal will not judge its competence along criteria which are different from those that a judge would apply under Art. V, NY Convention.
* **Law applicable to the parties’ capacity to arbitrate:** follows special conflict of laws considerations
* The juridical seat of the arbitration plays a dominant role as a connecting factor for the determination of the law applicable to the formal and substantive validity of the arbitration agreement.
* Its application may be due to the fact that the:
* law of the seat contains a substantive rule of private international law which applies to all arbitrations having their seat in that country, as in the case of the formal validity requirements or objective arbitrability rules
* seat serves as a classical connecting factor of conflict of law provisions in effect at the seat or in other countries, as in the case of the determination of the law applicable to the substantive validity of the arbitration agreement
* **Law of the seat governs the following issues, three of which relate to the validity of the arbitration agreement:**
1. the substantive validity of the arbitration agreement absent a choice of law
2. the formal validity of the arbitration agreement if it is to be determined by the tribunal
3. the object of arbitrability of the subject matter of the disputes
4. the arbitral procedure

(Note: The seat is typically chosen by the parties or by the tribunal or by the arbitral institution on their behalf. The choice of the seat becomes a direct or indirect choice of law by the parties with respect to the issues listed above.)

* If the issue at stake relates to the personal status of a party or to the protection of the other party, the significance of the seat is overridden by other connecting factors which are better able to do justice to these policy considerations. This applies to:
1. the parties’ capacity to arbitrate (“subjective arbitrability”), which is governed by the law of the country where the party has its residence, domicile or seat; and
2. the issue of whether a party was duly represented when concluding the arbitration agreement, which is governed by the law of the state where the agent has concluded the arbitration agreement.
* Thus: there are only three different connecting factors, the seat reigning most prominently among them, with respect to the determination of the law governing all aspects of the validity of international arbitration agreements for six different legal issue.
* **Cases**
* **All-Union Foreign Trade Ass’n. vs. JOC Oil Co. Ltd. (Award of 9 July 1994) (Foreign Trade Arbitration Comm’n, USSR Chamber of Commerce and Industry, Case NO. 109/1980)**

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| **Facts:*** All-Union Foreign Trade Association (“All-Union”) executed a contract (“Contract”) with Joc Oil Limited (“Joc Oil”) in Paris whereby All- Union will sell tons of oil and oil products on FOB and C&F terms, and the contract was signed by All-Union’s Chairman.
* Contract contains an arbitration clause providing for arbitration at the Foreign Trade Arbitration Commission of the USSR Chamber of Commerce and Industry, Moscow (“FTAC”) in accordance with its rules of procedure.

**Procedural History:*** Alleging late deliveries of certain shipments, Joi Oil ceased to pay for the shipments which had been delivered, and All-Union suspended further shipments.
* In May 1980, All-Union filed a claim for payment with interest with FTAC. Joc Oil filed a counterclaim for damages of breach of contract.
* Joc Oil objected to the jurisdiction of FTAC on the ground that the contract was void ab initio as the requirements of Soviet law as to the procedure for signing foreign trade transactions by Soviet organizations had not been observed. It further asserted that the arbitration clause, included in the contract, was null and void; that the theory of autonomy of an arbitration agreement was not applicable in the USSR; and thus, FTAC was not competent to hear the dispute which had arisen.
* Arbitral tribunal held that All-Union could not claim the contractual price of the goods because the sale contract was invalid as it did not comply with the formalities of Soviet law, but was entitled to restitution equal to the value of the amount of the shipments delivered and unpaid.
* All-Union sought enforcement of the award in Bermuda under the New York Convention 1958 and at common law, but Supreme Court refused enforcement.
* Decision was reversed on appeal by the CA which held that the arbitration clause survived the initial invalidity of the sales contract and that FTAC arbitrators acted within the scope of their authority.
* Parties reached an amicable settlement of the dispute shortly thereafter.

**Relevant Issues:**First Issue: Whether the arbitration agreement is independent (autonomous) in relation to the ContractSecond Issue: Whether the invalidity of the Contract has legal consequences on the award.**Holding:**First Issue: Yes, an arbitration agreement (arbitration clause) is a procedural contract, independent from the material-legal contract and that therefore the questions as to the validity or invalidity of this contract does not affect the agreement of the parties about the submission of the existing dispute to the jurisdiction of the FTAC. Second Issue: Yes. **Rule/Rule Explanation:**On Jurisdiction: The Commission therefore does not perceive the distinctions between the legal nature of an arbitration clause, included in the text of a material-legal contract concluded by parties and the legal nature of a separate written agreement as to the submission of a dispute to the jurisdiction of the FTAC. The circumstance that such an agreement is included in the text of a contract by a separate point or is formulated in an independent written document signed by the parties does not change the legal nature of an arbitration agreement. The distinction consists only in the legal-technical methods of expressing the will of the parties who have agreed to submit a dispute to the jurisdiction of arbitrators chosen by the parties.First Issue:* The subject of the agreement is the obligation of the parties to submit the examination of a dispute between a plaintiff and defendant to arbitration at the place where it sits.
* Predominant in the literature is the recognition of the autonomy of an arbitration agreement, its independence in relation to the contract. The principle of the independence of an arbitration clause (in relation to the contract, to which the said clause relates), is not predominant both in doctrine as well as in practice.
* An arbitration clause, included in a contract, means that there are regulated in it relationships different in legal nature, and that therefore the effect of the arbitration clause is separate from the effect of the remaining provisions of the foreign trade contract.

Second Issue:* The Arbitration Commission has confirmed further that, the recognition of the transaction as invalid does not mean that such a transaction does not give rise to any legal consequences, that it is nothing, legally amount to a nullity. As is evident from the content of Art 48 of the CC, a court or arbitration tribunal in the event of a dispute must discuss the question of the consequences of the invalidity of a transaction and rule upon the same.
* In view of the impossibility of restoring both parties to their initial position, since what has been transferred has already been used up, used in another way, but the value of what has been used has not been paid for, it is necessary to effect unilateral restitution, that is to say the payment of a monetary sum for the goods transferred to the other party but not paid for by him to the creditor. In addition to Art. 48 of the CC, as the basis for rendering the award, it is necessary to be guided by Art. 473 of the CC according to which a person who without any basis in law or a transaction has acquired property at the cost of another has the duty to return to the latter the unjustly acquired property.
* Joc Oil, apart from payment of the basic sum of the debt, is obligated to pay interest for the use of the monetary sum from the time specified in the rule. The reasoning of the award in this connection corresponds to judicial and arbitration practice in cases in which there are considered the relationship of claims as to the consequences of the invalidity of transactions not corresponding to the law, with a claim for the return of unjustly acquired property… {T]he question as to the property consequences of the recognition of a transaction as invalid must be decided on the basis of the rules set out in Art. 473 of the CC.
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* **Prima Paint Corporation v. Flood & Conklin Mfg. Co, 388 U.S. 395 (1967)**

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| **Facts:*** Prima Paint Corporation (“**Prima**”), a Maryland corporation, executed a consulting agreement with Flood & Conklin Mfg. Co.’s (“**Flood**”), a New Jersey corporation, in relation to the acquisition by Prima of Flood’s business.
* Under the consulting agreement, Flood will provide advice and consultation to Prima to be performed personally by Flood’s chairman, except in case of his death or disability. It also provides that “[a]ny controversy or claim arising out of or relating to [the] Agreement, or breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the [AAA].”
* Prima defaulted on its first payment to Flood under the consulting agreement, and paid only several days after the due date, but through an escrow account.
* Prima notified Flood of the latter’s breach of both the purchase and consulting agreement claiming that Flood had fraudulently represented that it was solvent and able to perform its obligations when in fact it had intended to file, and actually filed one week after the consulting agreement was signed, a petition for bankruptcy.
* Flood responded with the notice of intention to arbitration.
* Even before its time to answer expired, Prima sued Flood seeking rescission of the consulting agreement on the basis of fraudulent inducement.

**Procedural History:*** Complaint was originally filed in the US District Court for the Southern District of New York (“**DC**”) asserting diversity jurisdiction of the DC, and simultaneously, petitioned DC to enjoin Flood from proceeding with the arbitration.
* Flood cross-moved to stay the court action pending arbitration contending that the issue of “fraud in inducement” was a question that needs to be resolved by the arbitrators and not the DC.
* DC granted Flood’s motion to stay action pending arbitration and held that a charge of fraud in the inducement of a contract containing an arbitration clause was a question for the arbitrator, not the court relying on Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (C.A.2d Cir. 1959), cert. granted, 362 U.S. 909, 80 S.Ct. 682, 4 L.Ed.2d 618, dismissed under Rule 60, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960).
* CA affirmed the decision of DC and dismissed the appeal and also relied on the Lawrence Co. decision and further held that this rule—one of “substantive national law” governs even in the face of a contrary state rule.
* SC affirmed the CA decision and held that in passing upon the application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. (page 1806)

**Statement of the Issues:*** First Issue: Whether the “consulting agreement” between Prima and Flood is the kind of contract specified in Secs. 1 and 2 of the Act.
* Second Issue: Whether an arbitrator should resolve a claim of “fraud in the inducement” under a contract government by the US Arbitration Act of 1925 (“**Act**”), in the absence of evidence that the contracting parties intended to withhold that issue from arbitration.

**Holding:**First issue: YesSecond issue: Yes**Rule/Rule Explanation (Justice Fortas):*** US Arbitration Act of 1925, Sec. 2: provides that a written provision for arbitration “in any maritime transaction or a contract evidencing a transaction involving commerce \* \* \* shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
* US Arbitration Act of 1925, Sec. 3: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default with such arbitration.
* US Arbitration Act of 1925, Sec. 4: The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. \* \* \* If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

First Issue: The consulting agreement was inextricably tied to the interstate transfer of manufacturing and selling operations from NJ to Maryland and to the continuing operations of an interstate manufacturing and wholesaling business. This is a clear case of a contract evidencing a transaction in interstate commerce. (pages 1804, 1805)Second Issue:* Under Sec. 4 of the Act, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that “the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.” If the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. (pages 1806)
* In this case, Prima did not raise a claim of fraudulent inducement in entering into the agreement to arbitrate “[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof.” (page 1807)

**Concurrence and Dissent:**J. Harlan: Concurred, and also on the basis of Lawrence Co. decision.Js. Black, Douglas and Stewart dissenting:* The Court holds that is to me fantastic that the legal issue…
* An arbitration agreement is to be enforced by a federal court unless the court, not the arbitrator finds grounds “at law or in equity for the revocation of any contract.” If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated. Secs. 2 and 3 of the Act clearly presupposes the existence of a valid contract; they provide for enforcement where such a valid contract exists.
* If there has never been a valid contract, then there is nothing to arbitrate. The effect in this case is to force Prima to arbitrate a contract which is void and unenforceable before arbitrators who are given the power to make final legal determinations of their own jurisdiction, not subject to judicial review.
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* **Premium Nafta Products Ltd. V. Fili Shipping Company Ltd. [2007] UKHL 40 (Lord Hoffman, J. at 1-10, 16-21; Lord Hope, J. at 32-35)**

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| **Facts:*** Owners alleged that 8 charters were procured by bribery of senior officers of the Sovcomflot group (owned by the Russian state) by a Mr. Nikitin, who controlled or was associated with the charterer companies.
* The owners sought to rescind the charters and commenced court proceedings for a declaration that the charters have been validly rescinded.
* The charterers have applied for a stay of the proceedings under Section 9 of the Arbitration Act 1996 (“Act”) whereby the dispute will be submitted to arbitration.
* The arbitration clause in the Shelltime 4 charter agreements provides that any dispute arising under the charter shall be decided by English courts to whose jurisdiction the parties agree. However, either party may give written notice to the other party, elect to have any such dispute referred to arbitration in London in accordance with the provisions of the Act.

**Procedural History:**ER (Comm) refused a stay, but the CA allowed the appeal and granted the stay. The owners appealed.**Relevant Issue:**Whether the issue of validity of the contract (that such was rescinded or repudiated because of the bribery) should be decided by the arbitrator. (Owners argued that if they are right about the bribery, they were entitled to rescind the whole contract, including the arbitration clause, and in such a case, the arbitrator has no jurisdiction and the dispute should be decided by the court.)**Holding:**Yes. Therefore, the charterers are entitled to a stay of the proceedings to rescind the charters.**Rule/Rule Explanation:****Lord Hoffman:*** Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader’s understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.
* Arbitrators have jurisdiction to decide whether a contract was valid. (Harbour Assurance Co. (UK) Ltd. V. Kansa General International Insurance Co. Ltd. [1993] QB 701) This issue was put beyond doubt by section 7 of the Arbitration Act 1996: “Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because the other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”
* The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.
* The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a “distinct agreement” and can be void or voidable only on grounds which related directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is identical with the ground upon which the arbitration agreement is invalid. **For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attached is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a “distinct agreement”, was forged.** Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.
* On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the questions of whether there was a concluded main agreement to be decided by arbitration.
* In the present case, it is not shown that the agent was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. Owners argued that they would have not entered into any charter were it not for the bribery, but this is exactly the kind of argument which Section 7 intended to prevent. It amounts to saying that the invalidity of the main agreement would result in the invalidity of the arbitration agreement because the two were tied up with each other. But Section 7 means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.

**Lord Hope of Craighead*** In AT&T Technologies Inc. v. Communications Workers of America, 475 US 643 (1986), the U.S. Supreme Court said that, in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration could prevail. In Threlkeld & Co Inc. v. Metallgesellschaft Ltd. (London), 923 F 2d 245 (2d Cir. 1991), the court observed that federal arbitration policy concerning the scope of arbitral issues should be resolved in favour of arbitration and that arbitration clauses should be construed as broadly as possible. In Commandate Marine Corp. v. Pan Australia Shipping Pty Ltd. [2006], FCAFC 192, par. 165, the Federal Court of Australia said that a liberal approach to the words chosen by the parties was underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places, particularly when they were operating in a truly international market.
* It is in this light of these observations that the issue of severability should be viewed also. Section 7 of the Act reproduces in English law the principle laid down by Section 4 of the US Arbitration Act 1925 which provides that, on being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration. Section 7 uses slightly different language, but it is to the same effect. The validity, existence or effectiveness, of the arbitration agreement is not dependent upon the effectiveness, existence or validity of the underlying substantive contract unless the parties have agreed to this. The purpose of these provisions, as the US Supreme Court observed in Prima Paint, is that the arbitration procedure, when selected by the parties to a contract, should be speedy and not subject to delay and obstruction in the courts. The statutory language, it said, did not permit the court to consider claims of fraud in the inducement of the contract generally. It could consider only issues relating to the making and performance of the agreement to arbitrate.
* Appellants argue that, as there was no real consent to the charter parties because they were induced by bribery, there was no real consent to the arbitration clauses, submitting that line should not be drawn between matters which might impeach the arbitration clause and those which affect the main contract. But, this case is different from a dispute as to whether there was ever a contract at all. An arbitral award possesses no binding force except that which is derived from the joint mandate of the contracting parties. Everything depends on their contract, and if there was no contract to go to arbitration at all an arbitrator’s award can have no validity. So, where the arbitration agreement is set out in the same document as the main contract, the issue whether there was an agreement at all may indeed affect all parts of it. Issues as to whether the entire agreement was procured by impersonation or by forgery, for example, are unlikely to be severable from the arbitration clause. Besides, that is not this case.
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* **Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ 638 (paras. 132)**

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| **Facts:*** The case involves policies of insurance against various risks arising in connection with the construction of a hydroelectric generating plant in Brazil (Jirau Greenfield Hydro Project).
* Certain incidents occurred which led appellants to make claims under the policies, but Sulamerica declined liability on the grounds that losses were uninsured or excluded by express terms of the policies and that there had been a material alteration in the circumstances disclosed to them at the inception of which they had not been notified as required under the policies.
* The policies contain:
1. Brazilian law as governing law
2. exclusive jurisdiction of Brazilian courts
3. undertaking for mediation before reference of dispute to arbitration
4. in case of arbitration, the matter shall be arbitrated in accordance with ARIAS Arbitration Rules, with London, England as seat of arbitration.

**Procedural History:*** Sulamerica (insurer) gave notice of arbitration, and in response the Enesa (insured) started proceedings in Brazil seeking to establish that the insurers were not entitled to refer the dispute to arbitration and obtained from the court in Brazil an injunction restraining Sulamerica from resorting to arbitration. In response, Sulamerica made an application without notice to the Commercial Court seeking an injunction to restrain Enesa from pursuing proceedings in Brazil.
* Commercial Court issued an anti-suit injunction restraining Enesa Engenharia and other insured (appellants) from pursuing proceedings against Sulamerica and other insurers.
* Enesa argued that they were not bound to arbitrate because the arbitration agreement was governed by the law of Brazil, under which it could be invoked only with their consent, and that the condition on mediation was not satisfied.
* Judge held that the proper law of the arbitration agreement was English law, notwithstanding the express choice of Brazilian law as the law governing the policies and the obvious connection of the policy to Brazil, and pointed out that the choice of the seat of the arbitration agreement determines the curial law and the supervising jurisdiction of the courts of the country where the seat is located, in this case England. The law with which the agreement to arbitrate had its closest and most real connection was the English law.

**Relevant Issue:**Whether the applicable law governing the arbitration agreement is English law. (Enesa’s argument is harped on three factors: express choice of Brazilian law as governing law of the policy coupled with the submission of the parties to the jurisdiction of the Brazilian court; close commercial connection between the policy and the state of Brazil—project, currency, etc.; and inclusion of a mediation clause which is itself governed by Brazilian law. Sulamerica, for its part, argued on the basis of separability of the arbitration agreement from the main agreement.)**Holding:**Yes. An agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance; rather it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective. **Its closest and most real connection is with English law.****Rule/Rule Explanation:*** In principle, the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole. In **Channel Tunnel Group Ltd. V. Balfour Beatty Construction Ltd. [1993] A.C 334**: “more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally, it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the “curial law” of the arbitration, as it is often called.”
* Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract. Sonatrach Petroleum Corp v. Ferrell International Ltd. [2002] 1 All E.R (Comm) 627.
* C v. D [2007] EWCA Civ 1282 [2008] 1 All E.R. (Comm) 1001: “…to discover the law with which the agreement to arbitrate has the closest and most real connection.” “…**it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.**”
* In an arbitration case with a foreign element, three systems of law are potentially relevant. Namely: (i) the law governing the substantive contract; (ii) the law governing the agreement to arbitrate, and the performance of that agreement; and (iii) the law of the place where the reference is conducted: lex fori.
* Two propositions which provide the starting point for any enquiry into the proper law of an arbitration agreement. First, even if the agreement forms part of a substantive contract (as is commonly the case), its proper law may not be the same as that of the substantive contract. Second, the proper is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closes and most real connection As a matter of principle, those three stages ought to be embarked on a separately and in that order, since any choice made by the parties ought to be respected, but it has been said on many occasions that in practice, stage (ii) often merges into stage (iii), because identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law.
* If the court were concerned with a free-standing agreement to arbitrate in London containing no express choice of proper law, it is unlikely that there would be a sufficient basis for finding an implied choice of proper law and it would simply be necessary to seek to identify the system of law with which the agreement had the closest and most real connection. In those circumstances the significance of the choice of London as the seat of the arbitration would be overwhelming. However, where the arbitration agreement forms part of a substantive contract, an express choice of proper law to govern that contract is an important factor to be taken into account.
* Although there are powerful factors in favour of an implied choice of Brazilian law as the governing law of the arbitration agreement, two important factors point the other way.
1. The first is that identified by Toulson J. in XL Insurance v. Owens Corning [2001] All E.R. (Comm) 530. As the parties must have been aware, the choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. Accordingly, even though the arbitration agreement in this case does not specifically refer to the provisions of the Arbitration Act 1996, the parties must have foreseen and intended that its provisions should apply to any arbitration commenced pursuant to Condition 12. This tends to suggest that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators.
2. Second is the consequence that is said to follow from the choice of law of Brazil as the law governing the arbitration agreement. Insured say that it renders the agreement enforceable only with their consent. This is a power factor and must be taken into account when considering an implied choice of Brazilian law. Although most arbitration agreements permit either party to refer disputes to arbitration, some provide for arbitration only at the option of one or the other party. If that is what the parties wanted to achieve, the means were readily to hand. In this case, there is nothing to indicate that the parties intended to enter into a one-sided arrangement of that kind; indeed, condition 11, which provides the immediate context for condition 12, expressly provides that either party may refer to arbitration a dispute that has not been satisfactorily resolved by mediation. The possible existence of a rule of Brazilian law which would undermine the position tends to suggest that the parties did not intend the arbitration agreement to be governed by that system of law.
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* **Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazione v. Achille Lauro, 712 F.2d 50 (3d Cir. 1983) (except Part I)**

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| **Facts:*** Rhone Mediterranee Compagnia (“Rhone”) was the (casualty) insurer of a vessel owned by Achille Lauro (“Achille”). At the time the vessel caught fire, it was under time charter to Costa Armatori (“Costa”).
* As a result of the fire loss, Rhone reimbursed Costa for property and fuel losses, and consequently, Rhone, as subrogee of Costa, sued Achille and its master alleging breach of the time charter, unseaworthiness, and negligence of the crew.
* The time charter contains an arbitration clause referring any dispute arising under the charter to arbitration in London (or such other place as may be agreed) with one arbitrator to be nominated by the owner and the other by the charterer. All the parties to the time charter agreement and the lawsuit are Italian. Italy and US are parties to the New York Convention.

**Procedural History:*** Achille filed a motion for a stay of the action pending arbitration, which was granted by the District Court. Rhone appeals.

**Relevant Issue:**Whether or not the arbitration clause is unenforceable on the ground that the law of Italy, an arbitration clause which calls for an even number of arbitrators is null and void, even if there is a provision for their designation as a tie breaker.**Holding:**No. The agreement is valid. The rule of one state as to the required number of arbitrators does not implicate the fundamental concerns of either the intentional system or forum. **Rule/Rule Explanation:*** The meaning of Article II, Section 3 (of the New York Convention) which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is “null and void” only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, (see Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982); I.T.A.D. Associates, Inc. v. Podar Brothers, 636 F.2d 75 (4th Cir. 1981)), or (2) when it contravenes fundamental policies of the forum state. The “null and void” language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.
* On Rhone’s insistence that even in Italy this procedural rule on arbitration is waivable and a resulting award will be enforced—the Court ruled that even if that is not the law of Italy, Rhone’s objection does not compel the conclusion that Article II, Section 3 should be read as its suggests (that the choice of law rule of Article V should be read into Article II). The parties did agree to a non-judicial dispute resolution mechanism, and the basic purpose of the Convention is to discourage signatory states from disregarding such agreements. Rhone is not faced with an Italian public policy disfavoring arbitration, but only with an Italian procedure rule of arbitration which may have been overlooked by the drafters of the time charter agreement. Certainly the parties are free to structure the arbitration so as to comply with the Italian procedural rule by having the designated arbitrators select a third member before rather than after impasse. Even if that is not accomplished an award may still result, which can be enforced outside Italy.
* On Rhone’s argument that Article V section 1(d) prohibits such enforcement outside Italy, because it refers a non-Italian forum to the law of Italy—the Court ruled that Section 1 says only that “enforcement of an award may be refused” on the basis of the law of the country where it was made. Where the law of such a country generally favors enforcement of arbitration awards, and the defect is at best one of a procedural nature, Article V, section 1 certainly permits another forum to disregard the defect and enforce. That is especially the case when defendants come before the court and, relying on Article II, seek a stay of the action in favor of arbitration. They will hardly be in a position to rely on Italy’s odd number of arbitration rule if Rhone seeks to enforce an award in the DC of the Virgin Islands. The forum law implicitly reference by Article II section 3 is the law of the U.S., not the local law of Virgin Islands or of a state. That law favors enforcement of arbitration clauses. Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); Becker Autoradio U.S.A. Inc. v. Becker Autoradiowerk BmbH, 585 F.2d 39 (3d Cir. 1978).
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| **CLASS 4: FUNDAMENTALS OF ARBITRATION: KOMPETENZ-KOMPETENZ AND ARBITRABILITY** |

* **New York Convention**
* **Article II (SEE CLASS 2)**
* **Article V(1)(a) & (c):**

Recognition and enforcement of the award may be refused by the competent authority where recognition and enforcement is sought on the following grounds:

* parties were, under applicable law, under some incapacity, or agreement is not valid under the law to which the parties have subjected it or, failing any indication, under the law of the country the award was made; (1)(a)
* party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration (except: when decisions on submitted matters can be separated) (1)(c)

* **UNCITRAL Model Law**
* **Article 16 (Competence of arbitral tribunal to rule on its jurisdiction):**
* (1) arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
* an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
* a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitral clause.
* (2) general rule: issue of jurisdiction should be raised no later than the submission of the statement of defense.
* Exceptions (provided that the arbitral tribunal considers the delay justified):
1. plea of a party by the fact that he has appointed, or participated in the appointment of, an arbitrator
2. plea that the arbitral tribunal exceeded the scope of its authority 🡪 to be raised as the soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings
* arbitral tribunal may rule on a plea either as a preliminary question or in an award on the merits; if ruled as a preliminary question that it has jurisdiction, any party may request, within 30 days, the court to decide the matter, and the court’s decision cannot be appealed. But, while the request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.
* **Article 6, ICC Rules:**
* (1) where parties agreed to submit to arbitration under the Rules, they are deemed to have submitted effective on the date of commencement of the action, unless they agreed to the date of arbitration agreement as effective date
* (2) by agreeing, parties have accepted that the arbitration shall be administered by the Court of Arbitration of ICC
* (3) if a relevant party does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims may be determined together in a single arbitration, arbitration shall proceed and arbitral tribunal shall decide directly any question of jurisdiction or of whether the claims may be determined together, unless the Secretary General refers the matter to the Court
* (4) Court shall decide whether and to what extent the arbitration shall proceed with respect to items referred to in item (3), but arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist.
* where there are more than two parties, arbitration shall proceed between those parties including any additional parties joined, with respect to which the Court is prima facie satisfied that an arbitration agreement under the rules that binds them all may exist
* where claims pursuant to Article 9 (multiple contracts) are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied (i) that the arbitration agreements under which those claims are made may be compatible; and (ii) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration

**Note:** Court’s decision is without prejudice to the admissibility or merits of any party’s plea(s).

* (5) in all matters decided by the Court under item (4), any decision as to the jurisdiction of the arbitral tribunal shall then be taken by the arbitral tribunal itself, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed
* (6) upon notification by the Court that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not, and in respect of which of them, there is a binding arbitration agreement
* (7) where the Court decided that the arbitration cannot proceed in respect of any of the claims, such decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings
* (8) if any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure
* (9) unless otherwise agreed, arbitral tribunal shall continue to have jurisdiction notwithstanding any allegation that the contract is non-existent or null and void, provided the arbitral tribunal upholds validity of arbitration agreement
* arbitral tribunal shall also continue to have jurisdiction even though the contract itself may be non-existent or null and void
* **William W. Park, “The Arbitrator’s Jurisdiction to Determine Jurisdiction”, International Arbitration 2006: Back to Basics? (Albert Jan van den Berg ed., 2007) (ICCA Congress Series No. 13/Montreal 2006), Parts I, II and IV only**
* On its face, Kompetenz-Kompetenz addresses the powers of arbitrators, in particular their right to make jurisdictional rulings.
* From the perspective of a national legal system, challenges to an arbitrator’s authority raise two distinct questions:
1. timing—the point in the arbitral process when courts ought to examine arbitral authority to prevent or correct an excess of jurisdiction
2. effect of an arbitrator’s determination— the matter of when (if ever) courts should defer to an arbitrator’s jurisdictional determination as final.
* Effect of an Arbitrator’s Determination
* A legal system might take the position that all arbitral decisions on jurisdiction may be reviewed de novo by the appropriate court.
* In systems where courts may defer to an arbitrator’s jurisdictional determination, judges must still examine arbitral authority. However, the analysis takes place at a different level, asking whether the parties intended an arbitrator to have the last word on a particular jurisdictional issue. The pertinent question is what the contract provides.
* With the obvious exception of challenges based on public policy (non-arbitrable subjects), analysis would normally focus on the parties’ pre-dispute intent. Courts must examine the facts of each case as they bear on the parties’ pre-dispute expectations. If (and only if) the litigants intended arbitration of a particular jurisdictional question, the matter would be given to the arbitrator for ultimate disposition, not just an expression of preliminary views. However, in all events courts would first look seriously at the parties’ expectations.
* Review Standards
* Differences relate not only to when and whether courts may address arbitral jurisdiction, but on the standards of review applied when they do examine the validity of the arbitration clause. The most significant dividing line relates to whether the judge will make a full inquiry into the parties’ intent, or simply a summary examination, applying what is sometimes called a prima facie standard.
* Judge’s Role
* As a general matter, pre-award requests for declarations and injunctions implicate a preventive role for courts. The jurisdictional foundation of an arbitral proceeding must be monitored before anyone knows what the arbitrator will decide. The arbitrator’s jurisdiction becomes an issue because judges are asked to make a respondent participate, or to tell a claimant that the arbitration lacks jurisdictional foundation.
* But, when arbitral jurisdiction becomes an issue in the endgame, after an award is rendered, judges exercise a remedial function, correcting mistakes that allegedly occurred earlier in the arbitral process.
* **Three Meanings of “Kompetenz-Kompetenz”:** the right of arbitrators to rule on their own authority; if a legal system does allow the arbitration to proceed in the face of a jurisdictional challenge, at least three different approaches might be envisaged:
1. **arbitrators might offer an opinion on the limits of their own authority, but without in any way restricting the court’s consideration of the same question (courts proceed pursuant to whatever motions might be available under local law)**
* arbitrator’s right to make jurisdictional rulings operates in tandem with a rule allowing judges to examine an arbitrator’s jurisdiction, i.e., **before an award has been rendered**
* courts may step in, or might have full power to address arbitral jurisdiction in the context of lawsuits on the merits of the claim, but only limited margin to maneuver through declaratory judgments;
* arbitrator’s right to rule on jurisdiction holds significant practical value (at least to the party wishing to arbitrate)
* recalcitrant respondent cannot bring the proceedings to a halt just by challenging jurisdiction
* judge might order the proceedings suspended, either permanently or until the jurisdictional facts have been determined; or the arbitration clause may be found to be robust enough to cover the controverted dispute
* where courts address arbitral jurisdiction before an award is rendered, distinctions are often made between:

(i) judicial actions on the merits of a dispute (where a defendant asserts the action is preempted by an arbitration clause), and

(ii) requests for declaratory judgments about potential or ongoing arbitrations (where a respondent asserts defects in the arbitration clause)

* in countries which follow the UNCITRAL Model Arbitration Law, judges usually possess full power to address jurisdictional questions.
* Note: should not confuse allocation of functions between arbitrators and the supervisory arbitral institution AND allocation of responsibility between arbitrators and national courts. (Ex.: under the ICC Arbitration Rules, if the ICC Court is prima facie satisfied that an arbitration agreement may exist, any jurisdictional challenge of a deeper nature goes to the arbitrators. But, national courts will not be deprived of power to make jurisdictional determinations when asked to stay litigation, join arbitration or vacate an award.
1. **courts could refrain from entertaining any jurisdictional motions until after an award had been rendered; the arbitrators would then have the first word on jurisdiction**
* recourse to courts must wait until the end of arbitration, i.e., **after an award has been rendered**.
* permits arbitrators to decide challenges to their own authority
* the “negative effect” of the principle speaks to courts, telling judge to wait until arbitration ends before inquiring about the validity or effect of an arbitration clause.
* best exemplified by French law 🡪 if an arbitrator has already begun to hear a matter, courts must decline to hear the case; judge has a limited jurisdiction to hear a case only if the arbitration has not begun, and only if the alleged arbitration agreement is found to be clearly void (manifestment nulle)
* under the French doctrine, when a dispute has been brought before an arbitral tribunal pursuant to an arbitration agreement is brought before a government court, the court must declare itself without jurisdiction. If the dispute has not yet been brought before the arbitral tribunal, court must also declare itself without jurisdiction unless the arbitration agreement is clearly void
* issue here is the timing, rather than the extent, of judicial review
* outside the French hexagon, legal systems follow a more flexible and nuance approach with respect to court intervention 🡪 U.S., England, Sweden, Switzerland, and nationsl like Germany which follow the UNCITRAL Model Arbitration Law
1. **courts defer completely to an arbitrator’s decision about his or her own authority; arbitrator gets the first and last word (but requires that judges first determine that the parties did in fact agree to such finality)**
* **jurisdiction as a question of substantive merits**
* parties might agree, expressly or impliedly, to subject the jurisdictional question to arbitration
* in legal systems following this approach, jurisdictional questions themselves are considered capable of settlement by arbitration, pursuant to parties’ agreement, and an arbitrator’s determination on his or her own authority will be final 🡪 transforms the jurisdictional difference into a disputed question of fact or law, whose substantive merits the litigants submit to final determination by an arbitrator
* the parties’ agreement will be determined on a case-by-case basis
* **Germany**
* prevailing opinion in Germany (both scholarly and judicial) seems to hold that Kompetenz-Kompetenz clauses are invalid
* the parties may not restrict judges from examining arbitral jurisdiction in the context of challenges to either interim or final awards
* **Sweden**
* arbitrators may rule on their own jurisdiction
* further, Section 2 of Swedish Arbitration Act adds that such principle shall not prevent a court from determining such a question and that the decision of arbitrators on their jurisdiction is not binding but rather subject to the full panoply of grounds for challenging awards
* **American “Arbitrability Question”**
* in some situations, arbitrators may rule on their own powers without subsequent de novo review by courts; but it requires evidence of parties’ real intent expressed in concrete language either in the main contract or in a separate agreement
* if an “arbitrability question” has been submitted to arbitration, then courts defer to the arbitrator on the matter
* the American approach involves the transformation of a jurisdictional matter (normally for courts) into the substantive merits in the arbitration itself (for the arbitrators). Jurisdictional challenges usually relate to the arbitrator’s authority to decide an issue or to exercise a particular procedural power. Once it has been determined that the parties agreed to entrust to the arbitrator the adjudication of disputes on such questions, then almost by definition the question is no longer one of jurisdiction; arbitrators receive their power from the parties’ consent.
* when the very existence of an agreement to arbitrate is disputed, courts will generally refuse to compel arbitration until they resolve whether the arbitration clause exists at all; in some cases, the existence and content of the agreement is determined by a jury
* **Alliance Bernstein Investment v. Schaffran, 445 F.3d 121 (2d Cir. 2006)**

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| **Facts:*** A former employee of a NY hedge fund alleged wrongful termination, claiming that he had been fired for cooperating with government investigations into wrongdoings by his employer.
* The employment relationship was subject to the rules of NASD which provide for mandatory arbitration, except for claims of employment discrimination.
* Employer (normally the employee) moved for declaratory judgment that the “whistle blower” action (alleging retaliation for cooperation with government investigator) constituted an “employment discrimination” claim by the employee, and thus was not subject to arbitration.
* Arbitrator’s authority thus depended on whether the employee’s claim could be characterized as an “allegation of discrimination” within the meaning of the NASD Rules.

**Relevant Issue:**Who between the judge or arbitrator would decide whether the allegations of termination for “whistle blowing” were subject to arbitration, or instead amounted to the type of discrimination claim that was carved out of the scope of the arbitration clause.(The starting point for analysis lay in the relevant NASD Rules under which the arbitrators were expressly empowered to interpret and determine the applicability of all provisions under the NASD Code in a way that was final and binding on the parties.)**Holding:**The question of whether “whistle blower” claims were arbitrable was for the arbitrators.**Rule/Rule Explanation:*** A presumption exists that the parties would normally intend an “arbitrability question” to be determined by a judge. But this presumption may be overcome by “clear and unmistakable” evidence that the parties wished the question to be decided by arbitrators. This intent could be found in a separate agreement providing for arbitration of “any and controversies” including interpretation of the provisions of the relevant arbitration rules.
* The language of the relevant rule did not provide for “any and all” matters to be arbitrated, but only for power to “interpret and determine the applicability of” provisions under the NASD code, which would include the scope of the exclusion for discrimination claims. Since there was no disagreement that both sides had accepted the NASD rules, the parties’ intent to arbitrate their different interpretations of the rule could be ascertained from the four corners of the documentation before the court. The arbitrator’s decision on this matter would not be subject to later judicial second guessing. **The “whistle blower” claim would be subject to arbitration if, and only if, the arbitrator so determined.**
* But the award may be attacked on other jurisdictional grounds such as if an irregularity could be found in the signature of the agreement containing the reference to arbitration (perhaps signatory was not authorized to do so, or compelled by a gun at the head, or a forgery). But the decision on jurisdiction over the “whistle blower” claim could not be disregarded because a judge later disagreed with the arbitrator’s interpretation of the rules.
* Once a precise question has clearly been delegated to an arbitrator, it ceases to be “jurisdictional”. Any further inquiry must be limited to “What did the arbitrator decide?”
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* American judges who review questions of jurisdiction must look beyond labels and fix their scrutiny on the parties’ real deal. If two litigants intended to submit a question to final and binding arbitration, then the arbitral determination holds, regardless of whether the question would initially have fallen within the arbitrator’s mission.
* Policy Concerns
* United States
* American arbitration law traditionally has given parties a right to raise a matter of arbitral authority at any time, whether before or after the award. Such determinations would usually be made pursuant to litigation under Sections 3 and 4 of the Federal Arbitration Act, providing for stay of court litigation and orders to compel arbitration.
* This approach means that a party who never agreed to arbitrate will not need to waste time and money in a proceeding that lacks an authoritative foundation. Moreover, either side can request clarification about the scope of the arbitrator’s power before substantial sums are spent needlessly. The prospect of award vacatur on jurisdictional grounds cannot be excluded, but it may be less likely to hang as a Sword of Damocles in cases of obvious jurisdictional defect.
* France
* The French model delays court consideration of jurisdictional matters until the award review stage. This approach reduces the prospect of dilatory tactics designed to derail an arbitration. A bad-faith respondent will be less able to add the cost of a court challenge at the same time that the arbitration is going forward.
* England
* Roughly analogous to that in the United States, in that arbitrators addressed jurisdiction subject to general control by the competent court. Such remains the case with respect to final awards, where dissatisfied litigants may challenge arbitrators’ mistakes on substantive and procedural jurisdiction.
* The English Arbitration Act gives an arbitral tribunal the right to rule on its own substantive jurisdiction. The right to challenge arbitral jurisdiction by declaration or injunction is open only to a person “who takes no part in the proceedings.” This power can be particularly useful in connection with what are sometimes called “unilateral” arbitration clauses, which permit one side the option to litigate in court rather than to arbitrate. If the other side begins an arbitration before the option has been exercised, the power to request a declaration provides the machinery for vindicating the right to litigate.
* The Act does permit application for judicial determination on a “preliminary point of jurisdiction.” In this latter context, courts may consider the matter only on agreement of all parties, or if the arbitral tribunal grants permission and a court finds that addressing the question is likely to produce substantial savings in costs.
* Otherwise, a party seeking annulment of an arbitrator's decision for excess of jurisdiction may do so only after attempting to remedy the problem through the appropriate arbitral procedures. In the interest of arbitral efficiency, court challenges to awards can only be brought after any available institutional review.
* UNCITRAL Model Law
* The UNCITRAL Model gives the arbitral tribunal an explicit right to determine its own jurisdiction in the form of a “preliminary” award, subject to challenge on a request from a party within thirty (30) days. Arbitrators, of course, may choose to delay decisions on jurisdictional matters until the final award.
* The Model Law does not prevent courts from finding an arbitration clause to be void in the context of a judicial action on the substantive merits of the case, assuming judicial jurisdiction exists over the relevant parties and/or dispute. The Model Law envisions the possibility of simultaneous proceedings by courts and arbitrators regarding the competence of the arbitral tribunal. Article 8 provides that a court must refer parties to arbitration only if it finds the arbitration agreement not to be “null and void, inoperative or incapable of being performed.”
* **Summary on Different Base-Line Positions**
1. In most modern legal systems, an arbitrator will have the “first word” on his/her jurisdiction, unless a court of competent jurisdiction says otherwise. The arbitral tribunal need not stop the proceedings just because a party questions some aspect of arbitral authority.
2. The fact that arbitrators can have the first word does not mean that they always do have the “first word”. A litigant might go to court to challenge arbitral jurisdiction without waiting for an award. Such is the situation in the United States and Germany.
3. By contrast, in other countries courts must generally wait to examine jurisdiction until an award is rendered. This is the rule in France, subject to certain narrow exceptions.
4. In all major legal systems, the “last word” on arbitral jurisdiction will normally be for courts at the time an award is subject to scrutiny in the context of a motion to vacate, confirm or grant recognition.
5. Countries differ dramatically, however, on whether and when the parties may entrust a jurisdictional matter to final and binding arbitration, thus in effect transferring the “last word” from the courts to the arbitrators. In the United States, deference to an arbitrator’s jurisdictional decision requires a finding that “the arbitrability question” has clearly been given to the arbitrators. Courts might make this finding either at the beginning of the arbitral process (when one side tries to compel arbitration) or at the end (when an award is presented for review). Other legal systems (notably Germany) deny deference to agreements that purport to subject jurisdictional questions to final determination by arbitrators. Results may depend on whether the purported agreement on jurisdiction takes the form of a separate agreement or a clause in the main commercial contract.
* Autonomy of Arbitration Clause
* A frequent source of confusion about the arbitrator’s right to rule on his or her jurisdiction lies in the interaction of Kompetenz-Kompetenz principles and the doctrine of “separability” or the “autonomy” of the arbitration clause.
* Often conceptualized as a matter of “separability,” the principle that an arbitration clause possesses contractual autonomy permits the arbitrators to do their job, notwithstanding what their award might say about the validity of the contract in dispute.
* The separability doctrine gives the arbitration clause the status of a contract autonomous from the principal agreement in which it is encapsulated. Thus arbitrators may decide issues relating to the validity of the main contract (such as allegations of fraud in the inducement, or "per se" violations of antitrust law) without risk that their power will disappear retroactively.
* The autonomy of the arbitration clause recognizes the contracting parties' presumed intent that the arbitrator should be empowered to decide on the validity or survival of the principal commercial contract. Otherwise the arbitrators might be stripped of power at the very moment when evaluating important aspects of the parties' business relationship.
* The doctrine of Kompetenz-Kompetenz, on the other hand, gives the arbitrator the right to pass upon even alleged infirmities in the arbitration clause itself.
* Arbitrability Questions in the U.S.
* In the United States, questions otherwise be labeled “jurisdictional” often find themselves being classified as matters for the arbitrators to decide along with the merits of the dispute.
* Unlike the arbitration laws of France, and to a lesser extent England, the Federal Arbitration Act creates no statutory presumption that courts should await the award before pronouncing themselves on an arbitrator’s authority to hear a dispute. Early in the arbitral process, courts can decide whether a particular matter has been (or can be) submitted to arbitration, usually in the context of a motion to compel arbitration or to stay litigation.
* Courts remain free to entertain motions related to arbitral jurisdiction at any moment from the start of proceedings onward. Moreover, when the existence of an agreement to arbitrate is open to doubt, courts may order the question resolved by a jury.
* In other ways, however, American arbitration law has been extremely generous in giving arbitrators both the first and the last word in determining their own authority. The statutory scheme for international arbitration has been integrated with a practice of sending jurisdictional questions to arbitrators if there is evidence that such is the path intended by the parties.
* The conceptual underpinning of this approach relies on a finding that “the parties intended that the question of arbitrability (used in the sense of jurisdiction) shall be decided by the arbitrator.” With a different vocabulary, American courts have in essence adopted the old German concept of a Kompetenz-Kompetenz clause, by which the parties may agree to submit a jurisdictional matter to final and binding arbitration.
* **Redfern and Hunter on International Arbitration (Fifth Edition), Sec. 2.111-2.144**
* **Arbitrability:** involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts; both NY Convention and Model Law are limited to disputes that are “capable of settlement by arbitration”.
* Under the French Civil Code,family law and matters of public interest may not be subject of arbitration, but under German Code of Civil Procedure, any claim involving economic interest can be subject to arbitration
* each State decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policy
* if the issue of arbitrability arises, it is necessary to have regard to the relevant laws of the different States that are or may be concerned which are likely to include:
1. the law governing the party involved, where the agreement is with a State or State entity;
2. the law governing the arbitration agreement; the law of the seat of arbitration; and
3. the law of the ultimate place of enforcement of the award
* whether or not a particular type of dispute is ‘arbitrable’ under a given law is in essence a matter of public policy for that law to determine
* **Patents, trademarks, and copyright:** disputes over intellectual property rights are common referred to international arbitration because of opportunity to select a tribunal of experienced arbitrators, and confidentiality; with respect to copyrights, it is an IPR which exists independently of any national or international registration, and may be freely disposed of by parties
* **Antitrust and competition laws:**
* In general, an allegation of illegality (on the ground of breach of antitrust law) should not prevent an arbitral from adjudicating on the dispute, even if its finding is that the agreement in question is indeed void for illegality. Under the doctrine of separability, the arbitration clause in a contract constitutes a separate agreement and survives the contract of which it forms part
* it is now widely accepted that competition law issues are arbitrable (France, Switzerland, US in Mitsubishi Case)
* But in the EU, in its landmark case Eco Swiss china Time Ltd. V. Benetton International NV, the ECJ ruled that a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to [Article 81, EC], where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy. In other words, it identified Article 81 f the EU Treaty as a matter of public policy that would justify the annulment or refusal of enforcement of an award that ignores it.
* **Securities Transactions:**
* In Sherck v. Alberto-Culver, the US Supreme Court held that disputes under the securities laws are arbitrable in an international commercial arbitration. It was held that a parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate the purpose of the agreement but would damage the fabric of international commerce and trade and imperil the willingness and ability of businessmen to enter into international commercial agreements.
* In subsequent cases, the US Supreme Court accept the arbitrability of securities disputes in US domestic arbitration.
* But German Securities legislation expressly restricts the availability of arbitration to commercial cases in which both parties are established businesses or companies.
* **Insolvency**
* Issues of arbitrability arise due to the conflict between the private nature of arbitration and the public policy driven collective procedures provided for under national insolvency laws
* a distinction can be made between “core” or “pure” insolvency issues which are inherently non-arbitrable (e.g., matters relating to the adjudication of the insolvency itself or the verification of creditors’ claims), and the remaining circumstances of other cases involving the insolvency of one of the parties to a commercial arbitration agreement.
* In the U.S., approach is for the courts to look at the type of dispute before it, and determine whether there are any core insolvency issues in play which deprive an arbitral tribunal of jurisdiction.
* In the EU, the EC Council Regulation 1346/2000 provides that the law of the country in which insolvency proceedings are commenced shall determine the effect of those insolvency proceedings on other proceeding brought by individual creditors, including arbitration proceedings, with the exception of proceedings that re pending which shall be determined by the law of the Member State in which the lawsuit is pending.
* in Switzerland, the insolvency of one of the parties will not generally affect the arbitration agreement, and arbitrators retain a wide jurisdiction to decide disputes relating to insolvency issues, including claims made on behalf of the estate itself.
* In Germany, its laws adopt a liberal approach to arbitrability with arbitrators having jurisdiction to determine all disputes relating to bankruptcy proceedings other than those incapable of resolution by a tribunal (e.g., appointment of an administrator, collection and distribution of assets, reorganization of a business)
* In Spain, its Insolvency Act provides that arbitration agreements to which the debtor is a party will have no effect once a party has been declared insolvent. Thus, Commercial Courts will have jurisdiction to hear any disputes that otherwise would have fallen within the scope of the arbitration agreement.
* In England, it is difficult to enforce an arbitration agreement against an insolvent party where the trustee in bankruptcy does not consent. If trustee elects to reject the arbitration agreement, then arbitral proceedings can only be brought with the consent of the company’s creditors and the court, who will look at all the circumstances of the case to determine whether the dispute in question ought to be referred to arbitration. Should the trustee elect to confirm the arbitration agreement in a particular case, it becomes binding and enforceable both by and against the trustee.
* **Bribery and corruption**
* Issues of bribery or corruption in the procurement or performance of a contract raise important questions of public policy
* The modern approach, based on the concept of separability that has now widespread acceptance both nationally and internationally, is that an allegation of illegality does not in itself deprive the arbitral tribunal of jurisdiction. The arbitral tribunal is entitled to hear the arguments and receive evidence and to determine for itself the question of illegality.
* In Switzerland, in a case involving a consultancy agreement, the Swiss Federal Tribunal decided that even if a consultancy agreement was in effect an agreement to pay a bribe, the arbitration agreement would survive.
* If an allegation of corruption is made in plain language in the course of arbitration proceedings, the arbitral tribunal is clearly under a duty to consider the allegation and to decide whether or not it is proved. But what remains not clear is whether an arbitral tribunal has a duty to assume an inquisitorial role and to address the question of corruption on its own initiative, where none is alleged.
* **Fraud**
* Where allegations of fraud in the procurement or performance of a contract are alleged, arbitral tribunal may not decline jurisdiction, i.e., it is for the arbitral tribunal to dismiss it or not.
* However, problems may arise if the alleged fraud is not discovered until an award has been made as in the Fougerolle Case where the ICC tribunal rejected the claim of fraud and granted partial award, but some months later, it became known that the main contractor was relying on the same grounds as had been forward by Fougerolle in support of its own claim against the engineer. The arbitral tribunal refused to reverse as the award has already been approved by the ICC Court. The Paris Cour d’Appel stated that the award could be annulled, if fraud was proved; but in the event it was decided that there had been no fraud.
* **Natural Resources**
* Although States enjoy sovereignty over natural resources found within their territory, in most jurisdictions, no questions of arbitrability arise in relation to commercial disputes relating to those natural resources. Arbitral tribunals have invariably distinguished between the sovereignty itself, and the commercial decisions made by States in the exercise of that sovereighty.
* In one 1982 case, the Tribunal made an important distinction between the governmental decision itself, to stop the exploitation of natural resources (exercise of sovereignty), which was unchallengeable, and the financial consequences of that decision in relation to the disputed contract which could be determined by arbitration.
* **Cases**
* **Buckeye Check Cashing, Inc. v. Cardegna (SEE CLASS 2)**
* **Contec Corp. v. Remote Solution, Co., 398 F.3d 205 (2d Cir. 2005)**

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| **Facts:*** Contec L.P. and Hango Electronics (later changed its name to Remote Solution (“Remote Solution”), a Korean electronics company, executed an agreement for the manufacturing and purchase of remote control devices (“Agreement”). Later, Contect L.P. was converted to Contec LLC, and then merged with Contect Corporation (“Contec”).
* The Agreement contains an arbitration clause which provides that any controversy arising with respect to the Agreement, in case unresolved by the parties, shall be determined by arbitration in the City of Albany, New York in accordance with the Commercial Arbitration rules of the AAA.
* In 2000 and 2002, Contec was sued for alleged patent infringement. Under the indemnification provision of the Agreement, Remote Solution was required to defend Contec in any patent infringement suit and pay any and all costs or damages awarded, but Remote did not make such payments. Consequently, Contec withheld payment on a shipment of remote control units as a setoff against such non-payments.
* Remote Solution filed suit against Contec in Korea.
* Relying on the arbitration clause in the Agreement, Contec filed a demand for arbitration with the AAA and filed suit in the DC seeking to compel arbitration and order to dismiss or stay Remote Solution’s lawsuit in Korea.

**Procedural History:*** In the DC, Remote Solution contended that Contect was not a signatory to the Agreement and was therefore barred from seeking its enforcement.
* Contect counter-argued that arbitration, not the court, was the proper forum for determining whether a valid arbitration existed between itself and Remote Solution.
* DC dismissed the suit finding that all claims set forth in the complaint and counterclaim are subject to arbitration. It ruled that the agreement clearly provides that any dispute arising under the agreement will be resolved by arbitration in accordance with the Commercial Arbitration Rules of the AA which provides that issues of jurisdiction, including objections regarding the scope or validity of the arbitration agreement, are subject to arbitration.
* Contec, thus, appealed.

**Relevant Issues:**First Issue: Whether or not the issue of arbitrability is for the arbitrator.Second Issue: Whether or not a non-signatory can compel a signatory to arbitrate under an agreement where the question of arbitrability is itself subject to arbitration. **Holding:**First Issue: Yes. The parties empowered the arbitrator to decide issues of arbitrability. Consequently, the decision of the DC to dismiss the case in favor of arbitration is affirmed.Second Issue:Yes. Contec’s purported right to enforce the Agreement is a matter of the Agreement’s continued existence, validity and scope, and is therefore subject to arbitration under the terms of the arbitration clause.**Rule/Rule Explanation:**First Issue:* When parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator. There is no doubt that the 1999 Agreement bound its signatory Remote Solution to arbitrate any disputes within the Agreement’s other signatory, Contec L.P. If Contec remained in its original corporate form, Remote Solution would be compelled to arbitrate the indemnification dispute.

Second Issue:* In order to decide whether arbitration of arbitrability is appropriate, a court must first determine whether the parties have a sufficient relationship to each other and to the rights created under the agreement.
* A useful benchmark for relational sufficiency can be found in the estoppel decision Choctaw Generation ltd. P’ship v. Am. Home Assurance Co., 271 F.3d 403, 404 (2d Cir. 2001), where it was held that the signatory to an arbitration agreement is estopped from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.
* In the present case, the undisputed relationship between each corporate forms, the signing of the Agreement, and the fact that the dispute arose because the parties apparently continued to conduct themselves as subject to the Agreement regardless of the change in corporate form, demonstrate that a sufficient relationship existed between Contec and Remote Solution to permit Contec to compel arbitration even if, in the end, an arbitrator were to determine that the dispute itself is not arbitrable because Contec cannot claim rights under the Agreement.
* In Apollo Computer, Inc. v. Berg., 886 F.2d 469 (1st Cir. 1989), it was held that “… Whether the right to compel arbitration … was validly assigned to the defendants and whether it can be enforced by them against Apollo are issues relating to the continued existence and validity of the agreement.” In the instant case, whether the arbitration rights under the Agreement were validly assigned by Contec L.P. to Contec is an issue that pertains directly to the continued “existence, scope or validity” of the Agreement. As such, it is within the jurisdiction of the arbitrator pursuant to AAA Rules incorporated into the Agreement.
* Although the recent cases decided by the U.S. Supreme Court is of the view that “the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator,” it appears the SC in arriving at such ruling did not address whether there was clear and unmistakable evidence of the parties’ intent to submit arbitrability to an arbitrator… These cases are not determinative in cases where the incorporation of arbitration rules giving jurisdiction to the arbitrator provides clear and unmistakable evidence of the parties’ intent to arbitrate issues of arbitrability.
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* **First Options of Chicago, Inc. v. Kaplan (SEE CLASS 2)**
* **Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)**

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| **Facts:*** Dean Witter Reynolds, Inc. (“Dean Witter”) recommended to its client, Karen Howsam, (“Howsam”) that the latter buys and holds interests in four limited partnerships.
* Their relationship was covered by a standard Client Service Agreement that contains an arbitration clause which provides that all controversies concerning or arising from any account, transaction, or the construction, performance or breach of any agreement between them shall be determined by arbitration before any self-regulatory organization or exchange which Dean Witter is a member. It also provided that Howsam can select the arbitration forum and she chose arbitration before the National Association of Securities Dealers (NASD) (now FINRA).
* To obtain NASD arbitration, Howsam signed the NASD’s Uniform Submission Agreement which submits the controversy in accordance with the NASD’s Code of Arbitration Procedure, which in turn provides a six years reglementary period.
* Alleging that Dean Witter misrepresented the virtues of the partnerships, she filed an arbitration action before the NASD.

**Procedural History:*** Dean Witter filed the lawsuit in the DC and asked the court to declare that the dispute was ineligible for arbitration because it was more than 6 years old, and sought an injunction that would prohibit Howsam from proceeding in arbitration.
* DC dismissed the action on the ground that the NASD arbitrator, not the court, should interpret and apply the NASD rule.
* CA 10th Circuit reversed, holding that the application of the NASD rule presented a question of the underlying dispute’s arbitrability; and the presumption is that a court, not an arbitrator will ordinarily decide an arbitrability question.

**Relevant Issue:**Whether or not the interpretation and application of the issue involving NASD rule is for the arbitrator.**Holding:**Yes, the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge. The time limit rule closely resembles the gateway questions that the Court has found not to be questions arbitrability. Such a dispute seems an aspect of the controversy which called the grievance procedures into play. CA’s judgment is reversed.**Rule/Rule Explanation (Justice Breyer):*** Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409.
* **The question whether the parties have submitted a particular dispute to arbitration, i.e., the “question of arbitrability,” is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.** AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)
* Procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557, 84 S.Ct. 909 11 L.Ed.2d 898.
* So, too, the presumption is that the arbitrator should decide allegation(s) of waiver, delay, or a like defense to arbitrability. Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103, S.Ct. 927, 74 L.Ed.2d 765.
* The Revised Uniform Arbitration Act of 2000 (RUAA) states that an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled… **[I]n the absence of an agreement to the contrary issues of substantive arbitrability…are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.**
* The applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge. The NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding.
* **The NASD’s time limit rule falls within the class of gateway procedural disputes that do not present what cases have called “questions of arbitrability”**
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* **Prima Paint Corp. v. Flood & Conklin Mfg. Co (See Class 3)**
* **Mitsubishi Motors Corp. v. Soler Chryslter-Plymouth, Inc. (See Class 2)**
* **Roby v. Corp. of Lloyd’s, 996 F.2d 1353 (2d Cir. 1993) (Background; Parts I.B., II, and III)**

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| **Facts:*** Appellants, all American citizens and residents, are investors in the Corporation of Lloyd’s (“Lloyd’s) syndicates, which are the entities that nominally underwrite insurance risk.
* Lloyd’s is a market analogous to the NYSE with its own Council and Committee which promulgates regulations and enforces compliance therewith.
* There are numerous syndicates competing within Lloyd’s for underwriting business, each managed by an entity (Managing Agent) who is responsible for its own syndicate’s financial well-being. By Agreement, the Managing Agents stand in a fiduciary relationship to heir principals.
* Investors are substantially English and Americans. The Roby Names were solicited in the US by various Lloyd’s entities and representatives. Except for a brief meeting in London (a mandatory formality), the entire process by which the Roby Names became Names took place in the US.
* The various agreements executed by the parties contain a host of contract clauses binding them to arbitrate in England under English law.
* Appellants (investors—Roby Names) filed a suit before the US Southern District Court of New York claiming that they have suffered financial loss as a result of Lloyd’s violations of the Securities Act of 1933, the SEC Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. Each cause of action names as defendants a different combination of Lloyd’s, Lloyd’s governing bodies, certain Managing and Member Agents, certain individual members of these entities, and certain syndicates.

**Procedural History:*** DC dismissed the complaint against the “syndicate defendants” finding that they had no separate existence and therefore could not be sued as entities. In a subsequent order, DC found that the interlocking set of agreements bound the Roby Names to arbitrate or litigate their disputes in London and dismissed the complaint in its entirety. Such host of contract clauses must be enforced.
* Roby Names appealed to the CA.

**Relevant Issues:**First Issue: Whether or not English Law is the applicable law. Second Issue: Whether or not the allegations of contractual violations fall within the scope of the arbitration clause.Third Issue: Whether or not noncompliance with the anti-waiver provision of the securities laws rendered the arbitration clause void.**Holding:**First Issue: Yes. Whether the Syndicate and Arbitration Agreement or some other agreement may be interpreted to require the Roby Names to arbitrate is a question that should be decided under English law in an English court pursuant to the General Undertaking.Second Issue: Yes. The broad language of the forum selection clause of the General Undertaking covers the Roby Names’ claims at least against Lloyd’s governing bodies. Those claims are undoubtedly related to the Roby Names’ “membership of, and/or underwriting of insurance business at, Lloyd’s.”Third Issue: No. Not only that the Roby Names have several adequate remedies in England to vindicate their substantive rights, but also that in this case the policies ensuring full and fair disclosure and deterring the exploitation of US investors have not been subverted.In summary, Roby Names’ contract clauses cover the scope of, and the parties named in, the complaint and that the Roby Names have remedies under English law adequate not only to vindicate their substance rights but also to protect the public policies established by the U.S. securities laws. The judgement of the DC was affirmed.**Rule/Rule Explanation:*** Employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement. See, e.g., Nesslage v. York Securities, Inc., 823 F.2d 231, 233-34 (8th Cir. 1987); Scher v. Bear Stearns & Co, 723 F.Supp. 211, 216-217 (S.D.N.Y. 1989).

First Issue:* A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986).
* It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of his country’s tort law or his country’s statutory law or his country’s property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. A party’s promise should not be allowed to be defeat by artful pleading. In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if the agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.

Second Issue:* If the substance of the claims, stripped of their labels, does not fall within the scope of the clauses, the clauses cannot apply. However, one must make this argument in the face of strong public policy in favor of forum selection and arbitration clauses. Indeed, an order to arbitrate “should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 582-83, 80 S.Ct. 1347, 1352-54, 4 L.Ed.2d 1409 (1960).
* The Managing and Members’ Agent’s Agreements speak, with respect to the arbitration clauses, in terms of “dispute[s], difference[s], question[s] or claim[s] relating to” the agreements and, with respect to the forum selection clauses, in terms of submission for “all purposes of and in connection with” the agreements. In Bense v. Interstate Battery System of America, 683 F.2d 718, 720 (2d Cir.1982), it was held that a forum selection clause that applied to “causes of action arising directly or indirectly from [the agreement]” covered federal antitrust actions. Similarly, the SC in Scherk v. Alberto-Culvier Co., 417 U.S 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), held that controversies and claims ‘arising out of” a contract for the sale of a business covered securities violations related to that sale. There no substantive difference in the present context between the phrases “relating to,” “in connection with” or “arising from.”

Third Issue:* On the anti-waiver provision of the securities laws, Roby Names argued that they have been forced to forego the substantive protections afforded by the securities laws, not simply the judicial forum— Relyin on four SC precedents, the Court in Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (1992), held that when an agreement is truly international, and reflects numerous contacts with the foreign forum, the parties’ choice of law and forum selection provisions will be given effect. In other words, forum selection and choice of law clauses are presumptively valid were the underlying transaction is fundamentally international in character.
* American parochialism would hinder the expansion of American business and trade, and more generally, interfere with the smooth functioning and growth of global commerce. Forum selection and choice of law clauses eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws. International comity dictates that American courts enforce such clauses out of respect for the integrity and competence of foreign tribunals. Contracts entered into freely generally should be enforced because the financial effect of forum selection and choice of law clauses likely will be reflected in the value of the contract as a whole.
* This presumption of validity may be overcome by a clear showing that such clauses are unreasonable under the circumstances: (i) if their incorporation into the agreement was the result of fraud or overreaching; (ii) if the complaining party will for all practical purposes be deprived of his day in court due to the grave inconvenience or unfairness of the selected forum; (iii) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy (i.e., it’s not enough that the foreign law or procedure merely be different or less favorable than that of the U.S.; question is whether the application of the foreign law presents a danger that the relevant party will be deprived of any remedy or treated unfairly); or (iv) if the clauses contravene a strong public policy of the forum state.
* As regards public policy—General rule is that a contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which the suit is brought. Public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors.
* In this case, there can be no doubt that the contract clauses mitigate the uncertainty regarding choice of law and forum inherent in the multinational affairs of Lloyd’s. Comity also weighs in favor of enforcing the clauses. Roby Names have failed to make a showing that that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure.
* The available remedies are adequate and the potential recoveries substantial under English common law. This is particularly true given the low scienter requirements under English misrepresentation law. Together with the contractual obligations imposing certain fiduciary and similar duties on Members’ and Managing Agents, the available remedies and potential damages recoveries suffice to deter deception of American investors.
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* **Summary of Lufuno Mphaphuli & Associates (Pty) Ltd. V. Nigel Athol Andrews and Bopanang Construction CC (South Africa 2009)**

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| **Facts:*** Mphaphuli and Associates Ltd., applicant, is an electrical infrastructure contractor which was awarded a contract by Eskom to electrify certain rural villages in the Limpopo Province. Applicant subcontracted a portion of the work to Bopanang Construction CC.
* Prior to completion of the work assigned to it, Bopanang vacated the site, alleging that Mhpahpuli had failed to pay moneys owing to it. A dispute arose as to which party was indebted to the other and for what amount. Parties agreed that the dispute would be resolved by an arbitrator.
* After re-measuring work, the arbitrator found Mphaphuli to be liable to Bopanang. Bopanang then applied to the High Court in Pretoria for the arbitration award to be made an order order of the court.
* Application was opposed by Mphaphuli which also filed counter-application to have the award set aside as he was not accorded a fair and impartial hearing by the arbitrator who held secret meetings with Bopanang and was not privy to certain correspondence, and that the arbitrator has exceeded his mandate.

**Procedural History:*** High Court ruled in favor of Bopanang and the judgment was upheld by the Supreme Court of Appeal.
* The Constitutional Court heard an application by Mphaphuli for leave to appeal against the said judgment.

**Relevant Issues:*** Whether or not the Constitution applies directly to private arbitrations. Corollarily, whether or not the arbitration was conducted fairly.

**Holding:**No. it does not apply directly to private arbitration, and it may apply only when it is subjected to the Constitutional requirement of fairness.**Rule/Rule Explanation:*** The Constitution **does not apply directly** to private arbitrations. **The only reason why it might be argued that it applies to such arbitrations is to subject them to the requirement of fairness in the Constitutional provision**. First, arbitrations have always been required to be conducted fairly, and that what is fair in a given arbitration will be dependent on the context. Secondly, the Constitution is relevant to arbitrations in the sense that, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent.
* Arbitration in the instant case had been conducted fairly. The intention of the parties was that the arbitrator would conduct the arbitration in an informal, investigative manner, rather than in the formal, adversarial manner consistent with a trial in a court of law. **Whilst the conduct of the arbitrator may not have been perfect, it did not give rise to a gross irregularity which would warrant the arbitration award being set aside.**
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* **Rent-A-Cetner, West, inc. v. Jacson, 561 U.S> 63 (2010) [Dissenting Opinion of Justice Breyers)**

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| **Rule/Rule Explanation:**Majority Opinion:* The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. Parties can agree to arbitrate “gateway” questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. After all, arbitration is a matter of contract.
* An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under Sec 2 “save upon such grounds as exist at law or in equity for the revocation of any contract,” and federal courts can enforce the agreement by staying federal litigation under and compelling arbitration under Sec. 4.
* In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract. Sec. 2 operates on specific “written provision” to “settle by arbitration a controversy” that the party seeks to enforce. Unless Jackson challenged the delegation provision specifically, it must be treated as valid under Sec. 2, and must enforce it under Secs. 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator. [In this case, Jackson challenged only the validity of the contract as a whole.]

**Dissenting Opinion:*** It’s breezy assertion that the subject matter of the contract at issue—in this case, an arbitration agreement and nothing more— “makes no difference”, is simply wrong. The written arbitration is but one part of a broader employment agreement between the parties, just as the arbitration clause in Prima Paint was but one part of a broader contract for services between those parties. Thus, that the subject matter of the agreement is exclusively arbitration makes all the difference in the Prima Paint analysis.
* Certain issues—the kind that “contracting parties would likely have expected a court to have decided”—remain within the province of judicial review. These issues are “gateway matters” because they are necessary antecedents to enforcement of an arbitration agreement; the raise questions the parties “are not likely to have thought that they had agreed that an arbitrator would” decide. **Quintessential gateway matters include “whether the parties have a valid arbitration agreement at all; whether the parties are bound by a given arbitration clause; whether an arbitration clause in a concededly binding contract applies to a particular type of controversy. It would be bizarre to send these types of gateway matters to the arbitrator as a matter of course, because they raise a “question of arbitrability”.**
* **Question(s) of arbitrability** **thus include questions regarding the existence of a legally binding and valid arbitration agreement, as well as questions regarding the scope of a concededly binding arbitration agreement.**
* In this case we are concerned with the first of these categories: whether the parties have a valid arbitration agreement. This is an issue the FAA assigns to the courts. Sec. 2, FAA dictates that covered arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Such grounds, which relate to the contract validity and formation, include the claim at issue in this case, the unconscionability.
* Two different line of cases bear on the issue of who decides a question of arbitrability respecting validity, such as whether an arbitration agreement is unconscionable. Although this issue, as a gateway matter, is typically for the court, such an issue can be delegated to the arbitrator in some circumstances. **When the parties have purportedly done so, courts must examine two distinct rules to decide whether the delegation is valid.**
* **The first line of cases looks to the parties’ intent.** In AT&T Technologies, “questions of arbitrability may be delegated to the arbitrator, so long as the delegation is clear and unmistakable. This was affirmed, and a nuance was added, in First Options. Against the background presumption that questions of arbitrability go to court, it was held that federal courts should “generally” apply ordinary state-law principles that govern the formation of contracts to assess whether the parties agreed to arbitrate a certain matter (including arbitrability). A more rigorous standard was added and applied when the inquiry is whether the parties have agreed to arbitrate arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so (described as a type of “reverse” assumption—one in favor of a judicial, rather than an arbitral, forum). Clear and unmistakable “evidence” of agreement to arbitrate arbitrability might include a course of conduct demonstrating assent, or an express agreement to do so. In any event, whether such evidence exists is a matter for the court to determine.
* **The second line of cases bearing on who decides the validity of an arbitration agreement involves the Prima Paint rule.** That rule recognizes two types of validity challenges. One type challenges the validity of the arbitration agreement itself, on a ground arising from an infirmity in that agreement. The other challenges the validity of the arbitration agreement tangentiality—via a claim that the entire contract (of which the arbitration agreement is but a part) is invalid for some reason. Under Prima Prima, a challenge of the first type goes to the court; a challenge of the second type goes to the arbitrator. The Prima Paint rule is akin to a pleading standard, whereby a party seeking to challenge the validity of an arbitration agreement must expressly say so in order to get his dispute into court.
* **In sum, questions related to the validity of an arbitration agreement are usually matters for a court to resolve before it refers a dispute to arbitration. But questions of arbitrability may to the arbitrator in two instances: (1) when the parties have demonstrated, clearly and unmistakably, that it is their intent to do so; or (2) when the validity of an arbitration agreement depends exclusively on the validity of the substantive contract of which it is a part.**
* In this case, the arbitration agreement at issue did not clearly and unmistakably evince petitioner’s and respondent’s intent to submit questions of arbitrability to the arbitrator. Respondent’s claim that the arbitration is unconscionable undermines any suggestion that he clearly and unmistakably assented to submit questions of arbitrability to the arbitrator. Gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. A determination that a contract is unconscionable may in fact be a determination that one party did not intend to agree to the terms of the contract. **The fact that the agreement’s delegation provisions suggests assent is beside the point, because the gravamen of respondent’s claim is that he never consented to the terms of this agreement.**
* In other words, when a party raises a good-faith validity challenge to the arbitration agreement itself, that issue must be resolved before a court can say that he clearly and unmistakably intended to arbitrate that very validity question. This case will illustrate the point: If respondent’s unconscionability claim is correct, i.e., if the terms of the agreement are so one-sided and the process of its making so unfair, it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate. Accordingly, it is necessary for the court to resolve the merits of respondent’s unconscionability claim in order to decide whether the parties have a valid arbitration agreement under Sec. 2. Otherwise, that section’s preservation of revocation issues for the court would be meaningless.
* Whether the general contract defense renders the entire agreement void or voidable is irrelevant. All that matters is whether the party seeking to present the issue to a court has brought a “discrete challenge” “to the validity of the arbitration clause.”
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| **CLASS 5: ARBITRATION IN PRACTICE** |

* **IBA Guidelines on Conflict of Interest in International Arbitration**
* Reflect the understanding of the IBA Arbitration Committee as to the best current international practice; based on statutes and case law in a cross-section of jurisdictions, and upon the judgment and experience of practitioners involved in international arbitration.
* Apply to international commercial arbitration and investment arbitration, whether the representation of the parties is carried out by lawyer or non-lawyers, and irrespective of whether or not non-legal professionals serve as arbitrator.
* Do not override any applicable national law or arbitral rules chosen by the parties
* (1) **General Principle**: Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.
* This does not extend to the period during which the award may be challenged before the relevant courts, unless the final award may be referred back to the original arbitral tribunal under the relevant applicable law or relevant institutional rules.
* This arbitrator’s obligations ends when the arbitral tribunal has rendered the final award, and any correction or interpretation as may be permitted under the relevant rules has been issued, or the time for seeking the same has elapsed, the proceedings have been finally
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* terminated, or the arbitrator otherwise no longer has jurisdiction.
* (2) **Conflicts of Interest:**
1. an arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he has any doubt as to his ability to be impartial or independent.
2. The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator’s impartiality or independence, unless the parties waived the same.
* Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his deciIf the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment; this applies regardless of the stage of the proceedings
* The test for disqualification is an objective one. The use of the appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator is to be applied objectively.
* The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator’s impartiality or independence. 🡪 because no one is allowed to be his own judge, there cannot be identity between an arbitrator and a party; the parties cannot waive the conflict of interest arising in such a situation
* **(3) Disclosure by the Arbitrator**
1. if facts or circumstances exists that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority and the co-arbitrators, if any, prior to accepting his or her appointment, or, if thereafter, as soon as he learns of them.
2. An advance declaration or waive does not discharge the arbitrator’s ongoing duty of disclosure.
3. Any doubt should be resolved in favor of disclosure.
* Arbitrator’s duty to disclose rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view.
* A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself to be impartial and independent of the parties, despite the disclosed facts, or else he would have declined the nomination, or resigned.
* In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him. If the arbitrator finds that he should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he should not accept the appointment, or should resign.
* **(4) Waiver by the Parties**
1. if a party does not raise an express objection with regard to the arbitrator within 30 days after receiving the disclosure or after learning of the facts or circumstances, he is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any objection on such facts or circumstances at a later stage.
2. Any waiver or agreement to waive facts or circumstances described in the Non-Waivable Red List, and have such person serve as arbitrator, shall be regarded as invalid.
3. A person should not serve as arbitrator when a conflict of interest as exemplified in the Waivable Red List exists, unless: (i) all parties, all arbitrators and the arbitration institution, or other appointing authority, have full knowledge of the conflict of interest; and (ii) all parties expressly agree that such person may serve as arbitrator, despite the conflict of interest.
4. An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, arbitrator should first receive an express agreement by the parties that acting in such manner shall not disqualify him from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator’s participation in such a process, or from information that the arbitrator may learn in the process.
* **(5) Scope**: apply equally to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed; arbitral or administrative secretaries and assistants, to an individual arbitrator or the arbitral tribunal are bound by the same duty of independence and impartiality as arbitrators.
* **(6) Relationships**
1. arbitrator is in principle considered to bear the identity of his law firm, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether a disclosure should be made, the activities of an arbitrator’s law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator’s firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. If one of the parties is a member of a group with which the arbitrator’s firm has a relationship, it shall not necessarily constitute by itself a source of conflict of interest, or a reason for disclosure.
2. If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identify of such party.
* The relevance of the activities of the arbitrator’s firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case.
* **(7) Duty of the Parties and the Arbitrator:** a party shall inform an arbitrator, the arbitral tribunal, the other parties and the arbitration institution or other appointing authority of:
1. any relationship, direct or indirect, between the arbitrator and the party, or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so in its own initiative at the earliest opportunity.
2. the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers’ chambers, between its counsel and the arbitrator 🡪 at its own initiative at the earliest opportunity, and upon any change in its counsel team
3. an arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his impartiality or independence. Failure to do so is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.
4. Parties are required to disclose any relationship with the arbitrator.
5. Counsel appearing in the arbitration, namely the persons involved in the representation of the parties in arbitration, must be identified by the parties at the earliest opportunity.
6. In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them.
7. In order to satisfy their duty of disclosure, arbitrators are required to investigate any relevant information that is reasonably available to them.
* **Non-Waivable RED List**
1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.
2. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.
3. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
4. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his firm derives a significant financial income therefrom.
* **For Waivable Red List, Orange List and Green List (see separate material)**
* **James Carter, Reaching Consensus on Arbitrator Conflicts: The Way Forward, 6 Disp. Res. Int’l 17 (2012)**
* Most disputes about arbitrator conflicts of interest are resolved by arbitral institutions without any reasoned decision or public record. Court decisions addressing arbitrator conflicts typically arise at the award enforcement stage, are relatively infrequent and provide little useful basis for systematic factual analysis.
* Major innovation of IBA Guidelines on Conflict of Interest – “General Standards Regarding Impartiality, Independence and Disclosures”, is a list of practical applications of those general principles to specific fact patterns, divided into Non-Waivable Red, Waivable Red, Orange, and Green Lists of examples. The Orange List is intended as a non-exhaustive enumeration of situations, which, in the eyes of the parties, may give rise to justifiable doubts as to the arbitrator’s impartiality or independence and must be disclosed but are not necessarily grounds for disqualification. The Green list enumerates situations where no appearance of and no actual conflict of interest exists from the relevant objective point of view, and no disclosure is required.
* Guidelines have become a source of authority cited to ICSID panels ruling on arbitrator conflict challenges. These rulings are published and considered significant authorities on conflict issues generally.
* **ICC Challenge Summaries**
* Arbitrator conflicts areas:
1. Relationship between arbitrators and the parties (business relationships and personal links between arbitrators and parties, nomination of civil servants, successive nominations of the same arbitrator, and preliminary contacts between the party and the arbitrator)
2. Relationship between the arbitrator and the parties’ lawyers (social relationships and family connections, links of subordination, professional links between lawyers—activities of the arbitrator’s associates and partners, opinions and advice given by the arbitrator, barristers and solicitors, and cooperation between firms, and Involvement in a previous arbitration)
3. Pre-existing relationship in a previous arbitration
4. Information in the possession of the arbitrator
* **Cases where ICC declined to confirm the challenged arbitrator:**
1. Arbitrator nominated jointly by the claimants disclosed that several partners of her firm, located in other offices mostly in other countries, represented the claimants or affiliates of the claimants. She knew and had worked with some lawyers working for the claimant’ counsel, but none of those lawyers was involved in the present dispute 🡪 there was an established client relationship between the claimants and the nominee’s firm
2. Arbitrator nominated by the respondent disclosed that he had met with the respondent to discuss the possibility of representing the respondent in the matter, but respondent subsequently retained other counsel 🡪 disclosures may have been made during the meeting that could have an impact on the arbitrator’s independence
3. Arbitrator nominated by the claimant disclosed that his law firm was currently rendering professional services to two subsidiaries belonging to the same group of companies as the claimant 🡪 although the two subsidiaries were not directly related to the claimant, or involved in the matter in dispute, the same parent company had financial and administrative control over the claimant and the two subsidiaries and played an important role in negotiating the agreements that were the subject of the arbitration
* **LCIA challenge digests**
* Possible grounds for refusal to confirm arbitrator:
1. Presumption that activities of a partner in a law firm will be attributed to other partners for conflicts purposes and the contrary presumption that members of the barristers’ chambers are viewed as solo practitioners generally unburdened by any such attribution
2. Prior instruction by a party’s counsel in other matters, and common membership by an arbitrator and counsel in a professional organization
* The fact that a party was a former client of a law firm at which an arbitrator worked briefly does not, of itself, constitute circumstances giving rise to doubts as to the impartiality, who had severed all professional and personal ties with that party.
* The fact that an arbitrator practicing outside England is a door tenant of an English barristers’ chambers, thus having a “base” in England, does not amount to his being “based in England”.
* Each institution’s decision-making process is idiosyncratic, involving interpretation of its own rules and use of its unique procedures.
* **Philippe Fouchard, “Relationships Between the Arbitrator and the Parties and the Arbitral Institution,” in Varady, Barcelo & von Mehren, International Commercial Arbitration (1999), 312-320**
* Relationship between the arbitrator and the parties 🡪 An arbitrator is only a judge by virtue of a contract, whereby he has promised the parties (and possibility the arbitration institution) that he will carry out a clearly defined task, that is usually remunerated. **His status is contractual in origin.**
* **Arbitrator’s obligations towards the parties**
* any arbitrator is bound to behave equitably and impartially, and to treat the parties on equal footing throughout the whole duration of the procedure.
* he must ensure that parties are given every opportunity to assert their pleas
* such duties stem from his status as a private judge, but they also represent precise contractual obligations that he is bound by as a direct result of producing his task
* express stipulations on ethical duties of the arbitrator are not necessary because such behavior is already imposed on arbitrator by international conventions, laws, and the national courts
* the arbitrator must fulfill his task within the legal or contractual time limits laid down for him
* in accepting his task, he undertakes to fulfill it with due diligence.
* the arbitrator must carry out his task until its completion, i.e., until the final award is rendered 🡪 the moment he accepts, he can no longer divest of it without good reason
* provided he has legitimate reason for resigning, or if through no fault of his own, a circumstance of a kind that would affect his independence vis-à-vis the parties arise, the arbitrator may resign, with or without the authority of the arbitration center or his colleagues
* the arbitrator has the duty to respect the confidentiality of the arbitration
* **Article 35, AAA International Rules of Arbitration:** Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.
* ICC also refers to confidentiality but only in relation to the work of the International Court of Arbitration, i.e., permanent administrative body.
* **Parties’ obligations towards the arbitrator**
* The obligation is pecuniary in nature.
* Most institutional rules of arbitration lay down a scale of fees, which takes into account the commercial amount in dispute, and possibly the difficulty of the case and the time spent by the arbitrators in deciding it 🡪 these are contractual in nature
* such payment lay down a fundamental principle that is essential for safeguarding the independence of the arbitrators: prohibition of any unilateral financial arrangement between an arbitrator and the party who nominated him
* It is unlikely that courts could check and where applicable, reduce the amount of the arbitrator’s fees, if these were excessive. But if the amount of the arbitrator’s fees stems from the application of a scale, the parties are deemed to have known it and to have accepted it. In order to win their case, they would have to maintain that the pre-established provisions of the standard form contract in question were imposed on them by an abuse of economic power.
* Arbitrator’s fees may be reduced or refunded, in whole or in part, if he committed errors in the course of performing his duties.
* The final responsibility for the fees is decided by the arbitrator in his award. Most arbitration rules provide as follows: an order to pay all or part of the costs and fees of the arbitration is one of the usual heads of the award, which the arbitrators decide on the basis of the respective success and conduct of the parties to the arbitration.
* Arbitrator may decide which of the parties shall bear the payment of his fees and the amount of these fees in his award.
* Can the arbitrator award himself a right to recover any remuneration which he has not yet received, or owing to res judicata authority and subsequent enforceability of the award, prohibit any subsequent challenge by a party of the amount thereof?

🡪 French courts answered No, because the arbitrator cannot be both judge and party at one and the same time.

* Parties have other obligations of a moral character towards the arbitrator 🡪 he is charged with rendering justice; he has to comply with the arbitration agreement and the applicable procedural rules, he is not subordinate to the parties in the conduct of the arbitration proceedings. Because of the judicial nature of his task, he holds appropriate prerogatives for conducting the procedure.
* Arbitrator has the right to meet with faithful and cooperative behavior from the parties throughout the whole of the arbitration procedure; this, even if it’s not generally referred to in the rules of arbitral procedure
* Arbitrator has the right to continue his task until it is completed, and he may only be dismissed with the unanimous agreement of the parties.
* **Relationship between the arbitrator and the arbitral institution**
* When a permanent arbitration centre has been chosen to administer the procedure, the contractual relationship existing between the litigants and the arbitrator becomes triangular.
* A contract already exists between the litigants and the centre, whereby the former acknowledge that that the arbitration institution has certain prerogatives, whilst the institution is bound to carry out certain actions in relation to the parties.
* Arbitration centres do not themselves act as arbitrators; they solely provide the “policing of the arbitration procedure” or “the administration of the procedure”
* The contract resembles an agency since the centre is charged with carrying out a certain number of legal acts, in the name of the litigants; or a contract for hire of services since the centre undertakes to perform various material and intellectual services listed in its rules.
* The institutional functions of the arbitration centre are accepted by the parties when they choose the arbitration institution in their arbitration clause, thereby referring to the said rules, impliedly at least.
* As between the arbitration centre and the arbitrator, it is only from the moment of the arbitrator’s acceptance (of his appointment) that the prospective arbitrator and the institution actually enter into relations. Their respective rights and obligations continue throughout the whole of the arbitration procedure that is set in place.
* The arbitration centre is bound to carry out its functions of organization, administration and supervision of the arbitral procedure.
* From the moment when the arbitration institution recognizes that a person acts in the capacity of an arbitrator within the terms of its rules, it must treat him as such and respect the arbitrator’s distinctive powers to rule on his own jurisdiction, to determine the rules of the procedure and to conduct it.
* It is also bound to reimburse the arbitrator’s expenses and pay him fees, in respect of which it has collected advances from the parties, naturally, in accordance with the provisions of its rules.
* Even when there is no special provision in the arbitration rules, it has to be acknowledged that the arbitration centre has the duty to provide the arbitrator with its administrative and technical assistance so as to facilitate completion of his task. As a general rule, the centre will provide assistance in the material organization of the hearings, seeking the help of interpreters, and possibly secretarial tasks.
* As regards the arbitrator, in accepting his task:
1. he agrees to carry it out under the auspices of and in compliance with the centre’s rules
2. he guarantees his independence of mind and his availability to the centre and the parties
3. he consents to the centre exercising the functions resulting from its rule (power of confirmation, challenge, dismissal)
4. he consents to the duration of his task being determined and extended by the centre, to the proceedings themselves being supervised by the centre’s relevant departments, and in the case of the ICC, to his draft award being scrutinized and approved by the institution
5. he agrees that the reimbursement of his expenses, the amount of his fees and the modalities relating to their payment will be decided and fixed by the centre, in accordance with the powers accorded to the centre by the rules of arbitration
* **Nature of Relationship Between Arbitrator and Arbitration Centre**
* Their relationship is legal in nature. But is it contractual?

🡪 it does not appear to be so. The powers of the centre are those that the litigants have conferred on it, and that it acts basically in their name, in the capacity of an agent, without personally entering into a contract. An agent does not become a party to a contract that binds his principal (party to a dispute) to a third party (arbitrator).

🡪 this is especially true where the litigants have only charged the arbitration centre with the tasks of appointment (or confirmation) and possibly the challenge or replacement of the arbitrator (when AAA or ICC acts as appointing authority in the context of the UNCITRAL rules of arbitration)

* When American case law extends the immunity enjoyed by arbitrators to arbitration institutions, the quasi-judicial powers that it thus confers upon them can only be the powers that are peculiar to the said institution.
* Accordingly, the relationship between the arbitrator and the arbitration centre clearly seems to be based on a contract, even if it is a contract that is not clearly defined and less characterized than those previously analyzed.
* This contract results from the expression of a **two-fold consent**:
1. the consent of the centre which appoints or confirms the arbitrator and, by sending him a copy of its rules, informs him of the functions he will carry out in the course of the said procedure
2. the consent of the arbitrator when he reads the said rules and agrees to fulfill his task in this context and under the centre’s auspices
* it is an **innominate contract** in which each party separately undertakes to provide and does provide the other with intellectual services. Each also cooperates with the other to ensure that the arbitration the litigants have asked them to conduct progresses to a successful conclusion. Basically, it is in the interest of the litigants that the arbitration and the centre exercise their procedural functions and are led to cooperate.
* The arbitrator’s task is judicial in character and the purpose of the arbitration centre’s activity is to encourage its satisfactory completion.
* **IBA Guidelines on Party Representation**
* Guidelines shall apply where and to the extent that the parties have so agreed, or the arbitral tribunal, after consultation with the parties, wishes to rely upon them after having determined that it has the authority to rule on matters of party representation to ensure the integrity and fairness of the arbitral proceedings.

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* Party representative should identify themselves to the other party or parties and the arbitral tribunal at the earliest opportunity, and a party should promptly inform the arbitral tribunal and the other party of any change in such representation.
* Once the arbitral tribunal has been constituted, a person should not accept representation of a party in the arbitration when a relationship exists between the person and an arbitrator that would create a conflict of interest, unless none of the parties object after proper disclosure.
* Before an arbitral tribunal may exclude a new representative from participating, it is important that it gives the parties an opportunity to express their views about the existence of a conflict, the extent of the tribunal’s authority to act in relation to such conflict, and the consequences of the measure that the tribunal is contemplating.
* Unless agreed otherwise, a party’s representative should not engage in any ex parte communications with an arbitrator concerning the arbitration, except in the following cases:
1. to determine the prospective party-nominated arbitrator’s expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest
2. with a prospective or appointed party-nominated arbitrator for the purpose of the selection of the presiding arbitrator
3. if the parties are in agreement that such communication is permissible, with a prospective presiding arbitrator to determine his expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest
4. while communications with a prospective party-nominated arbitrator or presiding arbitrator may include a general description of the dispute, should not see the views of such arbitrator on the substance of the dispute.
* seek to reflect best international practices and, as such, may depart from potentially domestic arbitration practices that are more restrictive or, to the contrary, permit broader ex parte communications.
* “ex parte communications” means oral or written communications between a party representative and an arbitrator or prospective arbitrator without the presence or knowledge of the opposing party
* ex parte communications with a prospective arbitrator (party-nominated or presiding) should be limited to providing a general description of the dispute and obtaining information regarding the suitability of the potential arbitrator; should not seek views on the substance of the dispute.
* **appropriate discussion topics:**
1. prospective arbitrator’s publications
2. any activities of the prospective arbitrator and his law firm or organization within which he operates, that may raise justifiable doubts as to the prospective arbitrator’s independence or impartiality
3. description of the general nature of the dispute
4. terms of the arbitration agreement, and in particular any agreement as to the seat, language, applicable law and rules of the arbitration
5. identities of the parties, party representatives, witnesses, experts and interest parties, and
6. anticipated timetable and general conduct of the proceedings
* applications to the arbitral tribunal without the presence or knowledge of the opposing party may be permitted in certain circumstances, if the parties so agreed, or as permitted by applicable law
* a party representative may communicate with the arbitral tribunal if the other party fails to participate in a hearing or proceedings and is not represented

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* a party representative should not make any knowingly false submission of fact to the arbitral tribunal
* in case a party representative learns that he previously made a false submission of a fact to the arbitral tribunal, he should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission
* a party representative should not submit witness or expert evidence that he or she knows to be false; if he later discovers that such evidence is false, he should promptly advise the party whom he represents of the necessity of taking remedial measures and of the consequences of failing to do so. Such measures may include:
1. advise the witness or expert to testify truthfully
2. take reasonable steps to deter the witness or expert from submitting false evidence
3. urge the witness or expert to correct or withdraw the false evidence
4. correct or withdraw the false evidence
5. withdraw as party representative if the circumstances so warrant
* two aspects:
1. submission of fact made by a party representative
2. evidence given by a witness or expert
* the first two guidelines are restricted to false submissions of fact, and in all cases, the party representative must have actual knowledge of the false nature of the submission, which may be inferred from the circumstances.
* with respect to legal submissions to the tribunal, a party representative may argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable
* list of remedial measures above is not exhaustive; may extend to the party representative’s withdrawal from the case, if the circumstances so warrant

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* when the arbitral proceedings involve or are likely to involve document production, a party representative should inform the client of the need to preserve, so far as reasonably possible, documents, including electronic ones, that would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration
* a party representative should not make any request to produce or any objection to a request to produce, for an improper purpose, such as to harass or cause unnecessary delay
* a party representative should explain to the party whom he or she represents the necessity of producing, and potential consequences of failing to produce, any document that the part has undertaken, or been ordered, to produce
* a party representative should advise the party whom he represents to take, and assist such party in taking, reasonable steps to ensure that: (i) a reasonable search is made for the documents that a party has undertaken, or been ordered, to produce, and (ii) all non-privileged responsive documents are produced
* a party representative should not suppress or conceal, or advise a party to suppress or conceal, documents that haven been requested by another party or that the party whom he represents has undertaken, or been ordered, to produce
* if, during the course of an arbitration, a party representative becomes aware of the existence of a document that should have been produced, but was not produced, such party representative should advise the party whom he represents of the necessity of producing the document and the consequences of failing
* under the guidelines above, a party representative should, under the given circumstances, advise the party whom he represents to:
1. identify those persons within the party’s control who might possess documents potentially relevant to the arbitration, including electronic documents;
2. notify such persons of the need to preserve and not destroy any such documents; and
3. suspend or otherwise make arrangements to override any document retention or other policies/practices whereby potentially relevant documents might be destroyed in the ordinary course of business
* further under the guidelines above, a party representative should, under the given circumstances, advise the party whom he represents to, and assist such party to:
1. put in place a reasonable and proportionate system for collecting and reviewing documents within the possession of persons within the party’s control in order to identify documents that are relevant to the arbitration or that have been requested by another party; and
2. ensure that the party representative is provided with copies of, or access to, all such documents.
* while Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration requires the production of documents relevant to the case and material to its outcome, the Guidelines above refer only to potentially relevant documents because its purpose is different: when a party representative advises the party whom he represents to preserve evidence, such party representative is typically not at that stage in a position to assess materiality, and the test for preserving and collecting documents therefore should be potential relevance to the case at hand.

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* Before seeking any information from a potential witness or expert, a party representative should identify himself, as well as the party he represents, and the reason for which the information is sought
* A party representative should make any potential witness aware that he has the right to inform or instruct his counsel about the contact and to discontinue the communication with the party representative
* A party representative should seek to ensure that a witness statement reflects the witness’ own account of relevant facts, events and circumstances
* A party representative should seek to ensure that an expert report reflects the expert’s own analysis and opinion
* A party representative should not invite or encourage a witness to give false evidence
* A party representative may, consistent with the principle that the evidence given should reflect the witness’ own account of relevant facts, events or circumstances, or the expert’s own analysis or opinion, meet or interact with witnesses and experts in order to discuss and prepare their prospective testimony.
* A party representative may pay, offer to pay, or acquiesce in the payment of:
1. Expenses reasonably incurred by a witness or expert in preparing to testify or testifying at a hearing;
2. Reasonable compensation for the loss of time incurred by a witness in testifying and preparing to testify; and
3. Reasonable fees for the professional services of a party-appointed expert.
* Domestic professional conduct norms in some jurisdictions require higher standards with respect to contacts with potential witnesses who are known to be represented by counsel. In such a case, a party representative may address the situation with the other party and/or the arbitral tribunal
* If the arbitral tribunal, after giving the parties notice and a reasonable opportunity to be heard, finds that a party representative has committed misconduct, the arbitral tribunal may:
1. Admonish the party representative
2. Draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the party representative
3. Consider the party representative’s misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the party representative’s misconduct leads the tribunal to a different apportionment of costs
4. Take any other appropriate measure in order to preserve the fairness and integrity of the proceedings
* In addressing issues of misconduct, the arbitral tribunal should take into account
1. The need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award
2. The potential impact of a ruling regarding misconduct on the rights of the parties
3. The nature and gravity of the misconduct, including the extent to which the misconduct affects the conduct of the proceedings
4. The good faith of the party representative
5. Relevant considerations of privilege and confidentiality
6. The extent to which the party represented by the party representative knew of, condoned, directed or participated in, the misconduct.
* The arbitral tribunal should seek to apply the most proportionate remedy or combination of remedies in light of the nature and gravity of the misconduct, the good faith of the party representative and the party he represents, and the need to preserve the integrity, effectiveness and fairness of the arbitration and the enforceability of the award.
* Before imposing any remedy in respect of alleged misconduct, it is important that the arbitral tribunal gives the parties and the impugned representative the right to be heard in relation to the allegations made.
* **Redfern and Hunter on International Arbitration (Fifth Edition), §5.06-5.84**
* In international arbitration, the powers, duties, and jurisdictions of an arbitral tribunal arise from a complex mixture of the will of the parties, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place where recognition or enforcement of the award may be sought.
* The system for the protection of parties against excesses on the part of arbitral tribunals is usually contained in a framework for recourse against the award itself. Some national laws also permit another level of control imposed more directly on individual arbitrators (in which case, they may be removed for certain types of wrongful conduct.
* This may be done under the rules of an arbitral institution, where applicable (in some circumstances) under the law governing the arbitration agreement or, more usually, under the law governing the arbitration itself, by an application to the courts of the country in which the arbitration takes place.
* **Powers of Arbitrators**
* The powers of an arbitral tribunal are those conferred upon it by the parties themselves within the limits allowed by the applicable law, together with any additional powers that may be conferred by operation of law. In principle, these powers should be sufficient for the arbitral tribunal to carry out its task properly and effectively.
* In a well-conducted international arbitration, control of the proceedings moves smoothly from the parties to the arbitral tribunal. When the balance of power is shifted from the parties to the arbitral tribunal, the latter is in a position to start making known its views as to how the case should be presented within the framework of the particular rules which govern the proceedings, whether these are ad hoc or the rules of an arbitral institution.
* Sources of arbitrators’ powers
* Powers conferred by the parties
* parties may confer powers upon the arbitral tribunal directly or indirectly, but only within the time limits of the relevant law
* any excess of power (i.e., power granted beyond that allowed by relevant law) is invalid even if it is contained in the rules of arbitration
* direct conferment takes place when the parties expressly agree upon the powers they wish the arbitrators to exercise, setting them out in the terms of the appointment or some other special agreement such as submission agreement (include the power to order production of documents, to appoint experts, to hold hearings, to require the presence of witnesses, to receive evidence, to inspect the subject matter of the dispute
* indirect conferment takes place when the arbitration is conducted according to rules of arbitration, whether institutional or ad hoc, which set out the powers of the tribunal (in ICC, some of the powers may be conferred on the ICC Court itself 🡪 determination of place of arbitraiti0n, unless it has been chosen by the agreement of the parties)
* Powers conferred by operation of law
* powers conferred by the parties fall short of the powers which may be exercised by a national court, which derive their authority from the State, which grants to them coercive powers to ensure obedience to their orders
* parties cannot confer coercive powers over property and persons that are conferred by the State on a national court; **arbitral tribunals do not possess coercive powers**
* many systems of law supplement the powers of arbitral tribunals:
1. giving powers directly to arbitral tribunals
2. authorizing national courts to exercise powers on behalf of arbitral tribunals or the parties themselves, or
3. a combination of these two methods
* example 🡪 English Arbitration Act of 1996 (tribunal is given powers to order a claimant to provide security for costs, administer oaths to witnesses, and generally determine procedural matters
* to determine powers of the arbitral tribunal, it is not enough to refer to the arbitration agreement; any relevant provisions of law governing the arbitration agreement, and of the law governing the arbitration must also be taken into account
* Best practice: when considering the powers of an arbitral tribunal, look (in the following order):
1. arbitration agreement (to establish what powers the parties themselves have agreed to confer on the arbitral tribunal)
2. law governing the arbitration agreement (to identify the way in which it supplements or restricts the powers the parties have conferred, or have purported to confer, upon the arbitration tribunal)
3. law governing the arbitration (lex arbitri; to see whether it supplements or restricts the powers the parties have conferred, or purported to confer, on the arbitration tribunal)

🡪 example: arbitration agreement governed by English law, but which provides for the arbitration to take place in Zurich; if the arbitration agreement did not include an express provision that the arbitrator is entitled to administer oaths to any witnesses in the arbitration, English law (if it were the lex arbitri) would imply such a provision; however, law of Switzerland does not permit an arbitrator (private individual) to administer oaths; mandatory provision of Swiss law and, as the law governing the arbitration, would override the express or implied provisions of the arbitration agreement

* Common Powers of arbitral tribunals
* The broad power of the arbitral tribunal to determine the appropriate procedure is subject to the overarching **respect of due process**—equality of treatment and an opportunity to be heard.
* UNCITRAL Rules provide that an arbitral tribunal has general power to conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a fully opportunity of presetding this case
* Determination of applicable Law and Seat
* when the parties fail to expressly indicate the seat of arbitration or the applicable law in the agreement, and the matters is also not addressed by the arbitration institution itself, the arbitral tribunal is usually provided with the power to determine such seat and applicable law.
* the question of determination of seat or place of arbitration affects the lex arbitri and consequently establish a State jurisdiction to supervise the arbitration
* it is common practice to establish a seat in a jurisdiction which is a signatory to the NY Convention (for recognition and enforcement purposes) and with considerable experience of acting as seat in international disputes (e.g., London, Paris, Geneva, NY, or Stockholm)
* Determination of Language of the arbitration
* where the language is not established by the arbitration agreement and if the institutional rules do not provide for a fall-back resolution arbitral tribunal makes the decision
* it is common to fix as the language of the arbitration as that of the underlying contract since this is most likely to be the “common” language of the parties
* where the parties used to working languages in negotiations (or with two authentic versions in two languages), it may be possible for arbitral tribunal to agree to a bilingual arbitration in which two languages may be used interchangeably by the parties without the need for translation or interpretation
* Document production
* In case the arbitral tribunal determines that the document being requested by a party on the other party is relevant, it can order production, and if such order is refused by the requested party, the tribunal has no power (imperium) to force production but many nevertheless “draw adverse inferences” from such failure. The power to order production may not be exercised against a non-party to the arbitration.
* Note: In a US-based tribunal, the tribunal has the additional power of issuing a subpoena requiring a person within its jurisdiction to produce documents; but this can only be enforced by a court in the same State where the arbitration is taking place against a person within the jurisdiction of the relevant court
* Requiring presence of witnesses’ subpoena
* Arbitral tribunal has the power to require the presence of witnesses under the control of the parties.
* But, absent any powers to call upon the forces of public order, if such witness fails to appear, the tribunal can only draw adverse inferences from the party’s failure to secure the presence of the witness.
* Note:

🡪 in England and Wales, by seeking a peremptory order from the tribunal requiring the presence of a witness in the power of a party which, if disobeyed, may be followed by a court order in support; and disobeying such court order could lead to contempt and criminal prosecution

🡪 in U.S., an arbitral subpoena can be issued in respect of a third-party witness present in the jurisdiction of the State where the arbitration is to take place

* Administration of oaths
* some rules and laws grant power to administer oath
* in practice, witnesses are not usually required to swear an oath; arbitrators simply seek confirmation that the witness will tell the truth and alert the witness that failure t do so may constitute a breach of applicable law
* Examine the subject matter of dispute
* where the dispute concerns the status of the subject matter of the contract, tribunal may personally examine or inspect the subject matter
* Appointment of experts
* arbitration rules permit the appointment by the tribunal of its own expert

🡪 IBA Rules on Taking Evidence make specific provision for this and establish ground rules for such appointment

* where questions of technical expertise are involved, it is common for parties to present expert reports from independent experts that they have retained for the purpose
* it is also possible for tribunals to seek assistance from a neutral expert appointed by them to assist in evaluating the conflicting positions of the parties
* when this power is exercised, the expert should be carefully instructed as to the scope of the exercise with a list of specific questions and issues to consider (on which the parties should be allowed to comment prior to its remission to the expert), to prepare a draft report in response to the issues, and following receipt of comments on the draft report, to prepare a final report
* **the tribunal cannot and must not delegate its obligation to reach its own decision on all of the issues (including the technical issues) in dispute**
* Interim measures
* during the course of arbitration, it may become necessary for the arbitral tribunal or a national court to issuer orders intended to:
1. preserve evidence
2. protect assets
3. in some other way, maintain the status quo pending the outcome of the arbitration proceedings themselves
* other terms used to refer to interim measures

🡪 in Model Law and UNCITRAL Rules, they are known as “interim measures of protection”

🡪 in the English version of the ICC Rules. they are known as “interim or conservatory measures”

🡪 in Swiss law governing international arbitration, they are referred to as “provisional or conservatory measures”

* in many cases, where interim measures of protection are required, the arbitral tribunal itself has the power to issue them:

🡪 ICC Rules: Unless the parties have agreed otherwise, and as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.

🡪 in the Model Law: Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

🡪 ICSID Arbitration Rules (somewhat particular as they appear to limit the powers of the tribunal to that of recommending interim measures): At any time during the proceeding a party may request that provision measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures. 🡪 recent arbitral jurisprudence indicates that these provisional measures may be taken to constitute binding obligations

* while arbitration rules and laws permit interim measures to be granted at the tribunal’s discretion, there is very little guidance as to how that discretion is to be exercised.

🡪 in the ICSID case of Occidental v. Republic of Ecuador, the tribunal noted that “provisional measures should only be granted in situations of necessary and urgency in order to protect rights that could, absent such measures, be definitively lost; those in which the measures are necessary to preserve a party’s rights and where the need is urgent in order to avoid irreparable harm”.

* **Conditions for granting interim measures under Article 17A of the Revised Model Law of 2006:** The party requesting an interim measure shall satisfy the arbitral tribunal that:
1. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
2. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
* **Key elements:**
1. the risk of irreparable harm if the measure is not granted
2. the harm to the requesting party if the order is not given must be greater than the harm to the other party if the order is given (the balance of convenience), and
3. a reasonable chance of success on the merits (i.e., prima facie case)
* in most jurisdictions, the arbitral tribunal has power to issue interim measures provided both parties are heard (thereby preserving the essential right to be heard)
* Should arbitral tribunals be granted the power to order interim measures ex parte (i.e., in the absence of one of the parties)?

🡪 some have argued that such power is incompatible with the consensual nature of arbitration and the respect for due process

🡪 Article 17B of Revised Model Law sets out a compromise which provides for emergency relief in the form of a “preliminary order”, which can be requested on an ex parte basis simultaneously with the request for interim relief

* an order for preliminary relief is subject to a 20-day time limit, pursuant to Article 17C(4), and the same conditions apply as for interim measures
* within that 20-day period, an application may be made to the arbitral tribunal, on notice to the other party, to adopt or vary the preliminary order
* in addition, a preliminary order may be granted on an ex parte basis if the arbitrator decides that disclosure of the request for interim relief would frustrate the purpose of the measure (e.g., the opposing party might seek to hide relevant assets)
* Article 17C(5) provides that a preliminary order of emergency relief, while binding on the parties, is not enforceable by a court.
* Security for costs
* this is a special form of interim measure of relief since the usual criteria for interim measure above do not apply
* the tribunal must outweigh the costs to a respondent of defending a claim, with the possibility of not receiving those costs even if successful, against the risk of stifling a genuine claim by a claimant who is short of funds, possibly because of the conduct of the respondent which is the reason for the arbitration
* respondent may well ask if there is a way in which it can be assured that if it wins, and is awarded costs, there will at least be a fund out of which this costs award will be paid
* in certain circumstances it may possible to ask the tribunal to make an order to the effect that a claimant (or counterclaimant) should provide for security for costs

🡪 Article 25(2) LCIA Rules confers upon an arbitral tribunal the power to order a claimant or counterclaimant to provide security for the legal and other costs of any party by way of deposit or bank guarantee or in any other way that the tribunal may order

🡪 English Arbitration Act 1996 contains a similar provision

🡪 other institutional rules of arbitration (such as ICC) allows security for costs to be ordered under the general provision that authorizes an arbitral tribunal to issue interim measures of protection

* Supporting powers of the courts
* National courts with an “arbitration friendly” law usually lend support to arbitral tribunals, when needed.
* US. system provides tools to enable courts to assist international tribunals including, in some cases, arbitral tribunals with seats outside the US, where relevant evidence is in the US. These include:
1. power of order depositions
2. power to subpoena witnesses present in the jurisdiction to give evidence or produce documents
3. power to order production of documents sought by a party to an arbitration with a foreign seat
* English system:
* court can act as a “back-up” to the arbitration by ordering a party to comply with any peremptory order made by the tribunal; this effectively converts the breach of the tribunal’s order into a contempt of court
* court can also make its own orders in relation to the proceedings; include orders freezing a party’s assets, permitting the seizure of relevant evidence, or securing the attendance of witnesses
* This range of powers, whether exercised directly or indirectly, provides support from national legal systems that international arbitration requires to achieve its purpose.
* **Duties of Arbitrators**
* Duties imposed by the parties
* may be imposed before the arbitrators are appointed (usually in an ad hoc submission agreement), or during the course of the arbitration (usually only after consultation with the arbitral tribunal), or both
* where the arbitration is conducted under the auspices of rules of arbitration, the applicable rules impose specific duties on the arbitral tribunal, in addition to any imposed by the parties themselves

🡪 ICSID Arbitration Rules:

1. an arbitrator must, before or at the first session, sign a declaration as to independence and readiness to judge fairly as between the parties, in default of which he is deemed to have resigned;
2. arbitral tribunal must meet for its first session within 60 days of its constitution or such other period as the parties to the arbitration may agree;
3. it must keep its deliberations secret;
4. it must make decisions by a majority vote
5. it must give reasons for its award

🡪 ICC Rules also impose their own obligations upon arbitral tribunals:

1. to draw up terms of reference
2. to make an award within a defined period of time
3. to submit the award in draft form to the ICC Court for scrutiny
* the only way to ascertain the specific duties of an arbitral tribunal is to look at the terms of its appointment, including any particular rules that apply to that appointment; some may complement powers conferred upon the arbitral tribunal by the parties (example: where arbitrators are instructed to determine a dispute as amiables composituers then, subject to any contrary provisions of the applicable law, they are under a duty so to decide
* Duties imposed by law
* the law may require an arbitral tribunal to decide all procedural and evidential matters, to treat the parties fairly and impartially, or make the award in a particular form
* duty to act with due care
* It seems appropriate to except the same standard of professional care (duty to carry out professional work with proper skill and care) from a lawyer (or an accountant, architect, or engineer) who is serving as an arbitrator as would be expected in the course of other professional work. Parties except the arbitrator to perform the task with due care. 🡪 moral obligation
* There is an argument that arbitrators have professional duties of care, skill, and diligence and should be liable for breach of such duties.
* A party who has suffered loss through manifest lack of care by an arbitrator may wish to seek to recover that loss from the arbitrator personally.
* As to how a breach by the arbitrator of the obligation to act with due care be sanctioned depends on two schools of thought:
1. “contractual” school considers that the relationship between the arbitrator and the parties is established by contract

🡪 considers that an arbitrator is appointed by or on behalf of the parties to an arbitration to perform a service for a fee; thus, there is a contractual relationship between the parties

🡪 Austrian law: an arbitrator who does not fulfill the duties assumed by accepting an appointment, or who does not fulfill them in due time, may be liable to the parties for loss caused by wrongful behavior; liability in respect of procedural mistakes and wrong decisions is limited to damage caused by intent or gross negligence

🡪 Dutch law: an arbitrator is held to be in a contractual relationship with the parties and may be liable for damages in the event of committing gross negligence

🡪 Argentinian law: considers that the arbitral contract renders arbitrators liable for losses caused by any failure to perform duties; acceptance by arbitrators of their appointment shall entitle the parties to compel them to carry out their duties and to hold them liable for costs and damages derived from the non-performance of arbitral duties

1. “status” school which considers that the judicial nature of an arbitrator’s function should result in a treatment assimilated to that of a judge (which in some jurisdictions may give rise to immunity; in others, it simply results in the application of rules on judicial liability)

🡪 based on the performance by arbitrators of a judicial or quasi-judicial function, which grants an element of “status” entitling them to treatment similar to that of a judge

🡪 in most common law jurisdictions, they enjoy certain immunities, thus, their independence must be protected

🡪 in the U.S., arbitrators and arbitral institutions enjoy the broadest degree of immunity from suit for actions taken within their mandate

🡪 in England, arbitrators cannot be held liable for the performance of their arbitral functions unless bad faith can be proved

🡪 in Canada, New Zealand, and Australia, arbitrators cannot be held liable for negligence

🡪 ICC and LCIA Rules have adopted rules seeking to exclude liability for arbitrators

* in many civil law countries, the conferring of a quasi-judicial status does not result in immunity

🡪 in Chile, arbitrators are liable in the same way as judges for deliberate actions which cause damage to the parties or to a third party

* IBA Rules of Ethics for International Arbitrators: international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of willful or reckless disregard of their legal obligations
* Where arbitrators are exposed to a risk of personal liability by reason of the law under which the arbitration is to take place, they might refuse to accept appointment unless given an indemnity by the parties; in this way they would obtain immunity from liability by contract, even if they were not entitled to it by operation of law
* potential liability of arbitral institution
* like the relationship between the arbitrators and the parties, the relationship between parties to the arbitration and the arbitral institution administering the arbitration is generally considered to be contractual.
* while in common law jurisdictions they have more or less absolute immunity from liability, in civil law jurisdictions they may be held liable for wrongful acts and such liability will usually be based on general principles of contractual liability
* the basis for immunity of arbitral institutions in common law jurisdictions is the fact that they operate as quasi-judicial organizations in order to protect those functions that are closely related to the arbitral process and sufficiently related to the adjudicative phase of the arbitration
* in the U.S., breaches by an institution of its own rules and failure to abide by the arbitration agreement usually attract immunity
* in France, however, arbitration institutions are required to adhere to their own rules, and are potentially liable for their failure to adhere to the arbitration agreement
* duty to act promptly
* some systems ensure that an arbitration is carried out with reasonable speed by setting a time limit within which the arbitral tribunal must make its award; the time limit fixed is sometimes as short as 6 months (as in the ICC Rules), although generally it may be extended by consent of the parties or at the initiative of the institution or the tribunal
* if an award is not made within the time allowed, the authority of the arbitral tribunal terminates and the award will be null and void
* some systems provide that an arbitrator who fails to proceed with reasonable speed in conducting the arbitration, and making his award, may be removed by a competent court (example: Model Law provides that the mandate of an arbitrator terminates if he fails to act without undue delay)
* duty to act judicially
* an arbitral tribunal should act, and should be seen to act, judicially (i.e., respecting the rules of due process)
* this duty extends to all aspects of the proceedings
* neither the arbitral tribunal as a whole nor any of its individual members should discuss the case with one party in the absence of the other, unless the discussions concern purely procedural matters (of which the other party is then promptly informed), or unless the absent party has failed to attend a meeting or a hearing, having been given prior notice to do so
* at the hearing, this duty means that each party must be accorded equality of treatment and given a fair opportunity to present its case
* UNCITRAL Rules: the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given full opportunity of presenting his case
* ICSID Arbitration Rules’ detailed provisions ensure equality of treatment, and if any party fails to appear or present its case, a special default procedure must be followed
* LCIA Rules require arbitrators require arbitrators at all times to act fairly and impartially as between all the parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent
* English Arbitration Act (Sec. 33) provides that an arbitral tribunal shall (considered a mandatory provision which cannot be derogated from by either the parties or the tribunal):
1. act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and
2. adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

🡪 breach of this provision would result to removal of the arbitrator, plus the awards made in breach of it are open to challenge and would face enforcement difficulties

* the duty to act judicially is also an issue that arise where the arbitral tribunal itself decides to base its decision on an issue not specifically raised by the parties

🡪 if the arbitral tribunal considers that the parties have missed an issue and proceed to deliberate and decide on that issue without giving the parties an opportunity to be heard then the duty is likely to have been infringed.

🡪 in one English case, the courts noted that an arbitral tribunal must provide each party with a fair opportunity to address its arguments on all of the essential building blocks in the tribunal’s conclusion; claimant had been deprived of the opportunity to advance submissions on an issue that had been raised prior to the award; court held that such action amounted to a serious irregularity capable of causing substantial injustice

* where an arbitral tribunal fails in its duty to act judicially, the immediate sanction is for it be removed; in some circumstances, this can be done without waiting for the award, either under the rules of the relevant arbitral institution or by a national court, where the applicable law permits the courts that the place of arbitration to intervene; in some jurisdictions the aggrieved party must wait until the end of the proceedings before challenging the award
* this duty is different for the duty to be independent and impartial

🡪 in a decision of the LCIA Court, a sole arbitrator was challenged for conducting a meeting (which the arbitrator referred to as not a formal hearing) with the representatives of the respondent in the absence of the claimant or any of its representatives; court found no reason to doubt the arbitrator’s independence or impartiality, but found that the arbitrator’s actions constituted a failure to act fairly between the parties

* a party who has suffered financial loss as a result of the failure of an arbitrator to act judicially may wish to make the arbitrator personally liable for the loss he has suffered
* Ethical duties and standards (“deontology” of arbitrators)
* it is generally considered that an arbitrator has certain moral or ethical obligations
* one example is the obligation to decline to accept an appointment if, as a prospective arbitrator sufficient time and attention cannot be given to the case
* **ABA/AAA Code of Ethics for Arbitrators in the U.S.**
* no code of conduct for ICC arbitrators, but a general guide to acceptable international standards of conduct may be discerned from the attitudes and behavior of leading international arbitrators
* IBA Guidelines on Conflict of Interest
* Use of arbitration to further criminal purposes
* where the arbitral process is being hijacked for a criminal purpose, the parties usually ask the tribunal to embody a settlement of their “dispute” in a consent award through which an unlawful payment is successfully hidden
* a tribunal should be particularly cautious because a consent award is only of real utility where there is an element of future performance which may need to be enforced; an obligation to pay money is usually sufficiently protected by mutual releases in a settlement agreement condition upon the receipt of funds
* when confronted with possible criminal activity linked to an arbitration, each party should be given an opportunity to provide an explanation; once it has sufficient justification, it can then evaluate the facts; in case of fraud or corruption (such as money laundering or other manipulation of the process by the parties), the tribunal should terminate the proceedings on the basis that there is no actual dispute, and in case of a consent award, the tribunal may issue a ruling refusing to approve the settlement
* one of the ethical duties of an arbitrator is to decide fairly in the absence of any corruption or bribe

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| **CLASS 6 – TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION** |

* **IBA Rules on the Taking of Evidence in International Arbitration:**
* **Article 3:** A request to produce shall contain:
1. (i) a description of each requested document sufficient to identify it, or

(ii) a description in sufficient detail (including subject matter) of a **narrow and specific** requested category of Documents that are reasonably believed to exist; in the case of documents maintained in electronic form, the requesting party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner;

1. a statement as to how the documents requested are **relevant to the case and material to its outcome**; and
2. (i) a statement that the documents requested are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents; and

(ii) a statement of the reasons why the requesting party assumes the documents requested are in the possession custody or control of another party.

* **Article 9.2:** The Arbitral Tribunal shall, at the request of a party or on its own motion, exclude from evidence or production any documents, statement, oral testimony or inspection for any of the following reasons:
1. lack of sufficient relevance to the case or materiality to its outcome;
2. legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
3. unreasonable burden to produce the requested evidence;
4. loss or destruction of the document that has been shown with reasonable likelihood to have occurred;
5. grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
6. considerations of procedural economy, proportionality, fairness or equality of the parties that the Arbitral Tribunal determines to be compelling.
* **Article 9.3:** In considering issues of legal impediment or privilege under item (b) in 9.2, and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
1. any need to protect the confidentiality of a document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
2. any need to protect the confidentiality of a document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
3. the expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen;
4. any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the document, statement, oral communication or advice contained therein, or otherwise; and
5. the need to maintain fairness and equality as between the parties, particularly if they are subject to different legal or ethical rules.
* **Article 30, LCIA Rules**
* The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.
* The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that the disclosure of an arbitrator’s refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10 (revocation and challenges), 12 (majority power to continue deliberations), 26 (awards), 27 (correction of awards and additional awards).
* The LCIA does not publish any award or any part thereof without the prior written consent of all parties and the Arbitral Tribunal.
* **Article 22(3), ICC Rules**
* Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.
* **Pierre Tercier and Tetiana Bersheda, "Document Production in Arbitration: A Civil Law Viewpoint", The Search for "Truth" in Arbitration, ASA Special Series No. 35, 2011**
* Consensus among legal scholars is that arbitrators have the power to order production of documents which are in the possession or control of a party. In general, the purpose of document production procedure is to enable a party to establish facts on which the party relies or to contest the facts underpinning the other party’s case.
* The dichotomy of the document production or discovery in common law and civil law countries is limited to the extent to which the discovery should be allowed and how the procedure should be managed.
* Arbitration follows its own procedural rules which may be different from the national rules of civil procedure and are partly defined on a case-by-case basis in order to accommodate the parties’ specific needs.
* Arbitral proceedings are in general governed by:
1. the mandatory rules of the law on international arbitration applicable at the place of the arbitration,
2. the rules of an arbitral institution if arbitration is conducted under the auspices of such institution, and
3. the procedural rules issued by the arbitral tribunal, usually after consultation with the parties.
* Right to Production of Documents
* the right to production of documents, as a component of the right to evidence, enables the parties to prove facts which are not personally known to the judge or the arbitrator (it enables the parties to ascertain the facts)
* Article 184 of Swiss Private International Law: arbitral tribunal shall itself conduct the taking of evidence; if assistance of state authorities is necessary for taking of evidence, arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the state court at the seat of the arbitral tribunal; court shall apply its own law 🡪 **this means that arbitral tribunals have control over the evidentiary proceedings and have broad discretion within the framework constituted by the applicable procedural rules**
* **subject matter of evidence**: defines which facts have to be proved and is essentially derived from the parties’ submissions (particularly from their substantiated factual allegations) 🡪 subject to the law applicable to international arbitration in Switzerland if parties have not agreed otherwise
* **burden of proof**: determines who has to prove a fact, and consequently, who bears the risk of the failure to provide evidence 🡪 subject to the law applicable to international arbitration in Switzerland if parties have not agreed otherwise
* **procedure of taking evidence**: including such issues as admissibility of evidence and production of documents, falls under Article 182 of Swiss law above
* party’s right to evidence contains the right to documents relevant to establish the facts for which that party bears the burden of proof in relation to its claim or to its defense to a counterclaim; **document production procedure cannot be used for fishing expeditions**. No legitimate interest exists if the request for documents serves simply to gather information or to create a factual basis for the claim. The purpose of document production is to enable a party to prove its case but not to build its case.
* A party has a right to bring evidence, including documents to facts which it has alleged and for which it bears the burden of proof. The procedural duty to produce documents serves the purpose of proving properly detailed allegations of fact. When ruling on a document production request, the following questions enter into consideration:
1. has the requesting party pleaded the factual circumstances in sufficient detail?
2. has the opposing party contradicted the factual allegation in sufficient detail?
3. are the factual allegations are material and relevant?
* Divergence of Legal Traditions vs. Harmonization in International Arbitration
* There is no universal right to evidence and the concepts prevailing in different legal cultures diverge substantially. The law of evidence is a cultural institution and any right to submit evidence is deeply rooted in legal cultures.
* The right to evidence is governed by complex and subtle national rules, sometimes tied to the substantive law and sometimes to the procedural law.
* In international arbitration, the importance of the conflict-of-law rules is reduced because of the harmonization of international rules and practices through such tools that ensure the predictability and uniformity of rules of evidence in international arbitration (tools put in place by IBA, ICC, ICDR and CPR—International institute for Conflict Prevention & Resolution) 🡪 these tools aim at setting out general principles for dealing with the parties’ right to evidence
* Notwithstanding the trend of harmonization, the extent to which this tend prevails in each arbitration procedure depends on the legal background and experience of the arbitrators, parties and their counsel.
* It appears that harmonization of rules on document production in international arbitration constitutes an uncontested reality. While the right to evidence is a cultural institution embedded in the legal tradition of each jurisdiction, it at the same time constitutes a central issue on which the whole arbitration depends.
* E-Discovery
* Due to the technological progress, the documents sought in international arbitration can also be in electronic form. Electronically stored documents (particularly emails) have rapidly become an important source of evidence in commercial business disputes.
* In international arbitration, most of the arbitration rules empower arbitral tribunals to order the production of “documents” or other “evidence” but are silent as to electronic information.
* ICDR Guidelines for Arbitrators concerning Exchanges of Information provide that when documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the arbitral tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured so as to make searching for them as economic as possible.
* Under the 2010 version of IBA rules, either at a party’s own behest or upon order of the arbitral tribunal, e-documents may additionally be identified by file name, specified sear terms, individuals (specific custodian or authors) or other means of searching for such documents in an efficient and economic manner.

🡪 Article 3.12(b) IBA Rules provides that “documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the parties agree otherwise or, in the absence of such agreement, the arbitral tribunal decides otherwise”

* Efficiency of Case Management
* Arbitrators are under duty to act with due diligence and to ensure efficient case management. The need for a reasonable approach to document production is part of the efficient management of arbitration proceedings.
* When making a decision on a request for document production, arbitrators must keep arbitration proceedings within reasonable dimensions, i.e., they must have regard to the complexity, length and costs of the proceedings in general, including specifically the impact of their decision on document production on these parameters.
* The search for a reasonable solution serves a fundamental rule for the arbitrators in organizing the proceedings and in particular in deciding what evidence to accept and how to conduct the evidentiary proceedings. It also constitutes a means of construction of the procedural rules agreed upon by the arbitrators and the parties or issued by the arbitrators at the beginning of the arbitration proceedings.

🡪 tribunal must deliberate and reach a conclusion as to whether the documents are:

1. in the possession of the requested party, or the production of such documents fall within the reasonable possibilities of the requested party,
2. production is possible, and
3. must not be excessively burdensome

🡪 failure to produce documents may not always be justified by a formal excuse such as that the documents are in the possession of a different company within the same group

* The reasonable resolution requires putting on the balance the interests at stake and considering all the surrounding circumstances.
* Article 3.12(c) IBA Rules provides that a party is not obligated to produce multiple copies of documents which are essentially identical unless the arbitral tribunal decides otherwise
* The requirements of reasonableness and efficiency in conducting arbitration proceedings apply to also to the parties’ counsel. This implies that when formulating their requests for document production, counsel need to take into account the tight deadlines within which the members of the arbitral tribunal have to study the requests for production of documents and objections if any, confer between themselves and then issue a decision; consider the stage of the proceedings at which the document productions requests are filed and ability of arbitrators to assess the relevance of the documents sought.
* Procedures of document production
* The procedures are as follows:
1. immediately after the first procedural hearing, the arbitral tribunal issues procedural rules governing the arbitration (either as a separate document tagged as “procedural rules” or contained in Procedural Order No. 1)
2. parties exchange their submission on document requests by means of completing the respective columns of the Redfern Schedule
* arbitral tribunal issues its decision on document production in the form of a procedural order and attaches the completed Redfern Schedule to the procedural order and integrating this document into its decision
1. formal procedure of document production is initiated by a request for document production that the requesting party addresses to its opponent, in principle with a copy to the arbitral tribunal, within the time limit set out by the arbitral tribunal in the procedural timetable
* request must contain all the elements enabling the requested party to identify and locate the documents sought and the arbitral tribunal to rule upon the request in case the requested party objects
* request must also establish the legal relevance of the documents sought and why the requesting party assumes the requested documents to in the possession, power or control of its opponent
1. upon receipt of the document production request, the requested party has to react within the time limit granted to it by the arbitral tribunal, either by producing the documents to the requesting party (but not to the arbitral tribunal) within the fixed time limit, or providing the requesting party and the arbitral tribunal with its objections and/or reasons for its failure to produce responsive document
* documents so communication are not considered to be on record until requesting party subsequently produces them
1. parties and arbitrators may agree that the requesting party be authorized to reply to the requested party’s objections, possibly in the form of the Redfern Schedule to which an additional column is added to this effect; similarly, the requested party may then wish to submit its rejoinder in the form of comments on reply to the objections
* the procedural rules or special instructions of the arbitral tribunal, issued upon a request of the parties, define whether there will be a second round of exchange of submissions between the parties on document production requests
1. in case of refusal by the requested party, the arbitral tribunal makes a decision in the form of a procedural order; tribunal rules in its discretion upon the communication of the documents or categories of documents having regard to the legitimate interests of the requested party and of all the surrounding circumstances
* any disagreements between the parties as to the scope, conditions, timing and/or method of production of documents are also decided by the arbitral tribunal by means of a procedural order
* in order to respect the right to be heard, all the parties must have a reasonable opportunity to express their views
* Article 20(5) ICC Rules affords considerable discretion to the arbitrators when ruling upon the production of documents
* **Standards that guide international arbitrators when ruling on a document production request:**
* as to the drafting of a request, the request must identify each document or specific category of documents sought with precision (avoid sweeping requests like “all documents relating to” or “all minutes of the board”)
* the relevance of the document or category of documents sought must be explained in relation to the facts for which the requesting party bears the burden of proof; request must establish relevance in such a way that the other party and the arbitral tribunal are able to refer to factual allegations in the submissions filed by the parties to date (provided such factual allegations are made or at least summarized in the request for production of documents); requesting party must make it clear with reasonable particularity what facts/allegations each document (or category of documents) is intended to establish
* arbitral tribunal will only order the production of documents or category of documents if the requesting party shows that it is more likely than not that the documents exist and are within the possession, power custody or control of the other party; if request is contested, requesting party must establish that the documents sought are not and cannot be within its own possession, power custody or control and that it has made specific efforts to obtain the documents through other sources
* if the requested party puts forward an objection of principle (such as based on privilege or on business confidentiality), the requesting party will have to refute any such objection
* upon proper application from the requested party, the arbitral tribunal must balance the request against the legitimate interests of the requested party, including any applicable privilege, unreasonable burden and the need to safeguard confidentiality
* Article 9.2 IBA Rules lists the following:
1. lack of sufficient relevance or materiality
2. legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable
3. unreasonable burden to produce the requested evidence
4. loss or destruction of the document that has been reasonably shown to have occurred
5. grounds of commercial or technical confidentiality that the arbitral tribunal determines to be compelling
6. grounds of special political or institutional sensitivity (including those classified as secret by a government or a public international institution) that the arbitral tribunal determines to be compelling
7. considerations of fairness or equality of the parties that the arbitral tribunal determines to be compelling
* Article 9.3 IBA specifies that in considering the issues of legal impediment or privilege under Article 9.2, and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the arbitral tribunal may take into account:
1. any need to protect the confidentiality of a document created in connection with and for the purpose of providing or obtaining legal advice,
2. any need to protect the confidentiality of a document created in connection with and for the purpose of settlement negotiations,
3. the expectations of the parties and their legal advisors at the time the legal impediment or privilege is said to have arisen,
4. any possible waiver of any applicable legal impediment or privilege, and
5. the need to maintain fairness and equality as between the parties particularly if they are subject to different legal or ethical rules.
* Article 3.13 IBA Rules provides that any document submitted or produced by a party or non-party in the arbitration and not otherwise in the public domain shall be kept confidential by the arbitral tribunal and the other parties, and shall be used only in connection with the arbitration.
* Timing of document production requests
* Article 27(3) UNCITRAL Rules: the order to produce documents may be made at any time during the arbitral proceedings
* Article 3(10) IBA Rules; the arbitral tribunal may request a party to produce to the arbitral tribunal and to the other parties any documents that it believes to be relevant and material to the outcome of the case at any time before the arbitration is concluded
* This general principle does not in theory preclude the parties from submitting their requests at the very first stage of the proceedings, i.e., before the first exchange of briefs on the merits (in practice, requests are usually scheduled after the exchange of statement of claim and statement of defense)
* **As a matter of principle**: a request for document production should be submitted no earlier than and no later than after the first exchange of the parties’ submission on the merits
* this principle corresponds to the “best practice” in international arbitration
* in order for a party to ascertain whether certain documents are necessary to successfully argue its case or meet the burden of proof lying upon it, it is first necessary to present its own case and known the position of the other party
* for the arbitral tribunal to rule on a document production request, the arbitrators must be in a position to assess, at least prima facie, the relevance of the documents sought to and to form a preliminary view on the case
* but under certain circumstances where there is only one round of exchange of submissions, a request will be necessarily submitted before the exchange of submissions
* experienced arbitrators usually fix the timing of document production procedure during the initial procedural hearing with the parties, after hearing the views of the parties’ counsel and taking into account any specific requests and circumstances of the case
* parties may seek leave from the arbitral tribunal to make additional requests at a later stage should such need arises
* Article 3.14 IBA Rules provides that if the arbitration is organized into separate issues or phases (such as jurisdiction, preliminary determination, liability or damages), the arbitral tribunal may, after consultation with the parties, schedule the submission of documents and requests to produce document separately for each issue or phase
* In deciding on the requests for document production, the arbitrators rule on the prima facie relevance of the requested documents, having regard to the factual allegations made by the parties in the submissions filed to date.
* At the stage of the proceedings where a decision on the document production requests is made, the arbitral tribunal may not be in a position to make any final ruling on the relevance of the requested documents to the determination of the parties’ claims and defenses in the arbitration.
* Sanctions for non-compliance with the document production
* The arbitrator’s power to sanction a party’s non-compliance with a document production order is more limited as compared to the power of a State judge in similar circumstances; most efficient power in this respect consists of:
1. judicial sanctions –English and US courts may issue powerful judicial sanctions; note that arbitral tribunals do not have such sanctions at their disposal; thus, resort may be had to the courts for instance enforcement by the assigning judge or the power to order the defaulting party to pay a penalty
2. presumptions in matters of evidence and the reversal of the burden of proof – In order to avoid the risk of the parties being unfairly deprived of the ability to prosecute or defend against claims, international and institutional arbitral rules and some national arbitration laws authorized arbitrators, implicitly or explicitly, to draw adverse inferences from the parties’ non-production of discoverable evidence 🡪 this can impel recalcitrant parties to produce unfavorable evidence, thereby allowing their adversaries to make out their claims or defenses, and thus, contribute to ensuring the efficacy and fairness of international arbitration
* arbitral tribunal may excuse the requesting party when its evidence for a certain allegation would otherwise appear insufficient, and even infer that the withheld documents would have supported the requesting party’s allegation; requesting party may be discharged from its burden of proof
1. allocation in the costs of arbitration – Article 9.7 IBA Rules provides that if the arbitral tribunal determines that a party has failed to conduct itself in good faith in the taking of evidence, the arbitral tribunal may, in addition to any other measures available under the Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.
* **ASA President’s Message, 1/2011, The problem with predictability**
* Flexibility and responsiveness to the needs of a specific case are among the principal advantages of arbitration. But there seems to be a strong trend in arbitration practice steadily eroding these principles in the name of predictability.
* Depending on their cultural background, arbitrators may assist parties in their analysis of the dispute and, by an interactive conduct of the case, increase to some extent the predictability of its outcome.
* With respect to the substance of the dispute and predictability of its outcome, balance must be struck between (i) assisting the parties in the analysis of their case and (ii) avoiding prejudgment.
* In the matters of procedure, balance must be struck between (i) the needs of the parties to know the parameters in which to present their case to ensure equality of treatment in an adversarial procedure and (ii) the flexibility in responding to the needs of each case as it evolves during the course of the procedure.
* The threat comes from:
1. risk of arbitrators’ discretion (by their own practice, they negate the powers which law and arbitration rules place on them) and
2. flood of guidelines (increasing rigidity and standardization introduced in arbitral proceedings through initial procedural rules and timetables for the entire proceedings)
* While it is desirable and indeed necessary for an efficient conduct of the proceedings that the parties and the arbitral tribunal at a very early stage examine how the proceedings should be organize and make a programme, such programme has turned into a source of constraints which reduce the efficiency in the organization of the proceedings.
* Situation is made worse by two developments:
1. few arbitral tribunals are available for meetings with the parties during the time between the initial procedural meeting (case management conference call) and the main evidentiary hearing; and
2. tendency by many arbitration tribunals to regulate, at the time when the procedural timetable is settled, many aspects of the procedure.
* The problem with draft procedural order is that normally they are “boilerplate,” collected from previous arbitrations. Consequently, they not only regulate the concrete issues of the specific case but also seek to regulate possible future problems and, in doing so, provoke many of them (example: regulation of document production where a special phase in the arbitration would last for weeks during which nothing happens except exchanges about document production)
* Another problem seen is that early procedural regulations and the predictability which they are intended to promote, create dilemma for counsel who, faced with detailed rules about hypothetical situations, may accept them without much discussion hoping that the situations which they seek to regulate will not arise, and if they do, the rule will not cause too much mischief’ or counsel scrutinizes the proposed rules, engage in argument with opposing counsel and tribunal with the aim of bringing the boilerplate into a shape that is fair and equitable and suits the specific circumstances of the case.
* The law and most arbitration rules grant to the arbitrators a high degree of flexibility in the organization of the procedure; this is a privilege and a responsibility which arbitrators must use in a responsive manner rather than abandoning it to rigid planning and excessive concerns for predictability.
* **ASA President’s Message, 2/2012, Managing uncertainty**
* The current paradigm shift in dispute resolution is emphasizing on planning and on reducing or even eliminating uncertainty. Planners of international arbitration seem to have replaced flexibility by predictability.
* The uncertainty about the outcome of the dispute cannot avoided, but it can be reduced through the interactive conduct of the proceedings where the parties do not only confront each other but are given an insight into the evolving understanding and views of the arbitrators and are allowed to participate in the process (discussions between the arbitral tribunal and the parties in varying degrees)
* Reducing uncertainty by planning the procedure should be only one of the consideration taken into account when addressing the organization of an arbitration. The parties and arbitrators should preserve the possibility of responding in a fair and efficient manner to procedural incidents as they arise; and accept that an interactive conduct of the proceedings increases procedural uncertainty, precisely because the procedure must remain open to respond to new developments.
* “Nordic approach” 🡪 echoes what is or used to be characteristic of Swiss arbitration practice which leaves the organization of the procedure to the parties and calls on the intervention of the arbitral tribunal only where necessary; procedural uncertainty is not eliminated by anticipating regulation but is managed in view of the issues as and when they arise; parties are assured of the fundamental principles of equal treatment of the parties and adversarial proceedings.
* Discussing procedural difference as and when they arise and resolving them by reference to principles of fairness and “due process”, generally leads to more satisfactory solutions and a high degree of acceptance than addressing them in the narrow framework of predetermined regulations.
* **Fabian von Schlabrendorff and Audley Sheppard, "Conflict of Legal Privileges in International Arbitration: an Attempt to find a Holistic Solution", Global Reflections on International Law, Commerce and Dispute Resolution: Liber amicorum in Honour of Robert Briner, ICC, 2005**
* accepted arbitral practice or rule concerning evidentiary privileges, particularly the extent of any privilege of attorney-client communications, has yet to develop
* “**conflict of privileges**” 🡪 a scenario where the rules that apply in opposing parties’ respective legal systems relating to claims to legal privilege are not the same
* Most rules of arbitration procedure recognize that arbitral tribunals may determine procedural issues, but they do not indicate whether or not a tribunal must respect evidentiary privileges.
* A further consideration of practical importance for international arbitrators when confronted with a claim of legal privilege is the effect their determination might have on the enforceability of their award.
* NY Convention establishes liberal standards of enforcement.
* “choice-of-law” approach 🡪 approach taken by the US courts in diversity cases; arbitrators are given wide discretion in the method for selecting applicable law; they may do so either by reference to national rules, or to general principles of private international law, or by the so-called voie directe, without any reference to specific conflict rules.
* In the absence of any other determinative factors such as agreement between the parties, the concept of “closest connection” is the most appropriate method to be used to determine which rules of legal privilege should apply in a particular case

🡪 this test is now the standard rule in Europe for determining applicable law in the absence of an express or implied agreement of the parties, and it corresponds to the “most significant relationship” test favored in the U.S.

* In cases where there is a conflict of privileges and the rules differ as significantly as they do between the common law and civil law systems, arbitral tribunal should not simply rely on a choice-of-law analysis and apply different rules of privilege to different parties because the applicable rules vary taking into account the law and practice in various legal systems and the approaches adopted by different institutions.
* English courts: view privilege as a fundamental and absolute right, applying to external and in-house lawyers
* European Court of Justice: makes a distinction between advice from external lawyers based within the EU and advice from in-house lawyers and non-European lawyers; the legal privilege is extended only to in-house counsel or with EU lawyers
* US:
* issues of attorney-client privilege are substantive and thus controlled by the forum State’s law, while issues regarding the work product doctrine are procedural and thus controlled by the federal law
* attorney-client communication is privileged, and it applies to communications between an attorney and his client made for the purpose of obtaining legal advice
* Restatement denies a claim to privilege if it’s not privileged under the local law of the state which has the most significant relationship with the communication (even if privileged under the local law of the forum, unless admission is contrary to public policy), or privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum (unless there is some special reason why the forum policy favoring admission should not be given effect); in effect it allows admission if either the forum or the State that has the most significant relationship allows it;
* Hague Convention and EC Regulation 1206/2001: allow a recipient to a Letter of Request to refuse to give evidence if he can claim privilege under either the law where the request is made (if privilege specified in the request or has been otherwise confirmed by the requesting authority) or the law where the request is received.
* In arriving at an arbitration, consider that:
1. the expectations of the parties must be given adequate weight.
* A common lawyer party expects that its communications with both its external and in-house lawyers will be privileged.
* A civil law party expects that its communication with its external lawyer will be kept confidential and, while not characterizing its communications with its in-house lawyers in the same way it probably does not expect that such communications will be subject to non-voluntary disclosure
* The modern practice in international arbitration, at least where one common law party is involved, is to allow requests for production by each side and some non-voluntary disclosure.
1. considerable weight must be given to the “equality of the parties” principle, which is part of procedural public policy
* to have common law style non-voluntary disclosure and allow a common law party to claim common law privileges, but to restrict a civil law party to civil law confidentiality rights, would violate the principle of equality of arms
* under Article 9.2(g) IBA Rules on the Taking of Evidence, arbitral tribunal may deny disclosure for compelling considerations of fairness and equality
* “**most favorable privilege**”:
* provides highest degree of privilege protection, especially if a common law party is involved
* for greater predictability, after determining which privileges may be applicable based on the closest connection test, international arbitrators adopt an approach that allows any party to the arbitration to claim the same legal privileges as are available to any other party. This means that when a common law party is involved, a civil law party can claim common law privileges, thus, resulting in the application of the “most favorable privilege”.
* Such an approach: (i) is likely to meet, or at least not defeat, the expectations of any of the parties that communications with their lawyers will remain confidential. (ii) means that the principle of equal treatment of the parties will be observed; and (iii) will as far as possible avoid the risk of the award encountering difficulties at the enforcement stage due to privilege issues being viewed differently in other jurisdictions
* where it is difficult to determine which rules represent the most favorable privilege to be applied to both parties, arbitrator must consider the scope of the privilege, related standards of professional ethics, conditions of (partial or complete) waiver, possible inferences to be drawn from the exercise of the privilege right, and other elements need to be considered
* the interrelationship between such rules and applicable standards of fact finding, in particular standards of required document production, needs to be examined
* arbitrator must create a coherent amalgam of the rules applicable in each instance so as to provide a functionally workable system of best protection that correlates with the other evidentiary rules adopted
* note that arbitral tribunals do not generally have the power to force a party to disclose evidence; they may only draw adverse inferences if evidence ordered to be disclosed is not disclosed; where a claim of legal privilege over a document is accepted, the tribunal should not draw any adverse inference from non-disclosure of that document
* in both the common law and civil law systems, the courts do not generally see attorney-client communications and attorney work product, and do not make adverse inferences as to its contents; it does not frustrate the search for the truth but merely an acknowledgment that the parties should be treated equally and that the confidentiality attaching to lawyers’ communications and documents should generally be respected
* **Redfern and Hunter on International Arbitration (Fifth Edition), §2.145-2.176**
* Confidentiality of arbitral proceedings is one of the traditionally viewed important advantages of arbitration; one of the advantages of arbitration is that it is a private proceeding, in which the parties may air their differences and grievances and discuss their financial circumstances their proprietary “know-how” and so forth, without exposure to the gaze of the public and the reporting of the media. The fact that arbitral hearings are held in private still remains a constant feature of arbitration.
* An international commercial arbitration is not a public proceeding, but essentially a private process and therefore has the potential for being a confidential process
* It is ideal however for parties to include confidentiality provisions in their agreement to arbitrate, or in a separate confidentiality agreement concluded at the outset of the arbitration.
* **Arbitration hearings are private**.
* Article 21(3) ICC Rules: The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.
* Rules of the ICDR ICSID, LCIA, CEITAC, and WIPO contain similar provisions
* Article 25.4 UNCITRAL Rules: Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.
* If the hearing is to be held in private it would seem to follow that the documents disclosed and the evidence given at that hearing should also be and should remain private.
* **Confidentiality of arbitral proceedings**
* classical view: a general principle of confidentiality in arbitrations under English law (classical view) was enuncidated in Hassneh Insurance Co of Israel v. Mew where the court recognized the existence of an implied duty of confidentiality as the natural extension of the undoubted privacy of the hearing in an international commercial arbitration; that the requirement of privacy in arbitration proceedings must in principle extend to documents which are created for the purpose of that hearing (applied to note or transcript of the evidence)
* in Ali Shipping Corporation v. Shipyard Trogir, the English CA held that the confidentiality rule was founded on the privacy of arbitral proceedings and that an implied term as to the confidentiality of arbitration was a term which arises as the nature of the contract itself implicitly requires which the law would imply as a necessary incident of a definable category of category relationship
* the duty of confidentiality is subject to limitations that remain to be determined on a case-by-case basis
* current trend: beyond England, the current trend in international arbitration is to diminish, or at least question, the confidentiality of arbitral proceedings as a whole (especially where there is a genuine public interest in the sense that the decision of the arbitral tribunal would in some way affect the general public)
* Esso Australia Resources Ltd. v. The Honourable Sidney James Plowman – Australian court concluded that whilst the privacy of the hearing should be respected, confidentiality was not an essential attribute of a private arbitration and that it is not absolute as in the particular case where the public’s legitimate interest in obtaining information about the affairs of public authorities should prevail; court found that a requirement to conduct proceedings in camera did not translate into an obligation prohibiting disclosure of documents and information provided in, and for the purpose of, the arbitration; governmental secrets vs. personal and commercial secrets
* in another Australian case – court held that an arbitrator had no power to make a procedural direction imposing an obligation of confidentiality which would have had the effect of preventing the Government from disclosing to the State agency, or to the public, information and documents generated in the course of the arbitration which ought to be made known to that authority or to the public
* in the US: neither the FAA nor the Uniform Arbitration Act contains a provision requiring the parties or the arbitrators to keep secret arbitration proceedings in which they are involved; consequently, unless the parties’ agreement or applicable arbitration rules provide otherwise, the parties are not required by US law to treat as confidential the arbitration proceedings and what transpires in them
* Confidentiality of Award
* UNCITRAL Rules and some other institutional rules of arbitration, including ICSID, provide that the award may only be made public with the consent of the parties
* There are circumstances in which an award may need to be made public:
* Hassnew Insurance v Mew – judge concluded that an award and the reasons contained in that award were different in character from the other elements of the arbitration proceedings (e.g., notes and transcripts of evidence, witness statements, submissions, and pleadings all of which were covered by the principle of privacy stemming from the fact that arbitration hearings were held in private); the award was potentially a public document for the purposes of supervision by the courts or enforcement in them; thus, award could be disclosed without the consent of the other party or the permission of the court if, but only if, the party seeking disclosure needed to do so in order to assert or protect its legal rights vis-à-vis a third party
* where required by law
* when an arbitral institution (such as ICC) publishes “edited and redacted” copies of arbitral awards, as a guide for the benefit of lawyers and arbitrators
* ICDR Arbitration Rules provide that an award may be made public only with the consent of all the parties or as required by law; provide that, unless otherwise agreed by the parties, selected awards may be made publicly available with the names of the parties and other identifying features removed (except if the award has become publicly available through enforcement proceedings or otherwise, then names need not be removed)
* in Sweden, where it appears that there is no implied duty of confidentiality in relation to either the arbitral proceedings or the award, although it is accepted that arbitration is fundamentally a private process
* Aegis v. European Re (England): where an arbitration award in one arbitration under a reinsurance agreement is being relied upon by the winning party in another arbitration under the same agreement despite an express confidentiality agreement in respect of the first arbitration, the court allowed the disclosure of the award and held that the legitimate use of an earlier award in a later, also private, arbitration between the same parties was not the kind of mischief against which the confidentiality agreement was directed; the private and in theory, confidential nature of arbitration should not mean that the parties can go on arbitrating the same point ad infinitum until they get the result they prefer
* But in Aitah v. Oijeh (Paris Cour d’Appel): the court ruled that the mere bringing of court proceedings to challenge an arbitration award violated the principle of confidentiality in that it caused “a public debate of facts which should remain confidential”; with a dicta that it is in the very nature of arbitral proceeding that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed
* in a recent case Nafimco (Paris Cour d’Appel), the court invited a party seeking relief for a breach of confidentiality to show the existence and foundation of such a duty in French international arbitration law
* Express Duty of Confidentiality under certain Rules of Arbitration
* Article 30 LCIA Rules:
* Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain—save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority
* The deliberations of the arbitral tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator’s refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26.
* The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.
* To ensure the confidentiality of the entire proceedings, it is increasingly necessary to rely on an express provision of the relevant rules or to enter into a specific confidentiality agreement entered into as part of the agreement to arbitrate, or at the outset of proceedings.
* **Kaj Hober and Howard Sussman, "Chapter 5: Fundamentals of Cross Examination in International Arbitration", Cross-Examination in International Arbitration, OUP, 2014**
* **Purpose of cross-examination**:
* to reduce the adverse impact of the witness’ direct testimony on your client’s case to the extent reasonably possible without undue risk of further damages to that case;
* to destroy entirely the credibility of the other party’s witness;
* aimed at persuading the arbitrators
* Cross-examination takes place in the course of the main hearing and before the closing arguments which are made by counsel at the final phase of the main hearing, or in writing after it has been concluded, or both.
* **Cross-examination**: a particular way of asking questions of a witness who has testified.
* Deciding whether to cross examine: No cross-examination should be undertaken unless the damage done by the direct testimony was serious and the likelihood of being able to make things better is significantly greater than the risk of making things worse.
* Risks of Cross-examination
* Consider whether you are likely to be able to keep control of the witness so as to keep the witness from saying things you do not want to hear and do not want the arbitrators to hear. Remember that no matter what you do, the witness may try to take control of the examination away from you and say something you do not want to hear and do not want the arbitrators to hear. Failure to make progress against a witness despite an obvious effort to do so will often tend to reinforce the witness’ direct testimony.
* Planning the Cross-examination
* Begin with knowing thoroughly all the facts and all the law that bear on the dispute. It means having developed a full understanding of what your client’s case requires, and of what you will do to try to accomplish it.
* Being prepared means:
* preparing your closing argument as early as possible in the preparation of your client’s case
* anticipating what adversary counsel is likely to do; the written materials in an international arbitration will provide a good start in understanding the adversary’s case
* serious effort to find out everything you can about the dispute, about the witness the adverse party will call, about what material you will need for cross-examining them, and about what adversary counsel is likely to do
* When written witness statements are provided you will know, in advance of the main hearing, both the identity of the witness and the precise content of their direct testimony. Even when it will be given orally, you will know who the witnesses will be, and roughly what their testimony will cover.
* In addition to the factual study, you will need to develop all the law that bears on the dispute.
* Form of Questions:
* you will almost always want to use “leading questions” – short, simple, unambiguous statements of facts that confine the witness rather than allowing the witness to roam
* these leading questions should usually relate only to what the witness being cross-examined actually knows of the witness’ own knowledge, including things that have been told to the witness or that the witness has overheard
* leading questions do not seek new information, but are statements of fact that you have carefully chosen based upon what you know about the dispute
* It is always better when the arbitrators figure things out for themselves and feel that they have done so than when you have to lecture them in closing argument.
* Sequence is also critical that you need to bear in mind the tempo at which you put them.
* It is unwise to use in the cross-examination itself questions that have been written out in advance, even if writing out questions may prove very useful as part of your preparation for the cross-examination.
* What the Lawyer need to know?
* What the lawyer actually knows depends on two things: reliability of the information that has been conveyed to him and whether he has correctly understood the information.
* Avoid Questions about Conclusions
* Cross-examination is not the place for argument. Try not to argue the case during cross-examination, but instead save arguments for the closing argument where it properly belongs.
* You should not ask the witness to agree with inferences or conclusions that you intend to argue are to be drawn from the facts the witness has admitted or refused to admit; limit your questions to matters of fact and avoid questions about what the facts may be argued to mean.
* You should ask “one questions too many” which means that you should not ask a question that enables the witness to undermine what you have just accomplished by the questions that precede it.
* Significance of Non-verbal
* other things taken together with the words play a more important role than the words themselves in what is conveyed, and in what is understood, and in the response which is elicited. The non-verbal parts of what is conveyed, understood, and elicited in that interaction derive from the feelings and emotions of the people involved.
* The feelings and emotions are, for the most part, exhibited through the ways in which words are spoken and in the body language of the speaker.
* To be successful, you must be aware of, and find ways to deal effectively with, all of the non-verbal factors, in addition to dealing with the words themselves; use the witness’ emotion and psychological state, as well as your own affect in dealing with the witness, to reduce the witness’ capacity to dissemble; consider also the witness’ and your own anxiety.
* Sensing the Environment: In order to decide when and how to use a question that can raise a witness’ anxiety level, you will need to have a sense of witness’ state of mind 🡪 pay close attention to what the witness says, how the witness says it, and what the witness’ body language suggests
* Getting your Questions Answered: If a witness evades the questions or refuses to do so, one way is to repeat the question; the other one is to ask a series of questions after the question that was evaded so as to elicit the answer that was sought by the evaded question.
* Self-Control: Throughout a cross-examination you must be able to exercise control over your feelings and emotions so as not to argue with the witness or become angry. Real anger tends to distort judgment.
* Make No More Than Three Points.
* Aim for the arbitrators to remember, as to each witness, at most three main points you made in the cross-examination of the witness. But this does mean that you should ask only three questions. Instead, use many, probably very many, short, simple, unambiguous statements of fact, each generally limited to a single, simple fact, to provide the basis from which the main point or points can be seen or inferred.
* Structure the cross-examination as a narrative, if this can be done without letting the witness undermine its effectiveness.
* Adapt to the Environment
* Take into consideration the atmosphere or environment in which the cross-examination is being conducted 🡪 personalities and cultural assumptions of everyone involved—arbitrators, counsel, parties, witnesses
* Be continually aware of, and take continually into account in your conduct, the differences between the environment of that arbitration and the environment of the other dispute resolution environments with which you may be more familiar.
* **28 Y.S.C. Sec. 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration (NY City Bar Report)**
* Section 1782 of Title 28, US Code is the mechanism by which the US provides assistance to foreign or international tribunals in obtaining evidence. It states, “The district court of the district in which a person resides or is found my order him to give his testimony or statement or to produce a document or other things for use in a proceeding in a foreign or international tribunal.”
* **NYCBA Committee believes that this language should be construed to include both arbitral tribunals located abroad, as well as international arbitral tribunals, irrespective of location.**
* plain meaning of the text “for use in a proceeding in a foreign or international tribunal” is interpreted to permit discovery in aid of private international arbitration
* Intel v. Advanced Micro Devices, Inc. (2004) provides guidance and the court interpreted the term “a proceeding in a foreign or international tribunal” to extend to a quasi-judicial agency that serves as a “first-instance decision maker.” An arbitral tribunal clearly acts as a “first-instance decision maker” with judicial powers. SC has also proclaimed in various cases that “arbitration is now the functional equivalent of the courts”.
* legislative history—the current version extends to assistance to a “proceeding in a foreign or international tribunal” which in effect broadened assistance to include gathering evidence for use in “proceedings before a foreign administration tribunal or quasi-judicial agency”; Congress also explicitly left to district court discretion the determination of whether a given “international tribunal” qualifies for assistance under 1782
* recognized status of international arbitration under U.S. law – the FAA is the wellspring of this statutory authority; award of a foreign private commercial arbitration tribunal is legally binding both as a matter of domestic arbitral law of the seat of arbitration and as international conventions (New York, Panama and other Conventions)
* **Recommended Best Practices for Applying Section 1782 to Private Commercial Arbitration**
* Arbitration tribunals are “tribunals” within the meaning of Section 1782. Congress explicitly left to district court discretion the determination of whether a given “international tribunal” qualifies for assistance. In a well-established jurisprudence, it was held that the permissive language of Sec. 1782 vests district courts with discretion to grant, limit or deny discovery.
* US Courts must observe comity by seeking to grant discover only to the extent consistent with the wishes of the arbitral tribunal (once appointed)
* Section 1782 discovery be granted only if the request is made by the arbitrators or with the consent of the arbitrators, and that district courts consider the source of the request as a very important factor in exercising its discretion
* the decision should be left to the arbitrators so as to minimize the intrusion of courts into the sphere of arbitration; it allows the tribunal and the litigants to tailor the scope of discovery to the particular needs of the individual case
* the jurisprudence developed with respect to the NY Convention should not be extended to Sec. 1782 and that discovery in aid of a foreign arbitration should be available only if the seat of the arbitration is outside the US
* any Section 1782 application in aid of a foreign arbitration should be made by or with the approval of the arbitrators, thus, it would be impossible to obtain Section 1782 assistance prior to the time the tribunal is constituted
* Section 1782 applications from non-parties should be disfavored
* Thus, based on the plain meaning of the statute, the SC’s decision in Intel, the legislative history and policy considerations, Sec. 1782 discovery should be available in private, international arbitration seated outside the United States. DCs should respond to such Sec. 1782 applications using the suggested best practices which will effectively address certain of the more compelling arguments that have been made against using Sec. 1782 in the arbitration realm.

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| **CLASS 7 – PROCEDURAL STEPS UNTIL AWARD** |

* **UNCITRAL Model Law, Articles 18-27 (See Separate Rules)**
* **Federal Arbitration Act, Section 7 (See Separate Rules)**
* **English Arbitration Act, Sections 33-45 (See Separate Rules)**
* **ICC Rules, Articles 16-28 (See Separate Rules)**
* **LCIA Rules, Articles 14-22 (See Separate Rules)**
* **UNCITRAL Rules, Articles 17-31 (See Separate Rules)**
* **CIETAC Rules, Articles 11-21; 41-43 (See Separate Rules)**
* **Doug Jones, “Chapter 11: Improving Arbitral Procedure: Perspectives from the Coalface” in Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider), (Kluwer Law International 2015) pp. 91-102**
* International arbitration is now faced with the challenge of striking a proper balance between the arbitral process and the needs of its users. Resolving these challenges requires arbitral tribunals to embrace case management in a proactive manner. It is necessary for users of arbitration to devise a more streamlined and disciplined approach, but at the same time maintaining a process which his tailor-made to the needs of the users.
* It is the parties, the tribunal, and the arbitrators who are best placed to renew international arbitration as an efficient and cost effective avenue for the resolution of international commercial disputes. 🡪 proactive case management techniques and reforms to the way in which party-appointed experts and witness statements are used in arbitral proceedings.
* Arbitration preserves the autonomy of the parties, allowing them to tailor the arbitration process to meet their specific needs. Parties to international arbitration are not constrained by rigid procedural rules one encounters in litigation, and thus, arbitration process can remain flexible and adaptable to the legal cultures of the parties and the arbitrators.
* Tribunals bear a duty to ensure that the arbitral process is conducted as expeditiously and efficiently as possible, to carry out their duties impartially, and to guarantee the equal treatment of parties.
* While parties contribute most to the length of proceedings, it is the arbitrators and arbitral institutions who are best placed to reduce delay.
* Recommendations: use of a case-management conference at the early stages of the proceedings to allow the arbitral tribunal and the parties to identify the relevant issues and the procedural steps necessary to resolve them; the importance of avoiding repetition when presenting submissions and arguments; and the need to focus and minimize the use of witness statements.
* Recommended approaches:
1. Efficient use of party-appointed witnesses, who must recognize that their duty is to the tribunal, not the party by whom they were appointed. The expert has an overriding duty to assist the court impartially and independently, and not to advocate the case of the party by whom he or she is retained.
* Article 5(2)(c) of the IBA Rules on the Taking of Evidence require the party-appointed experts report to contain a statement of independence from the parties, from their legal advisors and from the arbitral tribunal.
* Article 5(2)(b) requires the expert to provide a description of the instructions that they have received from the parties
* Article 5(2)(g), which requires an affirmation of the expert’s genuine belief in the opinions expressed in the report, obliges the expert to specifically consider the legitimacy of the evidence tendered.
* CIArb Protocol for Party Appointed Experts requires the experts to meet before they tender their reports, to conduct tests and analyses, and to provide a statement declaring their independence.
* Consider hot-tubbing, or witness conferencing, and exchange of draft reports. “Hot-tubbing” (or witness conferencing, or witness hot-tubbing) is a common method of disposing of traditional witness examination and cross-examination procedures; refers to the process of taking evidence from witnesses in the presence of other witnesses (from both sides of the dispute) and allowing them to engage with each other to test the accuracy of their opinions; frequently used in relation to expert witnesses and “conferencing” to refer to both lay and expert witnesses (but this is not universal); especially effective in highly technical situations where there are complex factual issues involving number of expert witnesses. 🡪 IBA Rules provides that “the Arbitral Tribunal may vary this [traditional} order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different parties be questioned at the same time and in confrontation with each other.”
* Best practice directions for the appointment and use of expert witnesses should have regard to the early identification of the areas that will require expert evidence, and should also require the appointment of experts to be approved by the tribunal. The tribunal should then settle joint briefs to the experts within each discipline area🡪 directors for reports to be produced, either one with both areas agreements and disagreements, or one focusing only on areas disagreement.
1. Use of witness statements, as opposed to oral evidence, to facilitate efficiency in proceedings as it would reduce the length of hearings and give parties notice prior to the evidentiary hearing, and allows the parties to understand the pertinent issues at a relatively early stage in the arbitration proceedings and assist counsel in preparing for the hearing on the merits.
* IBA Rules require witnesses to disclose any present and past relationships they have with any of the parties to the dispute.
* IBA Guidelines on Party Representation address the issue of counsel conduct by recognizing that the role of counsel in drafting written testimony should be limited.
1. Use of limited time procedures such as “stop clock” or “chess clock” hearing procedures, which are techniques that impose a time limit on proceedings. In these instances, the arbitral tribunal will establish in advance of the hearing the precise number of hours and minutes that will be allocated to the arbitration hearings; total number of hours and minutes is then allocated between the parties equally, with some additional time allocated to the arbitrators themselves; when a party runs out of time, extension may be given only in exceptional circumstances. This technique, however, works best when the parties have a roughly equal number of witnesses, are both represented by similarly sophisticated counsel who are well-prepared for the hearings, and can intelligently make the difficult trade-offs required by stop-clock rules.; not appropriate when the case is “unbalanced”, either in the strength of evidence or counsel.
* Note that time limited procedures have the risk of inhibiting fair and proper administration of the case, resulting in a rigid and false “equality” between the parties. Thus, parties need to take measures to ensure a fair procedure in both form and substance when adopting time limited procedures.

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| **CLASS 8 – CHALLENGES, INTERVENTIONS AND CONSOLIDATION** |

**CHALLENGES OF ARBITRATORS**

* **Redfern and Hunter on International Arbitration (Fifth Edition), Chapter 4. The Establishment and Organization of an Arbitral Tribunal (from 4.91 to 4.155)**
* **Cases**
* **S.A. Auto Guadeloupe Investissements (AGI) c/ Columbus Acquisitions Inc, Cour d’appel de Paris, Pôle 1 – Chambre 1, n° 13/13459 (14 October 2014)**

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| **Facts:*** AGI and CFH were the owners of GCF, a French company established for the construction and operation of an undersea cable network in the Carribean. CFH was a wholly-owned subsidiary of LNC. Columbus Acquisitions Inc. and Columbus Holdings were the prospective buyer of CFH.
* In 2008, the parties executed a memorandum of terms fixing a deadline of 31 December 2009, later extended to 31 March 2009. The extension provided for arbitration under the ICDR rules before a sole arbitrator.
* Subsequently, AGI did not consider the memorandum to be binding and announced that it will no longer pursue the sale. Columbus initiated arbitration proceedings seeking specific performance and indemnity.
* In September 2009, A sole arbitrator was appointed and the arbitrator made the following disclosure: “I wish to disclose that a partner in my firm’s Toronto office has represented LNC in Canada in respect of Canadian based matters over a number of years. I understand that at present there are no matters in respect of which my firm is currently providing advice to LNC.”
* On 15 December 2010, the arbitrator’s firm published a report stating that LNC had, on that day, finalized a transaction with the assistance of three partners in the firm’s corporate, securities and tax departments, with a similar report in the magazine Lexpert in January 2011.

**Procedural History:*** In an award issued in Barbados on 27 March 2011, the arbitrator ruled in favor of LNC.
* On 3 July 2013, the Paris Tribunal de grand instance issued an order granting exequatur (order for enforcement) of the award.
* AGI brought an appeal against the order arguing, among others, that the arbitrator’s failure to disclose links between the firm in which he was a partner and two of the parties to the proceedings constituted an irregularity in the constitution of the arbitral tribunal and a breach of international public order.
* Columbus counter-argued that the relations between the arbitrator’s firm and persons directly linked to Columbus were old, and did not represent an ongoing course of business, and that the relations between the arbitrator’s firm and LNC had been disclosed by the arbitrator and were, in any event, widely-known, having been published in the firm’s website.

**Issue:**Whether or not arbitrator’s failure to disclose a potential conflict of interest invalidates the proceedings.**Holding:**Yes. Court thus set aside the award on the grounds of irregularity in the constitution of the arbitral tribunal**Rule/Rule Explanation:*** Articles 1456 and 1506 of the French Code of Civil Procedure provide that an arbitrator is obliged to disclose any circumstance that might affect his independence or impartiality.
* The fact that the arbitrator had been nominated by AGI did not remove his obligation of disclosure vis-à-vis AGI. In assessing an arbitrator’s obligation of disclosure, the extent to which the relevant circumstances were known, and their impact on the arbitrator’s judgment, had to be taken into account.
* Court drew a distinction between public and very easily accessible information, which the parties should consult prior to the commencement of the arbitral proceedings (though they are not expected to trawl exhaustively through every source which might, potentially, be of relevance) and information arising after the initiation of proceedings. With respect to the latter, it would be unreasonable to expect the parties to continue their research after proceedings had begun.

At that stage, the arbitrator must declare potential conflicts of interest as they arise, irrespective of whether the information is also publicly available and easily accessible. * In the case, the facts giving rise to the alleged conflict of interest were not widely-known at the time of the tribunal’s constitution. The arbitrator’s declaration of independence given in September 2009 had stated clearly that his firm was not currently advising LNC, and it was only in December 2010 (while the arbitrator was drafting the award that the arbitrator’s firm made the announcement. Irrespective of the fees involved, the firm’s own publicity demonstrated that it regarded the transaction as important. This was sufficient to give rise to reasonable doubts in AGI’s mind as to the arbitrator’s independence and impartiality.
* This is a reminder of the burden on arbitrators to provide a full disclosure of any potential conflicts, and to update such disclosure should new conflicts arise during the course of an arbitration.
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* **Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007)**

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| **Facts:*** In 1992, AIMCOR and Ovalar entered into a joint venture in which AIMCOR purchased and transported petroleum coke (a chemical created during oil refinery) to Ovalar, which then distributed the coke in Turkey. The contract provide that any disputes would be settled by arbitration in New York.
* In 1997, a dispute arose over the distribution of profits under the joint venture, and the parties resorted to arbitration. The arbitration agreement provided that each party would select an arbitrator, and the two party-appointed arbitrators would then select a third, presiding arbitrator.
* Although the agreement did not specifically address whether the arbitrators were required to make additional disclosures after the commencement of the arbitration, section 4 thereof provided that “no person shall serve as an arbitrator who has or has had a financial or personal interest in the outcome of the arbitration or who has acquired from an interested source detailed prior knowledge of the matter in dispute.”
* The third arbitrator selected by the party-appointed arbitrators was Charles Fabrikant, Chairman, President and CEO of Seacor Holdings, a multi-billion dollar company with 50 offices in 30 countries.
* In September 2003, before the hearings started, the arbitrators were advised that AIMCOR was being sold to Oxbow Industries. But each arbitrator submitted a disclosure statement, and Fabrikant statement indicated that he had no personal or business relationship with any of the parties to the proceeding, or their affiliates, and would reserve the right to amend or add to the disclosure should future circumstances warrant it.
* Parties bifurcated the proceedings into liability and damages phase, with the former commencing soon thereafter. In April 2005, Fabrikant disclosed to the parties that his St. Louis office has recently been engaged with Ox-Bow, but declared that he has not been involved in the discussions thereto and that his ability to decide the case on the merits is not impaired. No further disclosures or reactions from the parties were made.
* The panel, in a 2-1 decision in which Fabrikant cast the deciding vote, found Ovalar liable to AIMCOR for breach of contract. Following its loss, Ovalar secured new counsel.
* Two months later, Ovalar’s counsel wrote Fabrikant asking him to withdraw on the ground of inadequately disclosed commercial relationship between SCF, a division of Fabrikant’s company, and Oxbow, the parent of AIMCOR, and that since the 2004—well before the liability award SCF had been transporting petroleum coke for Oxbow which generated revenues.
* Fabrikant responded by saying that he sees no reason to withdraw as when he was initially informed about the SCF-Oxbow transaction, he informed SCF’s president that he wish to know nothing about it, and a “Chinese wall” was erected.

**Procedural History:*** In February 2006, when AIMCOR moved to confirm the partial arbitration award, Ovalar moved to vacate the award on the ground that Fabrikant’s failure to recuse himself violated Sec. 9, FAA.
* The US District Court for the Southern District of NY vacated the award, and held that the events gave rise to a reasonable expectation on the part of the parties that they would be notified of any contractual relationship between Seacor and Oxbow; and by insulating himself from learning about any such relationship, and failing to tell the parties that he had done so, Fabrikant created an “appearance of partiality” when a nontrivial commercial relationship surfaced that pre-existed the April 2005 email.
* Citing the AA Code of Ethics for Arbitrators and the IBA Guidelines on Conflict of Interest in IA, DC held that “reason dictates that there must be a continuous obligation on the part of the arbitrator to avoid partiality or the appearance of partiality.”

**Issue:**Whether or not there was evident partiality on the part of the presiding arbitrator which consequently rendered him disqualified.**Holding:**Yes. DC judgment is affirmed. An arbitrator an arbitrator is disqualified under the “evident partiality” standard of the Federal Arbitration Act (FAA) only when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side. There was evident partiality of arbitrator, warranting vacation of ward under the FAA, when arbitrator knew of a potential conflict, but failed to either investigate or disclose an intention not to investigate.**Rule/Rule Explanation:*** Sec. 10(a)(2), FAA provides that the US court in and for the district wherein the award was made may make an order vacating upon the application of any party to the arbitration: (1) where the award was procured by corruption, fraud, or undue means; [or] (2) where there was evident partiality or corruption in the arbitrators, or either of them, …”
* The SC addressed the meaning of “evident partiality” in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S.Ct. 337, 221 L.Ed.2d 301 (1968), and concluded that it existed when one of the parties was a regular, though sporadic, customer of an arbitrator, who failed to disclose that fact.
* With respect to the “evident partiality” ground for disqualification of an arbitrator in the Federal Arbitration Act (FAA), the standard of “appearance of bias” is too low and the standard of “proof of actual bias” is too high; rather, “evident partiality” within the meaning of the FAA will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.
* Unlike a judge, who can be disqualified in any proceeding in which his impartiality might reasonably be questioned, an arbitrator is disqualified under the “evident partiality” standard of the Federal Arbitration Act only when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side.
* An arbitrator who knows of a material relationship with a party and fails to disclose it meets the “evident partiality” standard of the Federal Arbitration Act: a reasonable person would have to conclude that an arbitrator who failed to disclose under such circumstances was partial to one side.
* While the presence of actual knowledge of a conflict can be dispositive of the evident partiality test, the absence of actual knowledge is not. Indeed, in Morelite, we did not address the scope of an arbitrator’s duty to investigate or disclose potential conflicts of interest. If we are to take seriously Justice White’s statement that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial, arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists. It therefore follows that (under the “evident partiality” standard of the Federal Arbitration Act) where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must: (1) investigate the conflict, which may reveal information that must be disclosed under Commonwealth Coatings; or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.
* If an arbitrator fails to investigate facts indicating a conflict of interest that come to light after the award, and those facts are not trivial, the aggrieved party may use this information to demonstrate evident partiality, warranting vacation of the award under the Federal Arbitration Act.
* There was evident partiality of arbitrator, warranting vacation of arbitration award under the Federal Arbitration Act, where arbitrator learned of potential conflict of interest arising from contract discussions between arbitrator's company and parent of party to arbitration, but arbitrator decided to erect a “Chinese Wall” instead of investigating further, and did not inform the parties of the “Chinese Wall.”
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* **Sierra Fishing Company and others v Hasan Said Farran and others [2015] EWHC 140 (Comm)**

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| **Facts:*** SFC is a company incorporated in Sierra Leone involved in the supply of seafood. Joining as claimants are Said Mohamed, the brother of SFC’s managing director, and the estate of their late father.
* Third Defendant Zbeeb is a Lebanese lawyer and one of the founding partners of the law firm Zbeeb Law & Associates, and is the managing partner of the firm. First Defendant Dr. Farran has at all material times been chairman of Finance Bank SAL. Second Defendant Assad is an individual of Iraqi nationality.
* In early 2011, Said entered into a finance arrangement with Dr. Farran and Mr. Assad who advanced a deposit for the purchase of two fishing vessels to be operated by SFC.
* In May 2012, Dr. Farran and Assad executed a loan agreement with SFC and Said and the agreement contains an arbitration clause stating that in case any dispute arises, the parties will refer to arbitration in Sierra Leone or London as decided by Dr. Farran and Assad.
* No repayments were made and consequently, Dr. Farran and Assad served a request for arbitration on the claimants, notifying of an intention to commence arbitration in London and the appointment of Zbeeb as their arbitrator.
* In August 2012, the parties executed a further agreement converting the loan into equity in SFC. The execution agreement contains a London arbitration clause and provided that the agreement would be null and void if not executed. As a result, the arbitration procedures was frozen conditional upon the fulfillment of the recently signed agreements.
* The execution agreement was not performed by October 1. Advise of the revival of the arbitration proceedings resulted to a new conversion agreement, which was also not performed.
* Consequently, the lawyers gave formal notice of the recommencement of the arbitration procedure and stating that Zbeeb was now sole arbitrator following the failure of Said to appoint an arbitrator.
* In May 2013, Zbeeb wrote all the parties advising them that he had commenced the arbitraito procedures in accordance with the Arbitration Act 1996.
* In the course of the proceedings, several postponements, attempts for settlements, and freezing of the proceedings, were made. Finally, a session was held in London in June 2014. Zbeeb opened the session by explaining the background and that in two previously conducted sessions, all the parties were absent with excuse. At that meeting, Englefiled, lawyer for SFC, et al. registered an objection to Zbeeb’s acting as arbitrator on the grounds of his lack of independence, i.e., the existence of social and commercial relationships between Zbeeb and Dr. Farran and Assad; that Zbeeb is the relative of Dr. Farran’s attorney. Englefield asked Zbeeb to allow SFC to appoint their own arbitrator to sit alongside Zbeeb together with a chairman.
* Zbeeb in an email respondend that he considered he had been validly appointed as sole arbitrator pursuant to Sec. 17, Act, and that SFC had lost any right to object to his appointment as a result of Sec. 73.
* HFW was appointed as new solicitors for SFC and in July 2014, they wrote Zbeeb that there were justifiable doubts as to Zbeeb’s independence and impartiality for the purposes of an application to court under Sec. 24. It had been incumbent upon Zbeeb before accepting appointment on behalf of Dr. Farran and Assad, let alone becoming sole arbitrator, to notify SFC et al. of his close connection to his appointees.
* Zbeeb decided to proceed with the arbitral proceedings, and on 17 September 2014, emailed the parties that an arbitral session was to be held on 8 October 2014, at which he would hand down a final award on the merits.

**Procedural History:**SFC applied for the removal of Zbeeb as an arbitrator pursuant to Sec. 24(1)(a) of Arbitration Act 1996 on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality. Zbeeb contended that Sierra has lost the right to raise objection under Sec. 73 of the Act by taking part in the arbitration.**Issues:**First Issue: Are there circumstances which give rise to justifiable doubts as to Zbeeb’s impartiality?Second Issue: If so, did SFC et al. take part or continue to take part in the arbitration proceedings, without raising the objection forthwith, at a time when they knew or could with reasonable diligence have discovered the existence of such circumstances?**Holding:** First Issue: Yes. There were grounds to doubt Zbeeb’s impartiality in the conduct of the reference.Second Issue: No. SFC have not taken part in the proceedings at any relevant time without raising the objection, it is not necessary or appropriate to undertake an analysis of the state of their actual or constructive knowledge of the connections between Mr Ali Zbeeb and Dr Farran which afford the grounds for his removal.**Rule/Rule Explanation:*** Legal and business connection between Dr Farran and Mr Ali Zbeeb. The connection alleged is that (1) Mr Ali Zbeeb was engaged by Finance Bank as legal counsel in 2005/2006 at a time when Dr Farran was, as now, chairman of the bank; and (2) Mr Ali Zbeeb's father and co partner in Zbeeb Law & Associates, Mr Hussein Zbeeb, has acted and continues to act as retained legal counsel to both Dr Farran and to Finance Bank, and retains a close internal role at the bank, where he is a member of the top executive management.
* The fair minded observer would take the view that this gave rise to a real possibility that Mr Ali Zbeeb would be predisposed to favour Dr Farran in the dispute in order to foster and maintain the business relationship with himself, his firm and his father, to the financial benefit of all three. Such possibility is not significantly diminished if, as Mr Ali Zbeeb's evidence suggests, the financial benefit would accrue to his father rather than to the firm.
* IBA Guildelines— One of only four situations identified in the Non-Waivable Red List is where "the arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom" (paragraph 1.4). The Waivable Red list includes the situation where "the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties." (paragraph 2.3.1) and where "the arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties." The state of the evidence in this case would leave the fair-minded observer concluding that there was a real possibility that the relationship between Mr Ali Zbeeb and Dr Farran fell within these criteria, as well as the situation described in the Orange List where "the arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator." (paragraph 3.1.4).
* On the involvement of Zbeeb in advising and assisting Dr. Farran and Assad in the settlement negotiations which gave rise to the execution agreement— It would not give rise to any apparent bias if the dispute were confined, as it appeared to be at the time, to the rights and obligations of the parties under earlier agreements. However, the situation changed significantly when the statement of claims was presented at the meeting on 28 July 2014. That was the first occasion on which it was apparent that Dr Farran and Mr Assad were relying on the Execution Agreement as one of the agreements to support a claim for transfer of the shares in SFC rather than a money award. Equally importantly, the arbitration clause in the Execution Agreement is part of what is relied upon by them and Mr Ali Zbeeb as conferring jurisdiction upon him in relation to such a claim, rather than the jurisdiction being confined to a money claim under the Loan Agreement which was what was encompassed in his original appointment. It is to be inferred that Mr Ali Zbeeb and/or his father, who was copied in on the 28 August email, was giving advice to Dr Farran and Mr Assad. Such advice potentially included advice as to the terms and effect of the clause in a respect which would include the jurisdictional issue upon which Mr Ali Zbeeb is now called to adjudicate as arbitrator. He was responsible for the drafting of the clause. There would be a real possibility, in the mind of a fair minded observer, that he would wish to decide the jurisdiction issue in favour of Dr Farran and Mr Assad whom he and/or his father was advising at the time. The situation potentially falls within paragraphs 2.1.1 and/or 2.1.2 of the Waivable Red List of the IBA Guidelines where "the arbitrator has given legal advice ... on the dispute to a party or an affiliate of one of the parties" and/or "the arbitrator has previous involvement in the case."
* Two aspects of Zbeeb’s conduct of the reference justify doubts about his impartiality.
* The first is his refusal to postpone the publishing of his award pending the outcome of this application when asked to do so by both sides on or shortly before 2 October 2014. Save in exceptional circumstances an arbitrator in the consensual arbitral process should give effect to the parties' desire that the tribunal should postpone its award until after determination of a court challenge which is capable of affecting the jurisdiction to make such an award, with the obvious advantages in cost and convenience which that entails.
* Secondly the content and tone of the tribunal's communications with the parties, once the dispute as to impartiality and jurisdiction had arisen in the summer of 2014, and of the five communications with the Court thereafter—these correspondence were argumentative in style and advances points against SCF et al. which had not been put forward by Dr Farran or Mr Assad, and to which the Claimants had not been given an opportunity to respond. There is nothing wrong with him putting before the Court his evidence on the course of the proceedings, and his evidence in relation to that which is said to raise justifiable doubts about his impartiality; and he is entitled to put before the Court his view as to why he should not be removed. Should he wish to do so, the proper course is to acknowledge service of the arbitration claim form, rather than send correspondence to the Court. But in doing so, he must be careful not to appear to take sides, so as to be unable subsequently to judge impartially the rival arguments in the case.
* A party does not take part in an arbitration for the purposes of section 73 unless and until he invokes the jurisdiction of the tribunal in respect of the merits of the dispute or invokes the jurisdiction of the tribunal to determine its own jurisdiction over the merits of the dispute. However once a party has taken part in proceedings, he may "continue to take part" by silence or inactivity in the face of a right to object which subsequently becomes available to him. If the status quo is that a party has already taken part, and is therefore participating in an arbitration in which he has invoked the exercise of the tribunal's jurisdiction, he may have to do something positive to change the status quo if he is properly to be regarded as not having continued to take part in the reference. But in the absence of a prior taking part, mere silence and inactivity will not be sufficient; nor will any activity which is neutral or equivocal as to whether the party invokes or accepts the exercise by the tribunal of jurisdiction over him.
* None of this activity or inactivity amounted to taking part in the proceedings within the meaning of section 73. A request or agreement to put the arbitral process on hold does not of itself seek to invoke the tribunal's jurisdiction; it is entirely neutral in that respect. The suspension merely seeks to preserve the status quo and envisages that if and when the process is revived the parties will be in the same position procedurally as they were when it was suspended. If at the moment of suspension a party has not lost the right to object because he has not yet taken part, a request for a suspension of the process preserves such right together with all other procedural rights. An obligation to raise the objection at that stage would serve no purpose because it would not fall to be addressed unless and until the process were revived, and any consideration of it before that time would be inconsistent with the parties' agreement to suspend the process. For similar reasons an agreement to revive the process from where it left off in the event of certain future contingencies cannot amount to taking part.
* Mere silence and inactivity in the face of revival of the process by the other party is equally incapable of amounting to a first taking part. It does not of itself invoke the tribunal's jurisdiction. If the right to object remains at the moment of suspension, the objection remains open to the party upon the other party's revival of the process unless and until the objecting party does something which is unequivocally an invocation of the tribunal's jurisdiction. Were it otherwise a party who wished to decline to take part in an arbitration would lose the right to do so by a suspension of the process, putting him in a worse position by virtue of an agreement whose purpose was merely to preserve the status quo.
* For similar reasons, requests or agreements to adjourn a procedural hearing cannot of themselves amount to a first taking part (although they might amount to continuing to take part where the party has already taken part by invoking the tribunal's jurisdiction). They do not, of themselves, seek to invoke the tribunal's jurisdiction; they merely seek to preserve the opportunity to participate or object at the hearing whose postponement is sought or agreed.
* Nor can the Claimants' indication that it would be appointing its own arbitrator amount to taking part, because it does not recognise the tribunal as yet being properly constituted and therefore cannot amount to invoking the jurisdiction of a tribunal in its improperly or imperfectly constituted form.
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**INTERIM MEASURES AND INTERACTION WITH NATIONAL COURTS**

* **E. Gaillard, Anti-suit Injunctions Issued by Arbitrators, International Arbitration 2006: Back to Basics? 235 (Albert Jan van den Berg ed., 2007) (ICCA Congress Series No. 13/Montreal 2006)**
* Anti-suits injunctions whereby each State court prohibits a party either from proceeding with an arbitration or from pursuing its disruptive attempts against an arbitral proceeding.
* Situations in which the arbitral tribunal may be confronted with the introduction of a parallel court action or with an existing court action, and a possible anti-arbitration injunction issued by the court:
1. When a party starts a court action in relation to a dispute that is covered by an arbitration agreement;
2. When the court seized decides that it has jurisdiction to hear the dispute;
3. When the court, having decided that it has jurisdiction, enjoins the other party from initiating an arbitral proceeding or from pursuing an ongoing arbitral proceeding.
* **Arbitral Tribunal’s Jurisdiction to Issue Anti-Suit Injunctions**
* Well-established principles of international arbitration law provide the basis for the arbitrators’ jurisdiction to issue anti-suit injunctions. These are the jurisdiction to sanction violations of the arbitration agreement and the power to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the final award.
* **Arbitrators have the power or jurisdiction to sanction, by equivalent or in kind, violations of the arbitration agreement.** The two main effects of the arbitration agreement are: (i) to oblige the parties to submit all disputes covered by the arbitration agreement to arbitration, and (ii) to confer jurisdiction on the arbitral tribunal to hear all disputes covered by the arbitration agreement.
* It is a fundamental principle of arbitration law that arbitrators have the power to rule on their own jurisdiction, a principle that is corollary of the principle of the autonomy of the arbitration agreement. Any claim that the contract containing the arbitration agreement is void or voidable has no impact on the arbitration agreement and the arbitrator’s jurisdiction. The principle of competence-competence further allows the arbitrators to decide any challenge to the arbitration agreement itself.
* Consequently, the arbitrator’s jurisdiction to decide disputes relating to the arbitration agreement contains, by definition, the jurisdiction to decide breaches of the obligation to arbitrate. It also contains the arbitrator’s power to sanction any breaches that are ascertained on that basis. This can be done either by an award of damages or by ordering specific performance, the recalcitrant party being ordered to cease such breach and take all necessary measures to restore the situation.
* In this context, anti-suit injunctions ordered by the arbitrators are in reality nothing more than an order given to the party acting in breach of the arbitration agreement to comply with its contractual undertaking to arbitrate the dispute it has submitted to the domestic courts.
* **Arbitrators have the power or jurisdiction to take any appropriate measures either to avoid the aggravation of the dispute or to ensure the effectiveness of their future award.**
* It is a recognized principle that the parties must refrain from any conduct that may aggravate their dispute. Submission of the matters covered by an arbitration agreement to the domestic courts, or even the risk of such submission, constitutes a factor that may aggravate the dispute between the parties, and that may justify the issuance of an order addressed to the parties prohibiting such conduct. Depending on the facts of each case, it is within the arbitrator’s power, as recognized in international arbitration law, to decide whether a decision in the form of an anti-suit injunction directed to one or more parties is the appropriate measure designed to prohibit conduct which may aggravate the dispute.
* It is an entrenched principle of international arbitration that arbitrators must render an award capable of being recognized and enforced. By submitting to a domestic court a matter that is covered by an arbitration agreement, and creating the risks of multiple, and possibly divergent, decisions on such matter (including on the question of the existence and the validity of the arbitration agreement), a party may not only breach the arbitration agreement but also undermine the effectiveness of the award to be rendered by the arbitrators. Thus, the power to issue anti-suit injunctions is only one aspect of the arbitrator’s power to take all necessary measures to protect the international effectiveness of their future award.
* Arguments Raised to deny Arbitrators the Power to issue Anti-suit injunctions
* It is somehow improper for an arbitral tribunal to address injunctions to State courts. An arbitral tribunal should not issue anti-suit injunctions because such orders interfere with the State court’s jurisdiction or the parties’ fundamental right of seeking relief before those courts.

🡪 counter-argument: The acceptance by the national legal systems—by way of rules incorporated in arbitration statutes or in international conventions—that the courts refer the parties to arbitration simply means that the courts, when making a prima facie determination that there exists an arbitration agreement and that it is valid, leave it to the arbitrators to rule on the question and recover their power of full scrutiny at the end of the arbitral process, after the award is rendered by the arbitral tribunal (“negative effect of the rule of competence-competence”)

* Domestic courts, too, have competence-competence; this argument emphasizes on the co-existence between the jurisdiction of arbitral tribunals and that of State courts, each being entitled to equal recognition of its jurisdiction to rule on its own jurisdiction; in issuing anti-suit injunctions, arbitrators will decide the question of the State court’s jurisdiction in lieu of the State courts.

🡪 counter-argument: the dispute which is covered by arbitration agreement is, by definition, excluded from the jurisdiction of the State courts

* An arbitral tribunal that issues anti-suit injunction would be a judge in its own cause.

🡪 counter-argument: this would conflict with the principle of competence-competence

* Recognition of Arbitral Tribunal’s Jurisdiction to issue Anti-Suit Injunctions
* Arbitrators, as a matter of principle, have jurisdiction to issue anti-suit injunctions.
* Anti-suit injunctions have been issued in a significant number of ICSID and Iran-US arbitrations, as well as international commercial arbitration proceedings.
* Many decisions show that ICC tribunals have been willing to issue injunctions to parties in order to ensure that arbitral proceedings were able to follow their “normal course”.

🡪 ICC Case No. 1512: Dispute between an Indian cement company and Pakistani bank. Arbitration took place in Geneva. High Court of West Pakistan issued an injunction restraining the Indian cement company from pursuing arbitration.

* Sole arbitrator upheld his jurisdiction and found that the defendant’s decision to institute the national lawsuits was another tactical move to gain time and to slow down the arbitration proceedings. Noting that the parties had agreed to international arbitration outside Pakistan according to the ICC Rules the arbitrator declared that it is a widely held principle that once the parties have chosen a law to govern the arbitration proceedings there is no room for the laws of the country of the parties. The ICC Rules, expressly accepted by both parties, constitute the law governing the objection raised by the defendant.

🡪 ICC Case No 3896 (1982): The claimant asked the arbitral tribunal to issue, as interim relief, a declaration that the bank guarantee was invalid, that the respondent’s attempt to call the guarantee was fraudulent, and that the respondent should suspend the call until a decision was reached on the merits of the dispute. Meanwhile, a national court issued an order prohibiting the guarantor from paying any sum until the arbitral tribunal had rendered a final decision on the merits. The respondent asked the tribunal to declare that the action in State court was abusive because it tended to obstruct the performance of the guarantee and to aggravate or extend the dispute.

* Tribunal issued a partial award stating that it has the duty to recommend or proposed to them measures which, in its view are appropriate to prevent an aggravation of the dispute between the parties. From this point of view, the tribunal must recall the well-established principle of international arbitration law according to which: the parties must abstain from any action likely to have a prejudicial effect on the execution of the forthcoming decision and, in general, to refrain from committing any act, whatever its nature, likely to aggravate or to prolong the dispute.

🡪 ICC Case NO. 5650: Dispute between an African State, a US company and two other companies. Contract provided for ICC arbitration as the means to settle any disputes. Before initiation of arbitration, US company received a writ from 3 experts appointed by the courts of African State in relation to a lawsuit between the African State and another company involved in the hotel program. US company respondent that since an ICC arbitration agreement covered disputes relating to the contract the writ should be withdrawn. A month later, State filed a Summons and Petitions for damages in its own courts. US company then commenced an arbitration seeking a declaration that the respondent had breach the arbitration agreement by initiating the lawsuit and that this lawsuit should be terminated.

* Sole arbitrating, sitting in Lausanne, dismissed the argument in regards to the writ since no judicial action was brought against the claimant at that time. But, arbitrator declared that the subsequent Summons and Petition amounted to a clear violation of Art. 8(5) of ICC Arbitration Rules. Court seemed to rule that were it not for the termination of the lawsuit against the claimant, the claimant would be entitled to have the lawsuit terminated in favor of the arbitration proceedings pursuant to the arbitration agreement.

🡪 In an arbitration conducted pursuant to the Arbitration Rules of the Zurich Chamber of Commerce, the arbitral tribunal having its seat in Zurich, had to decide questions relating to the alleged breaches of contract in the contractual relations based on four different agreements. In parallel to the arbitration, a subsidiary of the claimant brought an action in the US against the respondent in relation to 2 other agreements which did not provide for arbitration clause. Respondent later amended its response to make a counterclaim against the claimant’s subsidiary as well as the claimant in the arbitration in the US proceeding on the basis of the 4 agreements being considered in the arbitration. Claimant requested from the arbitral tribunal a preliminary injunction with respect to the pursuit, by the respondent, of any claims in relation to the agreements being the subject of the arbitration.

* Arbitral tribunal found that it had the power to order the requested measures, on the basis of Art. 28 of International Arbitration Rules of ZCC which allows for provisions or conservatory measures in accordance with Art. 183 of the Swiss Private International Law Statute and Zurich Civil Procedure. The arbitral found that the measures requested seemed appropriate in order to prevent imminent disadvantages to the petitioner, in particular light of the fact that the production of documents in the US proceeding would have presented a genuine danger with respect to business secrets, to the benefits of the claimant’s competitors and other third persons.
* Reports of the UNCITRAL Working Group on Arbitration
* Arbitrators have the power to issue anti-suit injunctions in order to protect the integrity of the arbitral process against the parties’ obstructive tactics.
* An arbitrator may order a party to “Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or to prejudice the arbitral process itself.
* The advisability of arbitral anti-suit injunctions is distinct from the question of the arbitrator’s power to issue such measures. Recognizing that such measures are within the arbitrator’s judicial power is not a reason to believe that, in every situation, the response to a recalcitrant party who submits the dispute covered by an arbitration agreement to the domestic courts or to another tribunal will be the issuance of an anti-suit injunction. **Different factors may be considered in order to determine whether such measures are, in fact, advisable.**
* Effectiveness of their order in the case at hand 🡪 it may be argued that arbitral anti-suit injunctions are not an effective means of resolving the situation created by a recalcitrant party seeking relief before the domestic courts, to the extent that the arbitrators’ order is not, in and of itself, enforceable before those courts.
* Desirability of anti-suit injunctions as a means to alert a recalcitrant party
* Decided in the light of the circumstances of each case, e.g., whether or not the relief is necessary or urgent, or if party would suffer an irreparable harm.
* Arbitral anti-suit injunctions being measures designed to protect the integrity of the arbitral process, they can presumably be issued at any stage of the arbitral proceeding. And even before they ruled on their jurisdiction, it should be in a position to direct the parties not to act in any way that would jeopardize its prima facie jurisdiction until such time as it has formed its own judgment on its jurisdiction and established in a final manner whether it has been established on the basis of an existing and valid arbitration agreement and whether the scope of that agreement includes the dispute that has been brought before it.
* The form of an order enjoining the parties to comply with the arbitration agreement depends on various factors, among which the stage of the arbitral proceeding at which disruptive tactics may be employed or the type of measure decided. Based on this, it may be argued that measures of a procedural nature may be addressed through procedural orders, and this applies even before a tribunal has ruled on its jurisdiction.
* The form of an award, which by definition has a permanent nature and finally binds the parties would be more appropriate for measures designed to definitively sanction a party’s disruptive conduct, such as an award of damages.
* **Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335, F.3d 357 (5th Cir. 2003)**

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| **Facts:*** Pertamina is an oil, gas, and geothermal energy company that is wholly owned by the Government of Indonesia (GOI). KBC is a Cayman Islands limited private power development company established to develop geothermal resources, including the construction and operation of electric power generating facilities
* KBC entered into two contracts with Pertamina to develop the Karaha-Bodas Geothermal Project which included the building of a geothermal power plant in West Java, Indonesia.
* In 1997, the Indonesian economy suffered during the Asian financial crisis which led t the indefinited suspensión of the Projet by the President.
* The contracts contained almost identical comprehensive consultation and arbitration clauses which required the parties to arbitrate any disputes in Switzerland pursuant to the Arbitration Rules of UNCITRAL.

**Procedural History:*** KBC initiated arbitration proceedings in Switzerland, claiming that Pertamina had breached the contracts. Pertamina opposed the arbitration on various grounds. The panel eventually held that Pertamina and PLN had breached the contracts and awarded damages to KBC.
* Pertamina appealed the Award to the Supreme Court of Switzerland. While that appeal was pending, KBC initiated an action in the US District Court for the Southern District of Texas to enforce the Award. Pertamina filed a motion to stay pending its appeal to the SC of Switzerland, but the DC denied its motion and directed the parties to proceed with summary judgment.
* Swiss court eventually dismissed Pertamina’s appeal. Consequently, DC granted KBC’s motion for summary judgment to enforce the Award.
* Pertamina appealed the Judgment but declined to post a supersedeas bond. DC entered an order allowing KBC to commence execution of the Judgment and thereafter granted KBC leave to register the judgment in NY, Delaware and California.
* KBC also brough actions under the NY Convention in HK, Canada and Singapore to enforce the Award in those jurisdictions.
* Subsequently, Pertamina filed an application in the Central District of Jakarta to annul the Award, and sought an injunction which was later issued preventing KBC from enforcing or executing the Judgment.
* DC orally ordered Pertamina to withdraw its application for injunctive relief and prohibited Pertamina from taking any substantive steps in that court, but permitted Pertamina to take any ministerial steps necessary to maintain the cause of action.
* DC issued the TRO to preserve the integrity of its Judgment which had become final, and to maintain the parties’ positions as they stood prior to Pertamina’s action in Indonesia.
* Claiming that it lacked sufficient time to do so, Pertamina did not withdraw its request for injunctive relief, and the Indonesian court issue a provision injunction prohibiting KBC from seeking to enforce the Award. Later that day, Pertamina’s president-director issued a statement to the effect that Pertamina would not attempt to enforce the Indonesian court’s order with respect to KBC’s enforcement actions in the US.
* KBC immediately filed a motion in the DC to hold Pertamina in contempt of the TRO. DC ordered Pertamina to withdraw its Indonesian application for injunctive relief against KBC, found Pertamina in contempt, among others. Pertamina notified the Indonesian court of the DC’s order but did not request for setting aside or suspension of the injunction.
* KBC next filed a motion in the DC for a preliminary injunction to prohibit Pertamina from further pursuing the Indonesian injunction and the Indonesian annulment action. Pertamina filed a motion to purge the contempt order. DC granted KBC’s motion.
* Pertamina thereafter informed the Indonesian court of the DC’s preliminary injunction requested the Indonesian court to suspend the proceedings indefinitely. The Indonesia court rejected Pertamina's request to suspend the litigation, in part because PLN, which was also a party to the Indonesian litigation, filed an objection to postponement, and in part because the court concluded that it retained the authority to adjudicate the case.
* Pertamina filed its notice of appeal with the SC, which denied Pertamina’s emergency motion for a partial stay of the DC’s preliminary injunction.
* While the matter was still under SC’s review, the Indonesian court concluded that it had primary jurisdiction under the NY Convention and annulled the Award on grounds that it was contrary to the Convention and Indonesian arbitration law.
* The US Court of Appeals held, among others, that the NY Convention did not divest DC of its inherent authority to issue an injunction; DC abused its discretion in granting preliminary injunction; and contempt order did not survive after underlying preliminary injunction was vacated because it was issued erroneously.
* The High Court of HK SARC of First Instance issued an order enforcing the Award.

**Issue:**Whether or not the DC lacked authority to issue the preliminary injunction and the contempt order under the circumstances of the case.**Holding:**Yes. SC reversed the DC and vacated the preliminary injunction and contempt order.* Given the structure and purpose of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the responsibilities of the United States under that treaty, district court abused its discretion in granting preliminary injunction prohibiting Pertamina from prosecuting an action it instituted in Indonesia to annul a Swiss arbitration award in favor of KBC; there was little evidence that the Indonesian injunction or annulment action would frustrate and delay the speedy and efficient determination of the cause, Indonesian court proceedings did not threaten the integrity of the district court's jurisdiction or its judgment enforcing the award, and an injunction would be likely to have the practical effect of showing a lack of mutual respect for the judicial proceedings of other sovereign nations and to demonstrate an assertion of authority not contemplated by the Convention.
* District's court's contempt order, which was intended to constrain Pertaimina to comply with the court's temporary restraining order (TRO) against pursuing Indonesian action rather than to punish company for any past misconduct, was civil in nature, and therefore did not survive after underlying preliminary injunction, which prohibited Pertamina from prosecuting an action it instituted in Indonesia to annul a Swiss arbitration award, was vacated because it was issued erroneously.

**Rule/Rule Explanation:*** Ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed de novo.
* Under United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the country in which, or under the arbitration law of which, award was made has primary jurisdiction over the arbitration award; all other signatory States are secondary jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.
* It is well established, however, that normally “federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits.” Moreover, “absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.” Chapter 2 of the Federal Arbitration Act (the Convention's implementing legislation) federal courts maintain jurisdiction to hear cases like this. Although these treaty obligations limit the grounds on which the court can refuse to enforce a foreign arbitral award, there is nothing in the Convention or implementing legislation that expressly limits the inherent authority of a federal court to grant injunctive relief with respect to a party over whom it has jurisdiction. Given the absence of an express provision, we discern no authority for holding that the New York Convention divests the district court of its inherent authority to issue an antisuit injunction.
* Federal courts may not give opinions upon moot questions or abstract propositions; thus, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.
* Pertamina’s appeal of preliminary injunction prohibiting it from prosecuting an action it instituted in Indonesia to annul a Swiss arbitration award in favor of KBC was not rendered moot because Indonesian court granted the annulment and injunctive relief that development company sought to prevent; other aspects of district court's preliminary injunction, particularly the portion of that order requiring indemnification, continued to give KBC a concrete interest in the dispute, and KBC was still potentially subject to both the fines and the penalties imposed by the Indonesian court, and therefore maintained an interest in affirming the indemnification aspects of the district court's preliminary injunction order.
* When a preliminary injunction takes the form of a foreign antisuit injunction, court is required to balance domestic judicial interests against concerns of international comity; in assessing whether an injunction is necessary, court weighs the need to prevent vexatious or oppressive litigation and to protect the court's jurisdiction against the need to defer to principles of international comity.
* In determining whether proceedings in another forum constitute vexatious or oppressive litigation for purposes of reviewing foreign antisuit injunction, court looks for the presence of several interrelated factors, including (1) inequitable hardship resulting from the foreign suit; (2) the foreign suit's ability to frustrate and delay the speedy and efficient determination of the cause; and (3) the extent to which the foreign suit is duplicitous of the litigation in the United States.
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* **Global Arbitration Review, "UNITED STATES: The rise of the emergency arbitrator", 23 February 2015**
* The party seeking emergency relief must file a written request for emergency relief with the arbitral institution. Although timeframes may vary depending on the institution, the rules of the ICC and ICDR provide for the quick appointment of a solo emergency arbitrator by the institution. The emergency arbitrator then has to promptly schedule a hearing and issue an award or an order.
* Generally, the emergency arbitrator may grant emergency relief if the applicant shows that immediate and irreparable loss or damage will result if emergency relief is not granted and that the requesting party is entitled to such relief. These requirements are very similar to those for injunctive relief in US federal and state courts. The interim award or order must be reasoned and may require the posting of security from the party seeking the relief as a condition of the interim award.
* How can a party enforce an emergency arbitration award, which is by definition temporary and not final? Can a party affected by the award of an emergency arbitrator move to confirm or vacate such award in a national court?
* **Yahoo! Inc. v. Microsoft Corporation, 983 F.Supp.2d 310 (SDNY 2013)**

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| **Facts:*** Yahoo! involved a dispute arising out of an agreement to merge the international search capabilities of Yahoo!'s search system with Bing, an internet search engine operated by Microsoft.
* Yahoo! decided not to proceed with the merger of the search engines, and Microsoft filed a demand for arbitration and requested the appointment of an emergency arbitrator pursuant to the arbitration clause in the merger agreement, which provided for the appointment of an emergency arbitrator.

**Procedural History:*** The request for an emergency order was filed on 26 September 2013, an emergency evidentiary hearing was held on 7 and 8 October 2013, and the emergency award was issued on 14 October 2013. In other words, the emergency award was issued 18 days after the request was filed. The emergency award ordered Yahoo! to continue redirecting internet searches to Microsoft's search engines.
* Yahoo! moved to vacate the award, and Microsoft countered with a petition to confirm.

**Ruling:*** The court confirmed the award on the grounds that the relief was “final and that the Emergency Arbitrator neither exceeded his authority nor manifestly disregarded the law in awarding such relief.”
* More importantly, to the viability of the emergency arbitration proceedings, the court held that it had jurisdiction to confirm and enforce the terms of an emergency award. The court relied on the principle that if “an arbitral award of equitable relief upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at any time it is made.”
* The court noted that Yahoo! did not intend to comply with the emergency award and that Microsoft would suffer irreparable harm if Yahoo! did not comply.
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* **Chinmax Medical Systems v. Alere San Diego, 2011 WL 2135350 (SD Cal May 27, 2011)**

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| **Ruling:*** A judge in the Southern District of California held that an emergency award was not final and not subject to judicial review.
* In reaching this conclusion, the court focused on the rules for the appointment of an emergency arbitrator and held that the arbitration panel had the ability to modify or vacate the emergency award.
* In a point of possible consistency with the Yahoo! decision, the court noted that the evidence does not present an extreme case permitting judicial review of a non-final order.
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* Note however that neither court addressed the underlying issue of whether an award has to be “final” to be subject to judicial review.
* The Federal Arbitration Act and the New York Convention provide for the confirmation of an "award" without any reference to its finality.
* Section 207 FAA, on its face, covers emergency awards issued by an emergency arbitrator, as long as the decision of the emergency arbitrator takes the form of an award and not of an order or advisory opinion.
* NY Convention also provides for the confirmation of arbitral awards irrespective of finality.

🡪 Article IV sets forth the requirements for an application to confirm an arbitration award, and does not mention or suggest any requirement of finality.

🡪 Article V provides that a state may refuse to enforce an award that has not become "binding" in the jurisdiction where it was issued, but it cannot be seriously argued that an emergency award is not "binding."

* The requirement of finality may be borne out of policy and practical considerations, to prevent piece-meal confirmation proceedings, as the US Court of Appeals for the Second Circuit recognized in Michaels v Mariforum Shipping, SA Owners of the M/V Leslie, 624 F.2d411 (CA2(NY, 1974). However, these policy and practical considerations do not apply to emergency arbitration awards, particularly where the parties agree — or the applicable arbitration rules provide — that the decisions of the emergency arbitrator would take the form of an award and not of an order.
* The decisions of emergency arbitrators under the ICC rules can be problematic in this context, as the ICC rules provide that these would take the form of an order. But an award issued by an emergency arbitrator, pursuant to the agreement of the parties or the applicable arbitration rules, should be subject to judicial review and enforcement in corresponding national courts, irrespective of the exigent circumstances under which the award was issued.
* **Andrea Carlevaris and Jose Ricardo Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases", ICC International Court of Arbitration Bulletin Vol. 25 (1) 2014**
* Before the arbitral tribunal has been constituted, parties remain free to seek urgent measures from state courts on the basis of the widely accepted principle of the concurrent jurisdiction of judges and arbitrators with respect to interim measures. But this may less than ideal for various reasons.
* Arbitral institutions began integrating provisions for obtaining emergency relief into their rules.
* ICC Emergency Arbitrator Provisions can only apply to cases in which the arbitration agreement was made after 1 January 2012.
* Filing of the Application
* Application for Emergency Measures:
1. must be filed with the Secretariat of the ICC International Court of Arbitration in the required number of copies
2. must contain the information on the parties, the circumstances giving rise to the Application, the relief sought, the urgency of the Application, the arbitration agreement and any other relevant agreements, and proof of payment.
* Setting in motion of the procedure by the President of the Court
* Once the Application has been filed, Art. 1(5) of the Emergency Arbitrator Rules require the President of the ICC ICA to decide whether the Provisions shall apply. Notification of the Application to the responding party depends upon this decision.
* In all applications to date, this decision was made within 48 hours and in most cases less than 24 hours.
* With the aid of a report prepared by the Secretariat, the President makes the decision after verifying that:
1. all parties identified in the Application are signatories or successors to signatories of the relevant arbitration agreement;
2. the arbitration agreement was concluded after the entry into force of the 2012 Arbitration Rules;
3. the parties have not opted out of the Provisions; and
4. the parties have not agreed on another pre-arbitral procedure for obtaining conservatory, interim or similar measures.
* The only two requirements that have so far called into question the applicability of the Provisions are those related to (i) the signatories and (ii) the timing of the arbitration agreement.
* Issue on Signatories:

🡪 If there is an issue of jurisdiction with respect to non-signatories, it would be addressed in the context of Art. 6(3) and, if need be, Art. 6(4) of the Arbitration Rules rather than in the emergency arbitrator proceedings, where the intention has been to avoid the delay that would be caused by jurisdictional objections raised on grounds of party’s failure to sign the arbitration agreement.

* Issues on Timing:

🡪 Where there was no evidence or claim that the parties had entered into an ICC arbitration agreement after January 1, 2012, the President decided that the Emergency Provisions did not apply and consequently the emergency arbitrator proceedings could not take place.

🡪 Where arbitration agreement was contained in a contract signed before January 1, 2012, and the amendment was after that date, the President took note of the issue, and adopting an approach comparable to that of the Court under Art. 6(4) of the Arbitration Rules, decided to set the emergency arbitrator proceedings in motion in order to allow the emergency arbitrator to rule on his/her own jurisdiction.

🡪 Where Application was based on an arbitration agreement contained in a contract signed before January 1, 2012, but the parties expressly referred to the ICC Rules in effect at the time of commencement of the arbitration, the President decided that the Emergency Arbitrator Provisions applied and allowed the matter to proceed. President considered the fact that the parties were aware that the Rules are subject to modification so, in referring to the version of the Rules applicable at the time of commencement of the arbitration, they could be considered to have accepted the applicability of future amendments, even if unknown at the time of the arbitration agreement. Hence, they could be regarded as having implicitly agreed to the 2012 amendments.

* If the President decides that the Provisions apply, the Secretariat transmits a copy of the Application and its attachments to the responding party. Whenever and insofar as the President has decided they do not apply, the Secretariat has informed the parties that the emergency arbitrator proceedings will not take place, or will not take place among all the parties mentioned in the Application, and has transmitted a copy of the Application to them for their information as required by Art. 1(5) of the Emergency Arbitration Rules (EAR).
* Place and language of the emergency arbitrator proceedings
* The place may be significant in determining the standards applicable to emergency and preliminary measures, while the language of the proceedings may have an impact on other aspects of the proceedings, such as the choice of available candidates to act as emergency arbitrator.
* Art. 4(1) of the EAR provides that, if the parties have agreed on the place of the arbitration, this will also be the place of the emergency arbitrator proceedings. Otherwise, the President fixes the place of the emergency arbitrator proceedings.
* Such proceedings have so far been seated in Europe (Paris and London), North America (New York and Houston) and South America (Sao Paulo) 🡪 the seat of the proceedings was the place of arbitration chosen in the arbitration agreement
* When fixing the place of emergency arbitration proceedings, the President followed criteria similar to those applied by the Court, i.e., the neutrality and accessibility of the place, the reliability of its legal and judicial system, and relevant language(s), the aim being to avoid any surprises for the parties.
* Art. 1(4) EAR provides that the Application must be drafted in the language of the arbitration if this has been specified in the arbitration agreement or subsequently agreed by the parties. If not, it is to be drafted in the language of the arbitration agreement.
* Appointment and challenge of the emergency arbitrator
* Appointing the emergency arbitrator is a cornerstone of the proceedings.
* The appointments are made by the President following discussions with the Secretariat’s management and the relevant case management team on the qualities required for the matter.
* Immediately upon receipt of the Application, a shortlist of potential candidates was drawn up by the President in collaboration with the Secretariat. At the same time the candidates are contacted to check their availability and interest in the appointment. Those that were available and interested were then considered for appointment after completing a statement of acceptance, availability, impartiality and independence as required by Art. 2(5) of the EAR and confirming that they had no conflicts of interest.
* The Rules do not provide for a list-based procedure. The President is free to appoint whomever he regards as suitable to act as emergency arbitrator. In doing so, he considers above all the candidates’ experience of international arbitration and the potentially applicable laws and fields of law, their proximity to the place of arbitration and their ability to conduct the proceedings in the required language.
* Unlike sole arbitrators and presidents of arbitral tribunals acting under the ICC Arbitration Rules, emergency arbitrators can be nationals of the same country as any of the parties, even without the parties’ consent. If the case has its centre of gravity in a country from which one, some or all of the parties originate, the President may consider it appropriate to appoint an emergency arbitrator who is a national of that country.
* Attention is paid to the candidate’s availability and any potential conflict of interest that have been disclosed.
* As to potential conflicts of interest, in one instance, the President appointed a candidate who had submitted what was considered a de minimis disclosure. This is consistent with the approach taken by the Court in arbitration proceedings, where it may appoint arbitrators whose disclosures are considered of such a nature as not to call into question the candidate’s independence and impartiality in the eyes of a reasonable and objective party.
* There is no provision for circulating candidates’ forms before the appointment, as happens under Art. 11(2) of the Arbitration Rules when appointing arbitrators.
* If a party wishes to challenge the appointment of an emergency arbitrator, the challenge must be filed within 3 days of the challenging party’s receiving notification of the appointment (or becoming informed of the facts and circumstances on which the challenge is based, if that date is later). There is no provision suspending the emergency arbitrator proceedings while a challenge is pending, and the challenge can be decided even after the emergency arbitrator’s order has been made.
* Filing of the Request for Arbitration
* Note that an Application can be filed before the submission of the Request for Arbitration. In such a case, the Request must be filed within 10 days of the Secretariat’s receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary. If no Request is submitted within the deadline set by the Rules or by the emergency arbitrator, the emergency arbitrator proceedings are terminated by the President (Art. 1(6) of EAR).
* In some cases, an Application was filed by the respondent in an ongoing arbitration; although not contemplated by the EAR, the Application was considered admissible and emergency arbitrator proceedings were set in motion in the already existing arbitration. The Secretariat considered that by filing counterclaims the applicant had complied with the requirement of Art. 1(6) of the EAR.
* Proceedings
* Art. 5, EAR requires the emergency arbitrator to act swiftly and to take into account the nature and the urgency of the Application while also ensuring that each party has a reasonable opportunity to present its case.
* There is no provision for ex parte proceedings. The Secretariat is required to notify the responding party of the Application.
* Jurisdiction
* The limited scope of the Provisions, and in particular their inapplicability to parties other than the signatories of the arbitration agreement upon which the applicant relies, or their successors, is designed to limit the risk of jurisdictional challenges that would delay the proceedings.
* Multi-tiered clauses
* In one case, the arbitration agreement provided that if a dispute was not settled pursuant to the ICC ADR Rules within 60 days of the Request for ADR, it was to be settled pursuant to the ICC Arbitration. Applicant filed its Request for ADR and its Application for Emergency Measures on the same day. Responding party argued that as the 60-day interval had not elapsed, the parties could not yet be considered to have committed themselves to arbitration. Responding party also pointed out that the Application was premature as a Request for Arbitration could not be filed within the mandatory 10 days without breaching the 60-ay interval set by the multi-tiered clause.

🡪 Emergency arbitrator dismissed the objections and upheld his jurisdiction. He observed that to hold otherwise would deprive the parties of the possibility of obtaining interim relief when it was most needed (after the dispute had arisen but before the arbitral tribunal was constituted). Emergency arbitrator proceedings constitute a largely separate process which should be able to take place notwithstanding the requirement to wait 60 days before commencing arbitration proceedings.

* If parties wish to have the possibility of recourse to an emergency arbitrator during the time set aside for mediation, the following multi-tiered clause is suggested:

“The requirement to wait [45] days, or any other agreed period, following the filing of a Request for Mediation, before referring a dispute to arbitration shall not prevent the parties from making an application, prior to expiry of those [45] days or other agreed period, for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce.”

* If they prefer recourse to the EA to be possible only after the expiry of the period set aside for mediation:

“The parties shall not have the right to make an application for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce prior to expiry of the [45] days or other agreed period following the filing of a Request for Arbitration.”

* Non-retroactivity
* Non-retroactivity of the Emergency Arbitrator Provisions is laid down in Art. 29(6)(a) of the Arbitration Rules.
* This is an exception to the general rule expressed in Art. 6(1) of the Arbitration Rules that the parties are deemed to have submitted to the Rules in effect on the date of commencement of the arbitration unless they make express reference to the Rules in effect on the date of the arbitration agreement.
* In one case, emergency arbitrator declined jurisdiction where it found that under the applicable law the amendments did not renew the contractual relationship of the parties in its entirety.
* In another case, the emergency arbitrator referred to national law and found that the parties’ agreement had been formed in 2012, so the Provisions apply (contracts signed in 2012 as s result of an earlier call for tenders)
* Concurrent state court and emergency arbitrator proceedings
* Emergency arbitrators have so far rejected jurisdictional challenges often citing Art. 29(7) of the Arbitration Rules, which provides that emergency arbitrator proceedings and court proceedings for interim measures are not mutually exclusive.
* In one case, a contractual clause stipulates that the parties accepted the jurisdiction of two national courts for the purpose of provision and conservatory measures. Responding party argued that this clause deprived the emergency arbitrator of his/her jurisdiction. Emergency arbitrator dismissed the objection explaining that the agreement to opt out of the Provisions must be explicit and suggested that any agreement upon another pre-arbitral procedure must be unambiguous. He also relied on Art. 29(7) to assert his jurisdiction by pointing out that the parties’ agreement did not attribute exclusive jurisdiction to the national courts.
* In another case, the responding party argued that the contract required requests for interim measures to be submitted to a particular national court. The emergency arbitrator ruled that this did not exclude the parties’ right to have recourse to an emergency arbitrator as well.
* Standing to apply for emergency arbitrator proceedings
* Where a jurisdiction challenge was raise on the ground that the applicant had assigned its rights to a third party and therefore lacked standing to request emergency measures, the emergency arbitrator found that the applicant remained a party to the arbitration agreement and retained standing.
* Types of measures requested
* The type of measure sought is a decisive factor in deciding whether to file for emergency measures before an emergency arbitrator or in a state court.
* **Four categories of interim relief:**
1. measures aimed at securing enforcement of the award
2. measures aimed at preserving the status quo
3. anti-suit injunctions
4. orders for interim payment.
* Securing enforcement of award
* requests order directing the responding party not to jeopardize funds necessary to fulfill payment obligations under the parties’ contract
* requests for sums to be placed in escrow account pending the outcome of the arbitration proceedings
* Preserving status quo
* applicant requesting the emergency arbitrator to order the responding party to refrain from transferring its equity interest and selling the company’s assets to third parties until such time as the dispute over the responding party’s right to terminate the purchase agreement had been resolved
* request for an order preventing a responding party from calling bank guarantee pending the resolution of the dispute
* Anti-suit injunctions
* requesting emergency arbitrator to oder the responding parties to refrain from initiating legal action in state courts or to discontinue such action
* Interim payments
* requesting emergency arbitrator to order the responding party to make an immediate payment, subject to its right to seek reimbursement following the arbitration.
* Orders
* Under the ICC arbitral awards, the orders made by emergency arbitrators are not subject to scrutiny and approval by the ICC Court before being issued. The urgency of emergency arbitrator proceedings does not allow time for formal scrutiny.
* However, the Secretariat informally scrutinizes orders upon receiving the draft, in order to correct any errors or inconsistencies they may contain and improve their overall quality. In all cases in which an order was rendered, the Secretariat conveyed its comments on the draft within the hours of receiving it. Secretariat has drawn up a checklist which EAs are invited to follow to ensure that their orders satisfy minimum formal requirements and contain all necessary information.
* Applicable law and standards
* Standards set by the ICC Rules
* The Provisions do not lay down substantive standards other than the urgency of the measures requested.
* In some cases, EAs addressed the requirement of urgency when discussing both jurisdiction/admissibility and the merits, while in others they addressed the issue only when dealing with the merits. They have generally avoided what is meant by this requirement and referred instead to the particular circumstances of the case.
* Standards set by national law or other rules
* The position taken by EAs varies depending on the circumstances of the case.
* General requirements
* Irrespective of whether they apply international principles, national law or criteria proposed by the parties, emergency arbitrators have usually considered whether there was a prima facie case for the measures requested and whether there was a risk of irreparable harm. Failure to meet either of these requirements has generally been considered sufficient to reject the applications.
* Significantly, emergency arbitrators have not felt strictly bound by criteria commonly relied on in international arbitral practice.
* Costs
* Art. 7(1) of the EAR requires an applicant to pay US$40,000 (comprising of the $10,000 administrative expenses and US$30,000 emergency arbitrator’s fees and expenses).
* Payment of a fixed advance by the applicant alone.
* If no order is made in the emergency arbitrator proceedings, the President determines the costs pursuant to Art. 7(5) of the EAR.
* In addition to fixing the costs of the proceedings, the emergency arbitrator’s order also determines how those costs should be allocated between the parties. In this regard, emergency arbitrators enjoy wide discretion. They have tended to follow the principle that costs follow the event. Hence, when an Application has been rejected, the applicant has generally been held responsible for the costs.
* If a party objects to the allocation of costs ordered by the emergency arbitrator, it is for the arbitral tribunal in ensuing arbitration proceedings to decide on the matter pursuant to Art. 29(4) of the Arbitration Rules.
* The effectiveness of as order ultimately depends on its enforceability, which in turn depends on its nature.
* The EAR differ from the Pre-Arbitral Referee rules in at least three important respects:
1. they are an integral part of the Arbitration Rules, automatically applicable unless expressly included;
2. they refer to explicitly to “arbitrators”
3. their ties with arbitration proceedings are strengthened by the requirement that the applicant file for arbitration within a short time limit.
* It is important not to exaggerate the importance of enforceability on the effectiveness of orders made by EAs. Experience shows that interim measures ordered by arbitrators are often complied without coercion, and that parties do not readily disregard an interim decision while a decision o on the merits is pending. This is all the more true of EA orders, whose effectiveness is strengthened by the fact that arbitral tribunals are empowered to decide on any question determined in the order, including any claims arising out of or in connection with the compliance or non-compliance with the order.
* Experience suggests that an EA’s order can be a powerful incentive for the parties to settle. Not just the content of the order, but also the mere availability of EA proceedings may contribute to, and even facilitate, the amicable resolution of the dispute.

**MULTI-PARTY AND MULTI-CONTRACT ARBITRATION**

* **Redfern and Hunter on International Arbitration (Fifth Edition), §2.186-2.218**
* The difficulties of multi-party arbitrations all result from a single cause. Arbitration has a contractual basis; only the common will of the contracting parties can entitle a person to bring a proceeding before an arbitral tribunal against another person and oblige that other person to appear before it. The greater the number of such persons, the greater the degree of care which should be taken to ensure that none of them is joined in the proceeding against his will.
* Where there is a multi-party arbitration, it may be because there are:
1. several parties to one contract, or
2. several contracts with different parties that have a bearing on the matters in dispute
* Several parties to one contract
* Dutco Case: Dutco had entered into a contract with a consortium of two German companies and, when the disputes arose, brought arbitral proceedings under the ICC Rules against those two companies. Each of the companies claimed to be entitled to appoint an arbitrator. The ICC requested the two German companies to make a joint nomination of an arbitrator. They did so, but reserved their right to challenge the ICC’s decision, which they regarded as depriving each of them the right to nominate an arbitrator.
* The French Cour de Cassation agreed with the German companies. The court regarded the principle of equality in the appointment of arbitrators as a matter of public policy.
* ICC Rules
* Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.
* In the absence of such a joint nomination and where all the parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such a case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.
* LCIA Rules
* Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent two separate sides for the formation of the Arbitration Tribunal as Claimant and Respondent respectively, the LCIA Court shall appoint the Arbitral Tribunal without regard to any party’s nomination.
* In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the appointment of the Arbitral Tribunal by the LCIA Court.
* Each of the foregoing rules recognizes the right of the parties to nominate a member of the arbitral tribunal, if they are able to agree, but takes this right away from all of them and vests it in the institution if they cannot do so.
* But, there may be difficulties in obtaining recognition and enforcement of an award made by a tribunal that has been established for the parties because the NY Convention provides that an award may be refused on proof that “The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”
* Model Law contains a similar provision.
* Several contracts with different parties
* Example would be an international construction project involving the employer, main contractor, specialized suppliers and sub-contractors, where each of them operates under different contracts.
* Adgas Case: Adgas was the owner of a plant that produced liquefied natural gas in Arabian Gulf. The company started an arbitration in England against the main contractors under an international construction contract, alleging that one of the huge tanks that had been constructed to store the gas was defective. The main contractor denied liability but added that if the tank was defective, it was the fault of the Japanese sub-contractor. Adgas brought ad hoc arbitration proceedings against the main contractor before a sole arbitrator in London. The main contractor then brought separate arbitration proceedings, also in London against the Japanese subcontractor. Both the main contractor and the Japanese subcontractor did not agree to have their separate arbitration proceedings joined with the other proceedings.
* While the Court plainly wished to consolidate the proceedings so as to save time and money and to avoid the risk of inconsistent awards, it recognized its lack of power to order consolidation without the consent of all parties.
* However, it found a practical solution by deciding that, since the case had come before the court on application for the appointment of an arbitrator, it could appoint the same arbitrator in each case, if that arbitrator was ready to accept the appointment (as indeed he was).
* Court held that there is ample power in the Court to appoint in each arbitration the same arbitrator as it is highly desirable so as to avoid inconsistent findings. (Note: It still meant that there are two proceedings.)
* Class Arbitrations
* A class or representative action is a legal proceeding that enables the claims of a number of persons with the same interest (the class members) to be brought by one or a number of claimants (the representative claimant(s)) against the same respondent. In a class action, only the representative claimant(s) is a party to the action, and although the class members do not take an active part in the proceedings, they are bound by the outcome.
* One might take the view that a representative action is anathema to the principles of privity and party autonomy that tend to lead to the classic constellation of claimants facing respondents in the same proceedings who are party to the same contract.
* Green Tree Financial Corp. v. Bazzle Case:
* This cases involved a lender who had entered into standard-form contracts for home improvement loans with a number of borrowers. The contracts contained an arbitration clause, referring all disputes to binding arbitration by one arbitrator selected by us (the lender) with the consent of you. The matter was commenced by two sets of consumers who first brought separate lawsuits before state courts challenging the lender’s practices. Both lawsuits were referred to arbitration at the lender’s demand, and in both cases the sole arbitrator (who was in fact the same individual in both cases) administered both cases as a class-wide arbitrations and issued class awards in favor of the borrowers.
* The lender challenged the award, submitting that in selecting an arbitrator that was consented to by one of its customers, as required by the express terms of the arbitration agreement, it was not selecting an arbitrator to determine its dispute with its other customers. On this basis, it argued that the terms of the arbitration agreement did not accommodate, but rather forbade, class-wide arbitration.
* South Carolina SC upheld the class awards reasoning that there was nothing in either the contracts or the FAA to preclude class-wide arbitration. The US Supreme Court also affirmed the judgment and found, in the process, that an arbitrator, rather than a court, must determine whether the contract forbid class arbitration.
* In 2003, AAA Supplementary Rules for Class Actions: require the arbitrator first to decide whether a class action is permissible under the contract in question and applicable State law; provide guidance for the arbitrator thereafter in determining whether to certify the existence of a class; and in particular, require the arbitrator to set forth his ruling on the class-action issues in a Class Construction Award that may itself be enforced or set aside in court.
* String arbitrations:
* in the commodity markets, the seller may make a contract with a purchaser who then passes the product down a line of intermediaries, until it reaches the last buyer in the chain or string. If a dispute then arises as to the quality and condition of the product, it would obviously be wasteful for the dispute to be litigated or arbitrated at each stage. Accordingly, the practice has developed within certain commodity markets of holding a single arbitration between the seller and the last buyer, on the basis that the award will be binding on all parties and enforceable, if necessary, by each contracting party against his co-contractant.
* Similar technique is applied in maritime arbitrations; if the same dispute arises under each sub-contract, the parties may agree to appoint the same arbitrator and to accept that his award will be binding on all parties.
* Concurrent hearings
* Another possible solution to multiparty disputes or contracts is to appoint the same arbitrator to both arbitrations. This may be possible where, for instance, a national court appoints the arbitrator. The arbitrator may then direct that (subject to any necessary provisions as to confidentiality) documents disclosed in one arbitration should be made available to the parties in the other, and that a transcript of the witness evidence should be made, so that evidence given in one arbitration may be used in the other (with the parties being given the opportunity to question or comment upon it).
* But it is also possible for this practice to be adopted by the parties themselves, without need for the court to intervene, as long as all the parties agreed to it.
* Court-ordered consolidation
* There is no provision in the Model Law for the consolidation of arbitrations, but several States which have adopted the Model Law have added a provision providing for court-ordered consolidation.
* Florida’s International Arbitration Act; a single arbitral tribunal may determine disputes, provided that all the affected parties agree and it is seen to be in the interests of justice and the speedy resolution of the disputes.
* In California, the court may order consolidation on such terms as the court considers just and necessary. If the parties cannot agree upon the arbitrators, the court will appoint them; the court will also determine any other matters on which the parties cannot agree and which are necessary for the conduct of the arbitration.
* Court-ordered consolidation seems to be the ideal solution to the problem of ensuring consistent decisions, when the same or similar issues of law and fact would otherwise come before different arbitral tribunals.
* As regards enforcement, there is strong support for the view that where a court has ordered a consolidated arbitration, the award would be enforceable under the NY Convention provided that the parties have at least agreed to arbitration and to the same arbitral jurisdiction.
* English Arbitration Act:
* The parties are free to agree—
1. that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
2. that concurrent hearings shall be held on such terms as may be agreed.
* Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.
* Consolidation by consent
* under an arbitration agreement
* ICC Commission on International Arbitration’s Final Report on multi-party arbitrators suggested that the problem posed called for a wide range of solution, and one was for the parties to agree in advance that any dispute between them would be referred to a multi-party arbitration.
* Drafting multi-party arbitration clause requires a close understanding of the nature of the relationship between the different parties, and of the type of disputes that may conceivably raise, and careful and detailed drafting.
* under institutional rules
* neither the Model Law nor the UNCITRAL Rules contain any provision for the consolidation of different arbitrations
* ICC Rules: where it receives a Request for Arbitration in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending, the ICC may at the request of a party decide to include the claims contained in the Request in the pending arbitration. But once the Terms of Reference have been signed or approved by the ICC, additional claims may only be included in the pending proceedings if authorized by the arbitral tribunal.
* LCIA Rules: give the tribunal the power, on the application of a party, to join one or more third persons in the arbitration, provided that the third person or persons and the applicant have consented in writing. Thereafter, the arbitral tribunal may make a single final award, or separate awards, in respect of all parties so implicated in the arbitration. This rule does not require the consent of all the parties to the arbitration, but it does require at least the consent of the party making the application and of the party or parties who are to be joined in the proceedings.
* The provision only operates with the consent of at least one party to the arbitration and all of the parties who are to be joined.
* **"Dealing with Multi-Party and Multi-Contract Arbitration Issues", 11 June 2012 (HSFnotes / Arbitration)**
* **Joinder of Parties**
* ICC Rules: Article 7 permits a party to file a “Request for Joinder” against a third party:(i) before an arbitrator is appointed, if there is an arbitration agreement under the Rules that binds all the parties; and(ii) after the appointment of any arbitrator, if all the parties, including the third party, agree and if there is an arbitration agreement under the Rules that binds all the parties.[1]The joined party will also be permitted, pursuant to Article 8, to make claims against any other party in the arbitration. Article 9 is not strictly a joinder provision, but it does offer an important alternative route for bringing claims against parties in multi­contract arrangements. It permits claims arising out of or in connection with more than one contract to be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.In order to bring claims under multiple contracts pursuant to Article 9, the consent of all the parties to the arbitration is required and the arbitration agreements should be compatible
* LCIA Rules: Article 22 permits joinder of a third party to the arbitration upon the application of a party. Consent of the third party is required. There is no express requirement that the third party must be party to the arbitration agreement so this should permit joinder in multi­contract situations.
* **Intervention**
* ICC Rules, LCIA Rules: There are no express provisions for intervention, so parties who wish to allow for intervention should include bespoke drafting to that effect in the arbitration agreement.
* **Consolidation**
* ICC Rules: Article 10 permits consolidation of two or more pending arbitrations at the request of a party, provided that:(i) the parties have agreed to the consolidation;(ii) the claims are made under the same arbitration agreement; or(iii) where the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the arbitration agreements are compatible.
* LCIA Rules: The Rules are silent in relation to consolidation.
* In multi-­contract transactions, parties should consider bespoke drafting to ensure that the arbitration agreements in the different contracts are compatible. Alternatively, an umbrella agreement may be executed to satisfy the requirement for an arbitration agreement binding on all parties. Where consent of the parties is required for joinder or consolidation, parties are advised to consider bespoke drafting to record their consent in the arbitration agreement(s).
* **Irene Welser and Alexandra Stoffl, Chapter II: The Arbitrator and the Arbitration Procedure, Multi-Party Arbitration – A Strategic Analysis with Focus on the Nomination of Arbitrators in Gerold Zeiler , Irene Welser , et al. (eds), Austrian Yearbook on International Arbitration 2015, Austrian Yearbook on International Arbitration, Volume 2015, pp. 277 – 290 (available on Kluwer Arbitration)**
* Handling of international arbitration proceedings gets complicated when more than two parties are involved in the arbitration, which is often the case.
* The question whether multi-party arbitration is permissible mainly depends on how the specific arbitration clauses are shaped. In general, the consolidation of arbitration proceedings or a joinder requires the parties’ unanimous agreement.
* If the arbitration clauses merely refer to certain institutional arbitration rules, it is commonly understood that the parties to the contract have agreed to multi-party arbitration if the institutional arbitration rules referred to provide expressly for such multi-party proceedings.
* In some cases, the arbitration clauses are individually tailored and aimed at the anticipation of consolidated or joint proceedings in case a dispute arises.
* Article 15, 2013 Vienna Rules – consolidation
* a consolidation of two arbitration procedures is admissible at the request of one party if the parties agree on the consolidation or the same arbitrators have been nominated in both proceedings
* the seat of arbitration as stated in the respective arbitration clauses must be identical
* the decision whether or not the proceedings are consolidated is taken by the Board after hearing the parties and the arbitrators already appointed
* “All relevant circumstances” are to be taken in consideration, including the compatibility of the arbitration agreements as well as the respective stage of the proceedings.
* Article 14, 2013 Vienna Rules - joinder
* the joinder of third parties to an arbitration procedure is possible at the request of one party (or the third party itself) after having heard all other parties involved
* it is within the discretionary power of the arbitral tribunal itself to allow or deny the joinder; therefore, the composition of the arbitral tribunal must be accepted as it is by the joining party
* Article 10, 2012 ICC Rules – consolidation
* the Court may, at the request of one party, consolidate two or more arbitrations pending under the ICC rules into a single arbitration if the parties have agreed to consolidation or all of the claims are made under the same arbitration agreement
* at the Court's discretion, a consolidation of proceedings is also possible (without it being necessary for the parties to give their consent) if the arbitrations are between the same parties and the disputes arise from the same legal relationship, even if more than one arbitration agreement is involved
* the Court must find the various arbitration agreements compatible and “in deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed”
* if the arbitrators appointed in two arbitrations are different persons, the Court cannot consolidate the arbitrations unless the different arbitrators resign or are removed by the Court at the parties' request.
* Article 7, ICC Rules – joinder
* only the parties to the pending arbitration are able to submit a request for joinder of a third party; the third party itself has no such right
* no additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree; it is therefore clear that the existing arbitrators stay in place and cannot be changed anymore, even under the ICC Rules.
* Note: in both Vienna and ICC Rules, in case of joinder, the joining party must in any case accept the existing arbitral tribunal as it is; this is not the case in regards consolidation
* **Factors in deciding whether to go for consolidation or joinder:**
* the party considering filing a request for consolidation should attempt to establish whether separate proceedings might in the end turn out to be cheaper than paying a share in a consolidated procedure 🡪 especially true in cases where the amounts in dispute in the two arbitration proceedings are very unequal, as such inequalities might lead to costs being allocated very disproportionately. a claimant who is only seeking to recover a fracture of the sum that his co-claimant is requesting has to seek agreement with this co-claimant on the proportion of the cost advance he actually has to bear
* a consolidation can give rise to many disadvantages if one of the two arbitrations that are being consolidated is much less complicated in nature than the other; such differences in complexity can lead to inequalities as regards a “fair” allocation of costs, as dealing with more complicated matters takes of course longer and therefore requires larger monetary resources, whereas a far-less complex dispute can be dealt with much faster
* before filing a request for consolidation, the parties have to question whether the claims are compatible at all; a consolidation is a good idea in cases where the distinct claims are similar, not only as regards their nature, but also their scope; if the interests of the parties involved in the different arbitration proceedings are contradictory, this can be a big obstacle to a potentially consolidated procedure
* Nomination of an Arbitrator in Multi-Party Proceedings
* For many parties, the appointment of an arbitrator is probably one of the single most important decisions during an arbitration. Many of these models basically rely on the assumption that multiple Claimants and multiple Respondents jointly agree beforehand on the nomination of one arbitrator for each side
* Arbitrators are not only selected according to their expertise, language skills and knowledge of the applicable law, but it is often also a question of trust, public standing or a long and impressive track record that matters. The possibility to choose one arbitrator freely is often the decisive factor when agreeing on a three-arbitrat or panel, if not on arbitration at all.
* When the cases are being consolidated into one single arbitration, one set of arbitrators becomes redundant, unless (in very rare cases) the arbitrators are the same in both arbitrations. The dismissed arbitrators are entitled to certain compensation, which leads to additional costs.
* The main question, of course, is which of the arbitrators can stay, and which ones have to go. Normally, none of the parties will voluntarily waive its right to its “own” nominated arbitrator. And even if the arbitrators have been appointed in only one of the two arbitrations, this leads to similar problems, as, in most cases, the “new” party to the consolidated procedure has to factually accept the already appointed arbitrators, only because the procedure that has been pending for a longer time than the other procedure becomes automatically the leading one.
* **Dutco Case— Siemens A.G. and BKMI Industrieanlagen GmbH v. Dutco Consortium Construction Co.**
* This case arose out of a contract for the construction of a cement plant in Oman. Dutco filed a claim against its consortium partners Siemens and BKMI under the ICC rules. In accordance with common practice, the ICC invited both sides to nominate an arbitrator, which meant that Siemens and BKMI had to jointly appoint an arbitrator or the ICC would select an arbitrator for both of them. BKMI and Siemens objected to joint proceedings due to their diverging interests. In the end, BKMI and Siemens jointly appointed an arbitrator, but under protest. The arbitral tribunal rendered an interim award on jurisdiction stating that it had been properly constituted. BKMI and Siemens challenged this interim award at the French Court of Appeal.
* The Court of Appeal dismissed this request for setting aside the interim award. The French Cour de Cassation, however, considered the appointment process to be contrary to public policy, because of the necessity of equality of the parties in the appointment of arbitrators. This fundamental principle could, according to this decision, only be waived after the disputes had arise.
* The clear statement of the Cour de Cassation outlines that, at least in France, the parties to the arbitration enjoy at law an equality of opportunity to appoint an arbitrator and that any infringement of that right was against ordre public.
* This is also true for Austrian law, as the equality of the parties in the constitution of the tribunal is considered part of the procedural ordre public.
* Article 12(8) ICC Rules
* ICC Court has the power to appoint all members of the arbitral tribunal in cases in which the parties are unable to jointly select an arbitrator.
* “In the absence of such a joint nomination and where all parties are unable to agree to a method for constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of the to act as a president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as an arbitrator, applying Article 9 when it considers this appropriate.”
* As basic rule, one co-arbitrator should be nominated jointly by Claimants and the other one jointly by Respondents. If either side fails to jointly nominate an arbitrator and if all parties have not agreed on a different procedure, the Court is empowered to appoint each member of the arbitral tribunal where this is considered appropriate.
* ICC Court would substitute all arbitrators and not only choose one arbitrator for the side that is unable to agree on one person.
* In VIAC arbitration, in case one side fails to appoint its arbitrator (jointly), the Board can appoint an arbitrator for only this side—also in multi-party proceedings.
* VIAC Rules also provide for the opportunity that the Board revokes an already appointed arbitrator in exceptional cases, after granting the parties the opportunity to comment, in case of diverging interests on one side (normally Respondents’ side).
* So if, for instance, one side cannot agree on an arbitrator and the other side has already appointed one, the Board can not only nominate an arbitrator for the side that has failed to nominate an arbitrator, but also can nominate an arbitrator for the other side that has already named one. The Board can also nominate three arbitrators and name one as chairman.
* However, unlike in ICC, VIAC Board normally would only nominate the arbitrator for the side that is unable to agree on one person and leave the other side’s arbitrator in place.
* Individually Tailored Arbitration Clauses
* Individual arbitration clauses are sometimes considered the answer to all uncertainties that arbitration gives rise to, especially in the case of multi-party arbitration.
* The situation may still be fairly easy if the multi-party situation arises out of the fact that there are two “groups” of parties who will definitely have similar interests. This is, for example, the case if a multi-party contract is entered into by two parent companies and their affiliates. In such cases, it is sensible to “group” the possible parties to the arbitration beforehand. A respective arbitration clause might read as follows:

“There shall be three arbitrators constituting the Tribunal. If there are more than two parties, for the purposes of this Section, A and any of its Affiliates will be considered as one party and B and any of its Affiliates will be considered as one party when it comes to nominating arbitrators. Therefore, each of these parties shall appoint one arbitrator and the two party-appointed arbitrators shall nominate the third arbitrator who shall serve as chairman of the Tribunal.”

* The situation is far more complex in the back-to-back transaction where one party is the claimant vis-a-vis its seller and the respondent in relation to its buyer. A clause that was recently used in a complex multilateral M&A transaction reads as follows:

“Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this agreement, any of the other Transaction Documents including any dispute as to their existence, validity, interpretation, performance, breach or termination or the consequence of their nullity shall be exclusively referred to and finally resolved by arbitration under the Rules of Arbitration of the ICC.

Each Party agrees that pursuant to Article 10 (a) of the ICC Rules, the Parties agree to the consolidation of any two or more arbitrations commenced pursuant to this clause into a single arbitration, as provided for in the ICC Rules.”

* Typical Procedure of the ICC:
* As long as there is only one arbitration without any request for consolidation, the appointment procedure of the arbitrators would be as usual. Hence, each party would nominate its arbitrator, the arbitrators would be sent the usual “statement of acceptance, availability, impartiality and independence” forms, and the ICC Court would continue with the confirmation procedure.
* When a second arbitration starts, the parties to this “new” arbitration to be consolidated with the pending one are still free to nominate “their” arbitrator and sometimes explicitly requested to do so by the ICC.
* However, as soon as there is a request for consolidation, the ICC Court will immediately stop to confirm them and ask the parties to agree on the arbitral tribunal as a whole, thus creating the necessity to may be “leave out” or even remove some of the persons nominated so far. In the end, the total member of arbitrators can only be three.
* Article 10 ICC Rules: When arbitrations are consolidated, they are consolidated into the arbitration that commences first, unless otherwise agreed by all parties. Therefore, in the likely event that arbitrators in the first arbitration have already been nominated and confirmed by the ICC Court, the room for maneuver of the parties of the second arbitration is relatively narrow: they can either accept the arbitrators who were nominated in the first arbitration, or they can refuse to do so, thereby running the risk that the ICC Court uses its discretion as laid down in Article 12 (8).”
* Strategically speaking, a party that is or may be subject to consolidated proceedings should use the advantage of bringing its arbitration case before the ICC Court first, and nominate an arbitrator straight away. As soon as this arbitrator has been confirmed by the ICC Court, it is (de facto) far more difficult to replace him/her, because if the parties of the second arbitration do not agree to the confirmed arbitrator, they run the risk that the ICC Court will, in application of the “Dutco”-mechanism nominate all arbitrators, which means to say they might end up with persons completely unknown to them.
* If both arbitrations that need to be consolidated were commenced at exactly the same time, it may be the case that two full panels have been nominated and confirmed. In such cases, it will probably be up to the ICC Court to revoke these arbitrators and nominate a completely new panel of three other persons.

**\*\*NO CLASS 9\*\***

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| **CLASS 10 – SET ASIDE AND APPEAL OF AWARDS** |

* **Gary Born, International Commercial Arbitration, Second Edition, §§25.01-25.04**
* The NY Convention limits the jurisdictions in which annulment of an international arbitral award may be sought, in particular: (i) to the place where the award was made, or (ii) under the law of which the award was made.
* If an annulment action can properly be brought in a particular jurisdiction, then the NY Convention imposes no express international limits on the grounds available for annulment under national law in that jurisdiction. The Convention’s only limits on the annulment authority of the arbitral seat are implied; even if accepted, these limits leave the subject of annulment primarily to local law in the arbitral seat.
* Many national arbitration statutes, including the UNCITRAL Model Law, permit the annulment of international awards if:
1. there was no valid arbitration agreement
2. the award-debtor was denied an adequate opportunity to present its case
3. the arbitration was not conducted in accordance with the parties’ agreement or, failing such agreement, the law of the arbitral seat;
4. the award dealt with matters not submitted by the parties to arbitration;
5. the award dealt with a dispute that is not capable of settlement by arbitration
6. the award is contrary to public policy
7. the arbitral tribunal lacked independence or impartiality
8. the award was procured by fraud
9. in a limited number of states, the arbitrator’s substantive decision was seriously wrong on the merits.
* International Limits on Grounds for Annulling International Arbitral Awards
* The grounds which are available for annulling an international arbitral award in the place of arbitration are defined principally by national law.
* The NY Convention and other international arbitration conventions have frequently been interpreted as imposing no **express** limits on the substantive grounds that may be invoked to annul an international arbitral award, thus leaving the subject entirely to national law.
* In effect, a Contracting State would in principle be free to subject all international awards made on its territory to de novo judicial review, with full evidentiary and legal submissions on the merits of the parties’ dispute, treating the award as relevant evidence in the litigation, if that, but no more.
* Note: The counter-argument for this one is that treating an award as nothing more than non-binding recommendation, with the parties’ dispute subject to de novo litigation, would thus contradict Contracting States’ obligations under Article II of the Convention to recognize agreements to arbitrate and would be inconsistent with the essential attributes of an arbitral award. In other words, de novo judicial consideration of the parties’ dispute would convert an agreement to arbitrate into an agreement to mediate and an award into a mere recommendation, results which are contrary to the Convention’s premises and requirements.
* Article V of the NY Convention do not apply to actions to annul an award in the arbitral seat, and instead apply only to the recognition of foreign and nondomestic awards. Articles V(1)(e) and VI simply refer to the possibility of action to annul an award by the competent authority in the arbitral seat, without expressly imposing any limits on the grounds that may be relied upon to annul an award.
* Yusuf Ahmed Alghanim & Sons WLL v. Toys “R” Us, Inc.
* “We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply to domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award… There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law.”
* “The Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the stat in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.”
* The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.
* Implied Limits Imposed by NY Convention on Grounds to Annul Awards
* The better view is that the Convention imposes implied limits on the substantive grounds that may be relied upon to annul awards in the arbitral seat; although these grounds leave substantial autonomy to national courts and legislatures in the arbitral seat, they nonetheless impose international limits on the annulment of international awards.
* It is in their very nature that arbitration agreements provide for the binding resolution of disputes by arbitration, with that resolution set forth in arbitral award, which in its very nature is a final and binding decision; it is a fundamental and necessary element of arbitration agreements and arbitral awards to provide for binding dispute resolution, not for an irrelevant or merely advisory arbitration followed by de novo judicial resolution of disputes.
* In Article V or elsewhere, the correct view is that the Convention limits the scope of national court review of awards by requiring Contracting States to recognize agreements to arbitrate (Article II) and to treat awards consistently with the basis attributes of such instruments. Therefore, the actions to annul international awards must be limited to the grounds specified in Article V of the Convention.
* A less expansive approach is to interpret Article II as requiring that any judicial review of international awards in an annulment action not compromise the parties’ basic agreement that their disputes would be finally resolved by arbitration This analysis would limit judicial review in an annulment action to no more than a customary supervisory function, in line with that of virtually all Contracting States to the Convention, of reviewing the arbitral procedures (e.g., procedural fairness, jurisdiction) and/or identifying material errors of law or fact (as some jurisdiction permit), but would preclude de novo judicial disposition of the parties’ dispute.
* This relies on the observation that de novo judicial review fundamentally contradicts the parties’ agreement to resolve their disputes by arbitration, rendering that agreement virtually meaningless. De novo judicial review would also ignore the essential character of arbitration and arbitral awards, recognized and embodied in the arbitration regimes of essentially all Contracting States, which is to finally resolve the parties’ dispute in a binding manner, in contrast to medication or conciliation, which is merely a prelude to litigation in national courts.
* The European Court of Justice has described the approach of most national arbitration legislation, and the policies underlying such provisions, as follows: “It is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exception circumstances.
* The same analysis also precludes Contracting States from applying substantive rules of law in annulments proceedings that violate the Convention’s specific provisions regarding recognition of arbitration agreements.
* Contracting States are obliged, by the Convention, to give general effect to these substantive rules regarding international arbitration agreements, in both proceedings to enforce arbitration agreements and other proceedings, including annulment actions.
* As a consequence, Article II’s provisions mandating recognition of agreements to arbitrate are properly interpreted to apply in annulment proceedings in Contracting States, placing limits on substantive grounds for annulment of international arbitral awards.
* This analysis would preclude, among other things, application of idiosyncratic local rules that would deny effect to agreements to arbitrate in violation of Article II of the Convention.
* Annulment decisions that fall under the following cases would be contrary to the NY Convention:
1. ignored Article II(2)’s maximum form requirement
2. invalided agreements to arbitrate noncontractual or future disputes (in violation of Article II(1))
3. denied effect to ad hoc (or institutional) arbitration agreements
4. overrode agreed arbitral procedures and required application of a domestic procedural code
5. disregarded the parties’ choice of an arbitral seat or language
6. ignored Article V(1)(a)’s choice-of-law rules
* Likewise, annulment decisions resting solely on a conclusion that an award had been made against a local business or damaged local commercial interests would contradict the Convention’s objectives of facilitating the enforcement of arbitration agreements and awards through uniform international standards.
* It may be argued that it is unjustifiable to rely on Article II of the Convention as implied limiting the grounds for annulling the awards because Article II, but is terms, addresses only arbitration agreements, and not arbitral awards, and that the provisions of the Convention relevant to awards are set forth (only) in Articles III to VI, not Article II. But this can be controverted because the parties’ arbitration agreement is central to the conduct of the arbitral proceedings, with party autonomy, expressed in the terms of the agreement to arbitrate, defining the character of the arbitral proceedings and the scope of the arbitral award. Consequently, the obligations of the Contracting States to recognize arbitration agreements necessarily extend to the treatment of such agreements by national courts in the context of reviewing arbitral awards and arbitral proceedings.
* Article II of the Convention is not subject to the jurisdictional limitation that is applicable, by virtue of Article I(1), to the treatment of arbitral awards in Articles III, IV, and V. As a consequence, Article II applies to international arbitration agreements, not merely to arbitration agreements that produce foreign or nondomestic awards; in contrast to the treatment of awards under Article I(1), the location of the arbitral seat (i.e., the place where the award will be made) is irrelevant to the Convention’s treatment of arbitration agreements in Article II.
* The Convention’s application to all international arbitration agreements, including locally-seated international arbitrations makes it essential that Article II apply in annulment proceedings. Unless Article II limits a Contracting State’s treatment of locally-seated international arbitrations in annulment proceedings, the Convention’s provisions regarding arbitration agreements (including its maximum form requirement, presumptive validity rules, and provisions regarding future disputes, noncontractual disputes and institutional arbitrations) could all be ignored in annulment proceedings and would be of little practical utility.
* Other International Arbitration Conventions
* The Inter-American Convention adopts essentially the same approach as the New York Convention (in Article 5), and is susceptible to precisely the same interpretation with regard to limits on the grounds for annulment.
* The European Convention expressly addresses (in Article IX) the consequences of decisions in the arbitral seat setting aside awards, providing that such decisions will not be a basis for non-recognition of an award unless they rest on specified grounds (essentially identical to those set forth in Articles V(1)(a) to (d) of the NY Convention). These provisions indirectly limit the effects of annulment decisions unless they are based on specified grounds.
* ICSID Convention, Articles 53 and 54 obligate all ICSID Contracting States—including the state where the arbitral award was made and the arbitral hearings were conducted—to recognize ICSID awards. There is no room for national courts to annul or review an ICSID award, regardless where those courts may be located or what their connection to the dispute was. The sole review mechanism for an ICSID award is provided by the ICSID Convention, which (unusually) permits a form of internal appellate review by an ICSID annulment panel.
* Presumptive Obligation to Recognize International Arbitral Awards Under National Arbitration Legislation
* Virtually all national arbitration statutes treat international arbitral awards as binding, with res judicata effect, from the time that they are made, and uniformly treats arbitral awards as mandatory instruments, imposing obligations on the parties to comply with their terms, not recommendations or suggestions for future conduct.
* Virtually all modern arbitration legislation treats awards as presumptively valid in actions to annul (and to recognize or confirm) such awards, while permitting annulment only on specified and limited grounds.
* In Switzerland, US, France and England, annulment of international awards is viewed as an exceptional occurrence, with the overwhelming majority of all awards being upheld in the face of annulment challenges.
* Presumptive Validity of Arbitral Awards under UNCITRAL Model Law
* Article 34 of the Model Law provides for the presumptive validity of international arbitral awards, with such awards having binding force and preclusive effects from the moment they are made and being subject to immediate recognition in both local and foreign courts.
* The presumptive validity is subject only to specified exceptions which are set out in Article 36 (dealing with recognition of both domestically-made and foreign awards) and Article 34 (dealing with annulment of domestically-made awards) 🡪 parallel with the non-recognition of grounds in the NY Convention.
* Article 35, Model Law: An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
* procedure for recognition is summary in nature
* the burden is on the award-debtor both to affirmatively raise and prove these defenses
* the standard of proof required to annul (or deny recognition or confirmation of) an award is generally an elevated one, satisfied only in exceptional and narrow circumstances.
* Article 34, Model Law provides **exclusive** grounds for annulment and thus may not be extend by analogy.
* Article 34(2), an award may be annulled only if the party challenging the award establishes one of the following specified grounds as follows:
1. the arbitration agreement was invalid or a party thereto lacked capacity
2. a party was unable to present its case, including for lack of notice
3. the award deals with matters outside the scope of the submission to arbitration
4. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties’ arbitration agreement
5. the dispute is nonarbitrable
6. the award violates local public policy
* Article 34’s grounds for annulment are **permissive and discretionary**, not mandatory. Hence, a court may annul an award if one or more of the Article 34(2) grounds are satisfied, but the court is not mandatorily required to annul the award, even where one of these grounds applies.
* There may be instances where, for example, a procedural error was sufficiently inconsequential that it is held not to affect the award’s validity or justify annulment.
* Party seeking annulment under Article 34 generally bears burden of proof
* The burden of proving that one of the exceptions under Article 34 applies is on the party seeking to set an award aside.
* Article 34(2)(b) which provides for annulment on grounds of nonarbitrability and public policy, is not prefaced by the requirement that the party seeking to annul an award demonstrate that the exception is applicable. This parallels the NY Convention and reflects the power of a national court to raise these issues sua sponte or ex officio.
* Nevertheless, it would be wrong to conclude that the burden of proof allocations are inapplicable to Article 43(2)(b)’s public policy and nonarbitrability exceptions. Many public and policy and nonarbitrability rules are designed in part for the protection of particular parties, and it is entirely appropriate to conclude that the party seeking to annul an award bears the ultimate burden of demonstrating that one of these exceptions applies.
* Article 34’s grounds for annulment are narrowly construed
* The grounds for annulment under this Rule are to be construed in a restrictive manner.
* The standard of review under Article 34 is tailored to preserve the autonomy of the arbitral process and to minimize judicial intervention in that process.
* The limited judicial review under Article rests on “concerns of international community, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of international commercial system for predictability in the resolution of the disputes”.
* These observations apply fully to awards made in locally-seated arbitrations. While locally-seated, the awards are nonetheless international arbitral awards, subject to the UNCITRAL Model Law on International Commercial Arbitration. As a consequence, annulment of these awards gives rise to considerations of international comity, respect for international tribunals and the needs of the international commercial system; that fact, and the international character of the arbitral award, is not altered by the location of the arbitral seat.
* Relevance of NY Convention Authority under Article 34
* The text of Article 34 of the UNCITRAL Model Law closely tracks that of Article V of the NY Convention. Consequently, decisions applying Article V of the Convention are relevant and persuasive authority under Article 34.
* Partial Annulment of Award under Article 34
* Partial annulment of arbitral awards is permitted, and in some cases required, by the UNCITRAL Model Law.
* Article 34(2)(a)(iii) provides for partial annulment of an award where only part(s) of the award exceeded the jurisdiction of the tribunal: “if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.”
* If one part of a tribunal’s award violates the annulment forum’s public policy, or rested on a procedurally-unfair process, then that portion of the award may be annulled, without affecting separable parts of the award that are unaffected by the relevant public policy or procedural objections. This parallels the treatment of partial recognition under the NY Convention and Article 36, Model Law.
* Presumptive Validity of Arbitral Awards under U.S. Federal Arbitration Act
* FAA reflects a strong presumption in favor of the validity and enforceability of arbitral awards including, in particular, international arbitral awards.
* Section 9, FAA: If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award—made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in Secs. 10 and 11 of this title.”
* Sections 10 and 11 then set forth exceptions to the confirmation of awards which are broadly similar (but not identical) to those in Article V of the NY Convention and Article 34, UNCITRAL Model Law.
* U.S. courts have consistently interpreted the provisions of the FAA concerning vacatur and confirmation of awards in a robustly pro-enforcement fashion. The court explained: “The purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings. Accordingly, it is a well-settled proposition that judicial review of an arbitration award should be, and is, very narrowly limited.”
* U.S. Supreme Court recently held, “under the FAA, courts may vacate an arbitrator’s decision only in very unusual circumstances.”
* Confirmation of an award is mandatory, subject to limited exceptions. Except where an award may be vacated, on one of the specific grounds identified in Sec. 10, US courts are required to confirm it. The grounds set forth in Sec. 10 are in principle exclusive, although US courts have recognized non-statutory public policy and manifest disregard grounds for vacatur.
* Federal standards for vacatur under the FAA are preemptive under US law superseding more expansive grounds for vacatur under state law.
* Confirmation of an award under the FAA is a summary procedure, intended to safeguard the expeditious character of the arbitral process. The burden of proof in a vactur action under the FAA is on the award-debtor, and this burden is a substantial one, particularly in international cases.
* A party which seeks to vacate, or delay confirmation of, an award without a substantial basis for doing so is subject to sanctions.
* Presumptive Validity of Arbitral Awards under Other National Arbitral Legislation
* Other national statutes are broadly similar to the UNCITRAL Model Law and FAA, providing for the presumptive validity of awards, subject to only enumerated and exclusive exceptions which parallel those applicable to non-recognition of a foreign award under the NY Convention.
* Under French Law, an award is presumptively valid and enjoys immediate res judicata effect once it has been made. Article 1518 of the French Civil Code provides that the same grounds exist for annulling an international award made in France as those applicable to a French court’s recognition of an award made abroad. French courts have emphasized that substantive judicial review of the merits of the arbitrator’s award is not permitted in an action to annul an international award made in France.
* Article 190 of the Swiss Law on Private International Law provides for the presumptive (and immediately) finality of an international arbitral award made in Switzerland, subject to annulment only on grounds roughly parallel to those in Article 34 of the Model Law and in Article V of the NY Convention (for non-recognition).
* Most common law jurisdictions also provide for binding, res judicata character of international arbitral awards, subject only to limited, exclusive statutory grounds for annulment or non-recognition, generally on the basis of legislation adopting the UNCITRAL Model law. 🡪 England, Canada, Australia, Singapore, HK, India, New Zealand
* The grounds for annulment available under national arbitration legislation are matters of national law and the issues that arise in their application are principally issues of national law. These issues also reflect common principles of international arbitration law as to which decisions in foreign jurisdictions are relevant and instructive in interpreting national annulment provisions.
* Decisions in foreign jurisdictions are particularly important under the UNCITRAL Model Law, because of its character as a uniform international instrument with a common text and drafting history.
* Decisions from foreign jurisdictions are more generally instructive in interpreting annulment provisions in all national legislation dealing with international arbitral awards (regardless whether are Model Law jurisdictions). This is because, regardless of jurisdiction, these provisions all address common problems arising from the same international process, as to which virtually all states share a common approach, reflected in the Convention and Model Law.
* Grounds for Annulling Arbitral Awards under National Arbitration Legislation
* It is fundamental under virtually all national legal systems that an action for the annulment of an international arbitral award is not comparable to an appeal from a lower court judgment. As one US court put it: “In reviewing an arbitration award, courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.”
* An annulment court does not review the arbitral tribunal’s decision in the nature of an appellate proceeding, but instead considers only whether one of a specified number of defined statutory grounds for annulment is present.
* The grounds on which an award may be annulled is a matter governed principally by the law of the judicial annulment forum.
* Grounds available for annulment of an international arbitral award are under contemporary national arbitration regimes:
1. The award was rendered pursuant to an arbitration agreement that, under applicable law, the parties lacked capacity to make or was invalid.
2. The award-debtor was not given proper notice of the appointment of the arbitrator of the arbitration proceedings or was otherwise unable to present his case.
3. The award deals with a different not contemplated by or not falling within the terms of the submission to arbitration.
4. The composition of the arbitral tribunal or the tribunal’s procedures violated either the parties’ agreement or (absent any such agreement) the law of the arbitral seat.
5. The subject matter of the parties’ dispute is not capable of settlement by arbitration, or is “nonarbitrable,” under the law of the annulment forum.
6. Recognition or enforcement of the award would be contrary to the public policy of the annulment forum.
* An award cannot be confirmed (or annulled) unless it is “final” within the meaning of the applicable national arbitration legislation.
* Nonexistent or invalid arbitration agreement
* This ground gives effect to the basic rule that the international arbitral process is based on consent and that, absent consent, an arbitral award is invalid and ineffective.
* General Principles
* The Model Law is representative of national approaches to annulment based on the lack of a valid arbitration agreement.
* Article 34(2)(a)(i), Model Law provides that an award may be annulled if one of the parties was “under some incapacity” or if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State where the action to annul is brought.
* Reflects the fundamental importance of consent to international arbitration; without a valid agreement to arbitrate, there is no basis for either an international arbitration or an international arbitral award.
* The text of the US FAA includes no express provision dealing with the absence of a valid agreement to arbitrate. But US judicial decisions make it clear that the nonexistence of such an agreement is grounds for vacatur of an international (or domestic) arbitral award in the US.
* Burden and Standard of Proof
* It is well-settled that the burden of showing the invalidity of an arbitration agreement under Article 34(2)(a)(i0 of the Model Law (or parallel provisions of other national arbitration statutes) is on the party seeking annulment.
* There is limited authority on the standard of proof that must be satisfied in order to demonstrated that an arbitration agreement is invalid. But the likely approach in most jurisdictions would be a generally-applicable “balance of probabilities” or a “more likely than not” showing with regard to the existence and validity of the arbitration agreement.
* Separability Presumption
* The consistent rule is that international arbitration agreements are presumptively separable from the underlying commercial contract with which they are associated.
* The separability presumption concerns the existence and substantive validity of the arbitration agreement, rather than issues of arbitrator’s competence-competence.
* In order to set aside an award under Article 34(2)(a)(i), it is necessary to demonstrate that the agreement to arbitrate itself—not the underlying contract—is nonexistent or invalid.
* While there are variations in the separability presumption among national legal systems, virtually all jurisdictions provide that an award cannot be annulled on the grounds that the arbitrators incorrectly decided that the parties’ underlying contract was invalid, unenforceable, or illegal; those claims do not concern the validity, enforceability, or existence of the arbitration agreement itself, and there are not grounds for annulment under Article 34(2)(a)(i) of the Model Law or comparable provisions of other legislation.
* Same conclusion applies to claims that the underlying contract was procured by fraud, was invalid by reason of unilateral or mutual mistake, was invalid for lack of consideration, was unconscionable, was terminated or rescinded, was invalid for failure of a condition precedent to the underlying contract, or was illegal, or allegations that the claimant’s claims are time-barred.
* In some jurisdictions, such as the US and England, courts inquire whether a claim is directed “specifically” at the validity or legality of the arbitration agreement. If not, then the claim only involves the alleged invalidity of the underlying contract and therefore does not provide grounds for annulment under Article 34(2)(a)(i) of the Model Law or comparable provisions of other statutes.
* Conversely, if a claim of invalidity is directed “specifically” at the arbitration agreement (as in cases involving claims that the arbitration agreement is unconscionable, is asymmetrical, is uncertain, was a contract of adhesion, was not incorporated, lacked consideration, violated public policy, was not an agreement to arbitrate, or has been waived), then it does concern the validity of that agreement and provide grounds for annulment of an award on jurisdictional grounds.
* Formal Validity
* Regardless of content of national form requirements, the formal invalidity of an arbitration agreement provides grounds for annulment of the award, under Article 34(2)(a)(i) of the Model Law and parallel provisions of other national arbitration legislation.
* Article II of the NY Convention imposes a maximum form requirement, which precludes Contracting States from imposing more demanding formal requirements on international arbitration agreements. The said requirement applies in annulment actions in the arbitral seat, as well as in recognition and other proceedings outside the arbitral seat.
* Hence, a Contracting State may not annul an international arbitral award, made locally, on the basis that the arbitration agreement was not contained in a separate instrument, was not printed in all capitals or red ink, was not in large font, and the like.
* Choice of Law Governing Arbitration Agreement
* In principle, the same choice-of-law rules that apply to the enforcement of arbitration agreements also apply in the context of the annulment of awards under Article 34(2)(a)(i) of the Model Law and parallel provisions of other national arbitration statutes.
* Different choice-of-law rules apply to, and different substantive laws are potentially applicable to, the formation and substantive validity of international arbitration agreements, the formal validity of arbitration agreements and the capacity of the parties to conclude arbitration agreements.
* The law governing the substantive validity of international arbitration agreements in annulment proceedings is generally prescribed by the NY Convention and parallel provisions of national arbitration legislation. The choice-of-law rules for selecting the law governing the substantive validity of the parties’ arbitration agreements in recognition proceedings as set forth in Article V(1)(a) are also applicable in annulment proceedings, by virtue of Article II of the Convention.
* The Convention requires a systematic interpretation of Articles II and V, with Article V(1)(a)’s choice-of-law rules being incorporated in Article II, and thereby being made generally-applicable in Contracting States, including in annulment proceedings.
* Under Article V(1)(a), an award need not be enforced if the parties’ arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award is made.
* The same standard is prescribed by Article 34(2)(a)(i) of the Model Law, which provides in identical terms that the validity of the arbitration agreement is governed by the law chosen by the parties and, in the absence of such choice, by the law of the state where the annulment application is filed.
* The better view is that Articles II(1) and V(1)(a) of the Convention, and Article 34(2)(a)(i) of the Model Law, require application of a validation principle in selectin the law applicable to the substantive validity of the arbitration clause. This applies fully in annulment proceedings, under both Articles II and V(1)(a) of the Convention and 34(2)(a)(i) of the Model Law, each of which contemplates that the law to which the parties have subjected their arbitration agreement is a validation principle giving maximum effect to that agreement.
* The second limb of Articles 34(2)(a)(i) and V(1)(a), providing for secondary application of the law of the state where the annulment application is filed to the substantive validity of the arbitration agreement prescribes a mandatory, default choice-of-law rule for international arbitration agreements, requiring application of the law of the annulment forum in cases where the parties have neither expressly nor impliedly chosen the law governing the arbitration clause. In virtually all cases, this will also be the law of the arbitral seat, since annulment actions may only be pursued in the arbitral seat.
* In a number of jurisdictions, courts apply either international law principles or a validation principle to the substantive validity of international arbitration agreements, in both cases aimed at giving effect to international arbitration agreements notwithstanding discriminatory or idiosyncratic rules of national law.
* The better is that the NY Convention and Model Law require application of a validation principle to the choice of the law governing international arbitration agreements (on the basis that a validation principle reflects the parties’ implied choice of law for their arbitration agreement).
* Article 34(2)(a)(i)’s fallback choice-of-law rule should be interpreted to include both a validation principle and international principles of neutrality (on the basis that these principles as themselves either the parties’ implied choice or the law of the annulment forum).
* Under the (US) Restatement approach, the default rule for the law governing the substantive validity of international arbitration agreements is the law selected by a contract’s general choice-of-law clause.
* If the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly), a general choice-of-law clause in the contract determines the law governing the validity of the arbitration agreement. If the parties have neither selected any law to govern the arbitration agreement nor included in the contract a general choice-of-law clause, the law of the seat of arbitration, without resort to its choice-of-law rules, governs the issue.
* Note: It is argued that this US approach however should not be generally followed because it is clear that where the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly), the second prong of Article 34(2)(a)(i) of the Model Law and Article V(1)(a) of the NY Convention specifically prescribe a default choice-of-law rules, i.e., the law of the arbitral seat, not the law governing the parties’ underlying contract. Courts in Contracting States are not free to reject this default rule, which is mandatorily applicable by reason of Article II of the Convention.
* Article 34(2)(a)(i) of the Model Law permits annulment of an award where one of the parties lacked the capacity to conclude a binding arbitration agreement. This reflects more general principles regarding the invalidity of the arbitration agreement (which require that the parties have capacity to conclude the agreement), which would apply even in the absence of specific statutory language.
* It also provides that the parties’ capacity is to be determined by the law “applicable to them”, or their “personal law”, thus reflecting generally-applicable choice-of-law principles.
* The better approach in the context of capacity to conclude an international arbitration agreement is to apply a validation principle. Applying a validation principle, the parties’ capacity should be upheld so long as it validly exists under the law of any state with a reasonable relationship to the transaction in questions.
* Questions of formal validity of international arbitration agreements are governed by Article 7 of the Model Law and parallel provisions of other national arbitration legislation, in each case subject to the uniform international maximum standard for form requirements prescribed by Article II of the Convention.
* In many cases, the law governing the formal validity of an international arbitration agreement in annulment proceedings is the law of the arbitral seat and annulment forum, subject to Article II’s international maximum standard.
* Parties may however agree upon the law governing issues of formal validity, in which case, the implied choice-of-law analysis and validation principle applicable to issues of substantive validity should be equally applicable.
* Hence, if an arbitration agreement is formally valid under the law governing the underlying contract, the law of the arbitral seat, or the law of the recognition forum, it will be formally valid for purposes of an annulment proceeding.
* The NY Convention should be interpreted as imposing international limits on the grounds of invalidity on which international arbitration agreements may be challenged.
* Only generally-applicable rules of contract law, and not discriminatory rules that singe arbitration agreements out for special or unusual burdens, may be invoked to challenge the validity of an international arbitration agreement that is subject to the Convention.
* Article II(3) of the Convention requires—as a uniform international rule, applicable in annulment as well as enforcement proceedings—the recognition of international arbitration agreements except where such agreements are invalid under generally-applicable, international-neutral contract law defenses that do not impose discriminatory requirements or conditions on the formation or validity of agreements to arbitrate.
* Under this standard, provisions of national law in Contracting States that impose discriminatory requirements, such as unusual notice requirements (e.g., all capital letters, particular font or colors), consent requirements (e.g., that arbitration agreements are specifically approved, approved by particular authorities, or established by heightened requirements), procedural requirements (e.g., only institutional arbitration agreements or domestic arbitral seats are permitted), or invalidity rules (e.g., arbitration agreements applicable to future disputes, fraud claims, or tort claims are invalid) are all impermissible under the Convention’s international standard.
* Preclusive Effect of Prior Jurisdictional Ruling by Arbitral Tribunal
* There is still no clear rule or guidance as regards the preclusive effect of prior jurisdictional ruling by arbitral tribunal.
* Many national courts apply a de novo standard of judicial review to jurisdictional determinations of arbitral tribunals under Articles 16(3) and 34(2)(a)(i) (at least as far as issues of law are concerned). 🡪 UNCITRAL Model Law jurisdictions, US, France, England
* Courts in some Model Law states appear to accord a substantial degree of deference to arbitral rulings on jurisdiction, including on legal conclusions.
* A de novo approach to judicial review of jurisdictional rulings also applies in the US. The general rule in vacatur proceedings under the FAA is that arbitrators’ jurisdictional decisions are subject to de novo judicial review. The US Supmree Court has repeated underscored this point by holding that: “If the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently.”
* Thus, if the arbitrators have not been granted the power to finally resolve jurisdictional disputes, then their award will be subject to an action to vacate under Sec. 10(a)(4) of the FAA; judicial review of decisions regarding the existence or validity of an arbitration agreement under said Section is de novo, affording no deference to the tribunal’s jurisdictional findings or conclusions.
* The better view is that US courts would nonetheless give at least some weight to the factual findings of arbitrators, particularly where those findings were based on a complete evidentiary record and involved issues of industry expertise.
* English courts also review jurisdictional decisions by arbitrators concerning the existence or validity of the arbitration agreements on a de novo basis, often without any suggestion of deference to the arbitrators’ legal conclusions or factual findings.
* The French Cour de cassation has also held that “There is no restriction upon the power of the courts to examine, as a matter of law and in consideration of the circumstances of the case, elements pertinent to the grounds in question in particular, it is for the court to construe the contract in order to determine itself whether the arbitrator ruled in the absence of an arbitration clause.”
* Swiss Courts review jurisdictional awards on a de novo basis, although only after according a substantial degree of deference to the factual findings of arbitral tribunals.
* Despite a general standard of de novo review, and the refusal of many national courts to grant formal preclusive effect to arbitrators’ jurisdictional rulings, courts in a number of jurisdictions have accorded a substantial degree of deference to arbitrators’ factual determinations and legal conclusions regarding the existence or validity of arbitration agreement in annulment proceedings. 🡪 US, Canada, Swiss, among others
* This is particularly true where the arbitral tribunal has conducted extensive fact-finding (especially involving witness credibility), has particular expertise in the commercial sector at issue, in the applicable law (especially when the reviewing court does not).
* National courts have also distinguished between annulment based on the nonexistence or invalidity of the arbitration agreement and annulment based on exceeding the scope of a concededly valid arbitration agreement. As to the latter category, many courts have accorded the arbitrators’ decisions regarding the scope of the arbitration agreement substantial deference.
* Negative Jurisdictional Rulings 🡪 where arbitral tribunals hold that there is no valid arbitration agreement or that one party lacked capacity to conclude the alleged arbitration agreement.
* With regard to negative jurisdictional rulings, the better approach is to treat them as awards in the same manner as other types of non-jurisdictional awards with the same degree of finality and preclusive effect as positive jurisdictional award.
* It makes no sense to accord a negative jurisdictional award no, or reduced, preclusive effects or possibilities for judicial review. Thus, if an arbitral tribunal considers whether there is a valid arbitration agreement, or whether a party lacked capacity and concludes that no valid agreement or capacity existed, then the tribunal’s resolution of the relevant factual and legal issues should be no less binding and no less subject to annulment than other jurisdictional determinations by an arbitral tribunal.
* The same de novo standard of judicial review that applies in annulment proceedings involving negative jurisdictional rulings should in principle apply to positive rulings. The same deference to the arbitrator’s fact-finding and industry or legal expertise that applies to positive jurisdictional rulings is also applicable to negative jurisdictional decisions.
* A number of legal systems permit parties to agree to finally resolve jurisdictional disputes by arbitration (and give binding effect to such agreements). 🡪 US, England, Canada, UNCITRAL Model Law jurisdictions.
* But in Germany, such agreements are void and unenforceable.
* First Options Case: Parties may agree to finally resolve “arbitrability” issues by arbitration, provided that there is “clear and unmistakable” evidence of that agreement. The decisive issue is whether the parties have “agreed to submit the arbitrability questions itself to arbitration,” or “agreed to arbitrate arbitrability,” which requires “clear and unmistakable evidence” that the parties concluded such an agreement.
* Where parties have “clearly and unmistakably” agreed to finally resolve disputes over the validity and enforceability of their arbitration agreement by arbitration, then the substance of the arbitrators’ jurisdictional ruling will be subject to only minimal review of the merits under the FAA.
* In such a case, the court’s standard in reviewing the arbitrator’s decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.
* Under the approach adopted by most US courts, challenges to the existence of the arbitration agreement are treated differently from challenges to the validity or enforceability of that agreement. Many lower US courts have held that challenges to the existence of any arbitration agreement are necessarily for judicial determination, regardless of any alleged agreement to finally resolve jurisdictional disputes by arbitration.
* Rationale: where a party denies that it has concluded any agreement at all, there cannot be “clear and unmistakable” evidence of an agreement to arbitrate arbitrability issues; any such evidence, in the form of the putative arbitration agreement, is necessarily disputed and cannot satisfy First Options’ requirement for “clear and unmistakable” evidence.
* The general view is that parties may agree to finally resolve at least some jurisdictional disputes by arbitration, with the consequence that the jurisdictional rulings of the arbitrators will be subject to minimal substantive review. 🡪 England, Canada, US, and other UNCITRAL Model Law jurisdictions
* It is important to distinguish an arbitral tribunal’s “procedural” rulings from its “jurisdictional” decisions: only jurisdictional rulings are subject to de novo judicial review in annulment proceedings, while procedural rulings are generally entitled to substantial deference and subject to only minimal judicial review.
* Most “procedural” rulings by arbitral tribunals during the course of an arbitration (e.g., disclosure and privilege rulings, evidentiary decisions, timetable for arbitration, decisions regarding stays or suspension of arbitral proceedings, confidentiality rulings and the like) are clearly non-jurisdictional in character and are not subject to judicial review under Article 34(2)(a)(i) of the Model Law or parallel provisions of other national arbitration legislation.
* With respect to pre-arbitration procedural requirements (e.g., requirements to negotiate in good faith, to mediate, or to pursue some alternative form of dispute resolution prior to commencing arbitral proceedings), even where they are enforceable, they are regarded as raising issues of “admissibility”, rather than jurisdiction, with the consequence that they are not subject to de novo judicial review in an annulment proceeding.
* US courts have generally held that “procedural” issues do not constitute jurisdictional objections, which are subject to de novo judicial review in an annulment proceeding.
* Procedural rulings by the arbitrators are subject to minimal judicial review.
* But note Republic of Argentina v. BG Groups plc, where the US appellate court vacated an award made in the US under the Us-Argentina BIT on the grounds that the BIT’s requirement for litigation in local (Argentine) courts prior to initiating arbitration had not been satisfied. The court held that the BIT’s pre-arbitration litigation requirement was a jurisdictional requirement (distinguishable from other procedural requirements regarding the conduct of the arbitral process itself) and that compliance with that requirement was reviewable on a de novo basis in a vacatur proceeding under the FAA.
* In general, where a prior judicial decision on jurisdictional issues was rendered by a court in the arbitral seat, that decision will have preclusive effects in annulment proceedings. But, that will not be the case where a judicial determination of jurisdiction was on a prima facie basis (because the issue in annulment proceedings will be whether the jurisdictional rulings was correct, not whether there was a prima facie basis for jurisdiction).
* Lack of Capacity
* All national arbitration regimes permit annulment of an award because one of the parties lacked the capacity to conclude a binding arbitration agreement.
* Even in jurisdictions where arbitration legislation does not provide expressly that lack of capacity to conclude the arbitration agreement is grounds for annulment, courts have reached this conclusion without hesitation.
* The award-debtor bears the burden of proof with respect to a lack of capacity under Article 34(2)(a)(i0 and parallel provisions of other national arbitration legislation.
* The “incapacity” relevant to annulment on jurisdictional grounds is the lack of capacity to conclude a binding agreement to arbitrate, as distinguished from capacity to conclude the underlying contract. 🡪 required by separability presumption
* A party’s incapacity must be assessed as of the time the parties concluded the arbitration agreement.
* Waiver of Jurisdictional Objections
* It is elementary that jurisdictional objections may be waived. If a party does not challenge the existence or validity of the putative agreement to arbitrate relatively early in the arbitral proceedings, then virtually all national legal systems preclude subsequent jurisdictional objections, including in annulment proceedings.
* Decisions under the Model Law have held that if a party did not challenge the existence of an arbitration agreement at the latest in the statement of defense (as required by Article 16(2)), it was precluded from subsequently raising that objection under Article 34.
* The failure of a party to object to an arbitral tribunal’s jurisdiction in a timely manner constitutes an implied agreement to proceed with resolution of the parties’ disputes by arbitration, which is subject to recognition and enforcement under the NY Convention and national arbitration legislation, in the same manner as other arbitration agreements.
* In most jurisdictions a party can remain inactive and raise a jurisdictional objection for the first time in an action to enforce or confirm the award by an award-creditor. This is provided for by Article 36 of the UNCITRAL Model Law which permits parties to raise in confirmation actions, including the arbitral seat, the same grounds that are available for annulment.
* It is held in some Model Law jurisdictions that a party is required to challenge a jurisdictional ruling under Article 16(3) when the ruling is made, and that failure to do so waives subsequent rights to challenge the ruling under Article 34 (and Article 36).
* Denial of Opportunity to Present Case
* A tribunal’s failure to afford the losing party an equal and adequate opportunity to present its case during the arbitration can provide grounds for annulling an award under all national arbitration regimes. This is related to the failure to comply with the parties’ agreed arbitral procedures.
* Article 34(2)(a)(ii), Model Law:
* is representative of national arbitration legislation providing for annulment based on serious procedural unfairness
* provides that an award may be annulled if the applicant “was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.”
* modeled close on Article V(1)(b) of the NY Convention Convention, and is directed towards denial of notice or an opportunity to be heard and similar types of serious procedural unfairness.
* Section 10(c) of the FAA provides that an award may be set aside “where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.”
* Article 1520 of the revised French Civil Code permits annulment of an award “if due process has not been respected.”
* The European Convention Providing a Uniform Law on Arbitration and other international instruments adopt similar bases for annulment of awards.
* The English Arbitration Act, 1996, is sui generis and provides a catalogue of the principal grounds for serious procedural irregularity justifying setting an award aside; these include:
1. failing to deal with all the issues presented to the tribunal,
2. failing to conduct the arbitral proceedings in accordance with the parties’ arbitration agreement,
3. failing to render an award free from ambiguity,
4. failing to conduct the proceedings fairly and equitably and exceeding the arbitral tribunal’s powers
* These procedural defects will only warrant setting an award aside if they caused substantial injustice to the party challenging the award.
* Annulment of an award based on denial of an equal and adequate opportunity to be heard is related to, but distinguishable from, annulment of an award for failure to comply with the parties’ agreed procedural arrangements.
* It is fundamental that an award may be annulled based simply on a violation of mandatory procedural protections imposed by applicable law, regardless of the terms of the parties’ agreement regarding the arbitral procedures.
* The opportunity to be heard, and the right to equal treatment, entail mandatory procedural guarantees; these guarantees apply even in the absence of an agreement by the parties on arbitral procedures and, in some cases, will override the parties’ procedural agreement.
* It is also essential to formulate and apply mandatory procedural guarantees in the context of specific agreements to arbitrate, including both the parties’ procedural agreements and expectations.
* Equally important, mandatory national law restrictions on the parties’ agreed arbitral procedures are subject to international limitations, imposed by Article II and V(1)(d) of the NY Convention. These provisions should be interpreted to preclude application of discriminatory or idiosyncratic mandatory procedural requirements by Contracting States, including in annulment actions.
* Several related procedural guarantees are incorporated into Article 34(2)(a)(ii), including the right to: (a) equal treatment; (b) an adequate opportunity to present one’s case; and (c) regular, nonarbitrary procedures.
* These safeguards apply generally to all aspects of the arbitral procedures, including constitution of the tribunal, presentation of both factual evidence and legal argument and opportunities to respond to ether the other party’s case or to new arguments identified by the arbitrators.
* Swiss decision: The right to be heard … provides each party with the right to state all its factual and legal arguments on the object of the dispute and to provide necessary evidence, as well as the right to participate in hearings and to be represented or assisted in front of the arbitrators.
* German courts have adopted similar reasoning and held that the right to be heard entails two related sets of rights: (a) a party is entitled to present its position on disputed issues of fact and law, to be informed about the position of the other parties and to a decision based on evidence or materials known to the parties; and (b0 a party is entitled to a decision by the arbitral tribunal that takes its position into account insofar as relevant.
* Many national courts have held that local standards of procedural fairness in the arbitral seat apply in an application to annul an international award.
* US Court in an annulment action under the FAA has held that “an arbitral award should be denied or vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard as our due process jurisprudence defines it.”
* Absent a choice of a foreign procedural law by the parties, the law of the arbitral seat (and annulment forum) provides the procedural law of the arbitration in virtually all cases, and is fairly clearly the law of the jurisdiction that is most closely connected to the conduct of the arbitral proceedings.
* Note that application of the law of the arbitral seat in the proceedings to annul an international award does not mean that local litigation procedures must be applied by the arbitrators, but only that fundamental requirements of fairness, guaranteed by local law, must be satisfied.
* US courts have held that general procedural guarantees based by analogy on the US Constitution apply in actions to annul international awards made in the US (and not the specific procedural provisions of the Federal Rules of Civil Procedure). In the words of the US decision, “in making evidentiary determinations, an arbitrator need not follow all the niceties observed by the federal courts… The arbitrator need only grant the parties a fundamentally fair hearing.”
* Swiss courts have also held that basic principles of procedural fairness under the Swiss Federal Constitution are applicable in defining the minimum standards of fairness in international arbitrations seated in Switzerland, but that there is no requirement that arbitrators apply the domestic procedural rules applicable in Swiss courts.
* The standards of procedural fairness in an international arbitration should be neither domestic legal standards nor standards applied in litigation contexts, but rather sui generis international standards.
* Hence, even if the basic constitutional guarantees of the arbitral seat provide the starting point for standards of procedural fairness in international arbitral proceedings, it is essential that courts apply those guarantees in light of the international character of the arbitral process.
* The award-debtor bears the burden of proof of procedural unfairness, warranting annulment, and the showing required is a substantial one.
* Similarly, under the UNCITRAL Model Law, the award-debtor has the burden of affirmatively raising claims of procedural unfairness, which cannot be raised ex office by the annulment court, and of establishing those claims.
* The burden of demonstrating procedural unfairness, sufficient to warrant an annulment of an award, is a significant one in most jurisdictions.
* In the words of a leading US decision, “arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant, and barring a clear showing of abuse of discretion, the court will not vacate an award based on improper evidence or the lack of proper evidence.”
* Decisions under Article 34(2)(a)(ii) and analogous statutory provisions generally reflect a pronounced judicial reluctance to annul awards based on alleged procedural mistakes by the arbitrators.
* The same rule applies under the FAA. “Parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.”
* National courts have been almost as deferential to procedural and evidentiary rulings by arbitral tribunals (in the absence of procedural agreements by the parties).
* Principal categories of claims of procedural unfairness:
1. Equality of Treatment
* If a tribunal denies one party equal treatment, by granting its counter-party an opportunity to address an issue, to submit evidence, to produce a witness, or otherwise present its case, without affording comparable opportunities to other parties
* Equal treatment does not require precisely identical treatment (e.g., the same amount of time, number of witnesses) and tribunals are afforded considerable discretion in their procedural decisions.
1. Notice of Hearings
* If a party is not provided notice, or is provided inadequate notice, of hearings or other important steps in the arbitral process
* Factual disputes arise as to the award-debtor’s receipt of the notice of arbitration (or other steps in the arbitral process).
* In a few cases, courts have confirmed awards, notwithstanding the lack of proof that the award-debtor actually received notice, if reasonable diligence was used by the award-creditor or tribunal in attempting to provide notice.
1. Refusal to Hold Hearing
* A tribunal’s refusal to conduct an oral hearing, where it has been requested
* Note however that an arbitral tribunal is generally not required to hold an oral hearing unless a request for such a hearing has been made.
* Arbitrators are not obliged to conduct hearings on every issue that arises in an arbitration and in practice are properly afforded substantial discretion in determining how and whether to hear the parties on particular issues or evidence. Thus, arbitrators are under no obligation to hold any oral hearing at all in an arbitration if they conclude that a hearing is unnecessary.
* It is well-settled that parties are almost always free to agree (including in advance) to dispense with an oral hearing and such agreements (agreements “for documents only” arbitrations) are valid and enforceable.
* An arbitrator’s duty to hold hearing is not discharged by merely allowing a formal presentation by the parties and thereafter disregarding or ignoring it. Having permitted parties to make oral (and other) submissions, the arbitral tribunal is required to take these submissions into account.
1. Adjournment and Scheduling of Hearings or Other Procedural Steps
* The scheduling decisions were made that either seriously impeded their ability to present their case (e.g., prevented the attendance of a witness, granted counsel less preparation or presentation time than requested), or provided adverse parties with some significant, unjustified procedural advantage (e.g., more time to respond).
* Under most national laws, arbitrators are accorded substantial discretion in scheduling and adjourning hearings and, as a consequence, awards are very seldom annulled on these grounds.
1. Language of Arbitration
* The awards did not satisfactorily comprehend or speak the language of the arbitration.
1. Introduction of New Claims
* If a tribunal permits the last-minute introduction of a genuinely new claim, without affording the counter-party an adequate and equal opportunity to respond
1. Exclusion or Admission of Evidence
* Arbitrator’s improper exclusion or admission of evidence
* The basic rule under the FAA is that “in handling evidence, an arbitrator need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing.”
1. Disclosure Rulings
* Based on alleged unfairness in a tribunal’s disclosure rulings (typically, in common law jurisdictions, where parties may claim that the tribunal was required to have granted their requests for disclosure in order to enable them to present their case)
1. Examination and Cross-Examination
* Impropriety of a tribunal’s ruling either permitting or excluding/curtailing witness examination, whether direct or cross.
1. Refusal to Permit Party to Present Argument or Evidence
* Where an arbitral tribunal fails to permit a party to present its argument or evidence, or to respond to its counter-party’s evidence or argument
* Where the award-debtor was (inadvertently) not provided with documents submitted by another party to the arbitral tribunal
* A party is denied the opportunity to participate in the arbitration because of the nonpayment of its shares of the tribunal’s costs
* Where the arbitrators permitted a party to submit evidence, but then did not in fact consider that evidence or argument
1. Arbitrators’ Consideration of Material Outside Record
* Where an arbitrator conducts a substantial fact-finding of material evidence outside the record in the arbitration
* But parties are free to agree to permit arbitrators to undertake independent investigations.
* Arbitrators are permitted to draw on their experience and expertise in evaluating the evidentiary record presented by the parties.
1. Ex Parte Contacts of Arbitrators with Parties
* Virtually all national legal systems and institutional rules presumptively forbid ex parte contacts between the parties (or their counsel) and the arbitrator(s) about the substance of the parties’ dispute.
* Where the parties have agreed to permit ex parte contacts by the arbitrators, they will generally be permissible, provided that the parties are treated equally and fairly.
1. Questioning by Tribunal
* Generally, claims relating to this ground have been rejected. But some national courts have suggested that an arbitrator’s comments that particular issues are irrelevant, or already satisfactorily dealt with, may constitute procedural errors if they lead a party not to present evidence, but the tribunal subsequent changes its mind without informing the parties.
1. Prejudgment by Tribunal
* When an arbitral tribal “prejudged” the issues in dispute, by reaching a decision without affording the parties an opportunity to be heard.
1. Inadequate Internal Deliberations of All Members of Tribunal
* Where there was not meaningful participation in deliberations by all the tribunal members.
1. No Verbatim Transcript
* It is sometimes suggested in common law jurisdictions that the lack of a verbatim transcript of the arbitral hearing is a ground for setting the award.
1. “Surprise” Decisions by Arbitrators
* if the arbitrators rest a decision on factual matters or (less clearly) a legal theory not advanced by the parties, without providing the parties an opportunity to be heard
* But arbitrators are not obligated to give the parties specific invitations to comment on every inference that might be drawn from the evidence or interpretation that might be given to a statute or contract.
* Arbitrators are not required to invite a party to devote detailed attention to what proves to be a (or the) decisive point; the only requirement is that the parties be given the opportunity to address all of the issues upon which the tribunal may base its decision.
* Some jurisdictions distinguish between factual and legal matters and held that an arbitral tribunal has greater freedom to rest a decision on legal grounds not addressed by the parties than with respect to factual grounds that have not been addressed by the parties.
1. Reasoned Awards
* A number of national arbitration statutes require that awards rendered in locally-seated arbitrations be reasoned, with some such statutes providing for the annulment of unreasoned awards.
* In the absence of express statutory provisions of this sort, many courts decline to annul unreasoned awards.
1. Default Awards
* Under most national laws, absent contrary agreement, arbitrators have the power to proceed with an arbitration, notwithstanding one party’s non-participation, and to make a default award.
* Most courts deny to vacate an arbitral award based on this ground.
* It is elementary that only a material violation of a party’s procedural rights can result in annulment.
* An award will not be annulled for procedural unfairness unless it can be demonstrated that the procedural violation had a material effect on the arbitral process or the arbitral tribunal’s decision.
* There is authority for shifting the burden of proof with respect to materiality to the award-creditor: if the award-debtor establishes the existence of a serious procedural unfairness, then some courts hold that the burden shifts to the award-creditor to prove that the irregularity was immaterial.
* The better view is that an award should ordinarily be annulled only if a tribunal’s procedural error had a material effect on the arbitral process or the outcome in the arbitral award; the wrongful denial of an opportunity to be heard on an ancillary or incidental point should not provide grounds for annulling an otherwise valid award.
* Most national arbitration regimes require that parties object to procedural or evidentiary rulings during the proceedings in order to preserve their rights subsequently to seek annulment of an award on the basis of those rulings.
* If parties fail promptly to raise a procedural objection, they will be held to have waived subsequent objections in annulment action.
* The application of waiver principles complements the central role of the parties’ procedural autonomy in international arbitration.
* Annulment under most national arbitration statutes, including Article 34(2) of the Model Law, is discretionary, not mandatory.
* Failure to Comply with Arbitral Procedures Agreed by Parties
* A tribunal’s failure to conduct the arbitral proceedings in accordance with the parties’ arbitration agreement or applicable procedural rules can also provide grounds for annulling an award in most jurisdictions. This basis for annulment is a reflection of, and means of giving effect to, the consensual nature of the arbitral process and the parties’ general procedural autonomy.
* Article 34(2)(a)(iv), Model Law is representative, providing for the setting aside of awards where “the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate.
* This is similar to Article V(1)(d) of the NY Convention, and parallels provisions in other national arbitration statutes.
* The annulment of awards for failure to respect the parties’ procedural agreements is related to, but distinguishable from, the denial of an opportunity to be heard.
* The parties’ procedural agreement may provide for procedures that would not, absent such agreement, be mandatory, but violation of these agreed procedures can nonetheless provide grounds for annulment.
* Conversely, a party’s right to be heard can be denied, by violation of mandatory procedural requirements, even where the tribunal does not violate any procedural arrangement agreed by the parties.
* The text of Article 34(2)(a)(iv) differs in one respect from that of Article V(1)(d) of the Convention. The former permits annulment of an award based on noncompliance with the parties’ agreement only where that agreement was not “in conflict with a provision of this [i.e., the UNCITRAL Model Law] from which the parties cannot derogate.” This could not be found in Article V(1)(d) of the Convention.
* The principal object of Article 34(2)(a)(iv)’s reference to mandatory provisions is Article 18, Model Law and its guarantee of equality of treatment and an opportunity to be heard.
* Where the parties’ agreement on the constitution of the arbitral tribunal or the arbitral procedures violates Article 18, then Article 34(2)(a)(iv) does not provide for annulment of the resulting award if the parties’ agreed procedures are not applied. It is clear that the parties’ agreement on arbitral procedures is only, under Article 34(2)(a)(iv, overridden by mandatory national law (in the arbitral seat), and not by non-mandatory, default rules.
* The award debtor bears the burden of proof of noncompliance with the parties’ agreed procedures.
* The burden of demonstrating procedural irregularities, sufficient to warrant annulment of an award, is a substantial one under most national arbitration regimes.
* Article 34(2)(a)(iv), Model Law provides that an award may be annulled if “the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the arbitration statute in the arbitral seat.”
* This is analogous to the grounds for non-recognition set out in Article V(1)(d), NY Convention, and parallels similar grounds contained in national arbitration legislations.
* Where a tribunal was not constituted in accordance with the parties’ agreement, national courts have held that the tribunal’s award may be annulled. 🡪 US, France, England
* A tribunal’s (or appointing authority’s) failure to comply with the procedural provisions contained in arbitration agreements can constitute grounds for annulling the award.
* Arbitrators may exceed their power within the meaning of Sec. 10(a)(4) of the FAA if they failed to comply with mutually agreed-upon contractual provisions in an agreement to arbitrate.
* An arbitrator may also exceed her authority by failing to provide an award in the form required by an arbitration agreement.
* The failure of a tribunal to adhere to the contractual time limitations included in the arbitration agreements may provide grounds for annulling an award.
* Absent clear language to the contrary, an agreement regarding time limits should not be treated as jurisdictional, but instead as an element of the procedural conduct of the arbitration.
* Hence, an unjustified violation of such an agreement regarding arbitral limits should permit the parties to seek removal of the arbitrator(s), but not to annul an award, once it has been made.
* Some US courts have held that an award is valid if rendered a “reasonable” time following expiry of time limits in the parties’ agreement.
* Most courts inquire into the materiality of the procedural requirements which were not complied with, and will not set aside an award because minor formalities or technical provisions were ignored.
* A party’s failure to object to departures from the parties’ agreed arbitral procedures will virtually always waive any objection in subsequent annulment proceedings.
* Similarly, the failure by a party to object to noncompliance with contractually-agreed time limits has been held to waive objections under Article 34(2)(a)(iv) of the Model Law.
* But a waiver will be found only where a party was aware, or should have been aware, of noncompliance with the parties’ agreed arbitral procedures. So, where no written record of the proceedings was kept by the arbitral tribunal, contrary to the parties’ agreement, but this was not apparent to the award-debtor, a court held that no waiver of rights under Article 34(2)(a)(iv) had occurred.
* Failure to Comply with Procedures Prescribed by Law of Arbitral Seat
* The failure of an arbitral tribunal to comply with procedural requirements imposed by laws of the arbitral seat may, in the absence of contrary agreement by the parties, provide grounds for annulment of the arbitral award.
* Article 34(2)(a)(iv), Model Law provision’s second limb providing for the annulment of an award where the arbitral procedure, failing agreement, was not in accordance with the Model Law.
* This mirrors Article V(1)(d) of the NY Convention, and a number of arbitration statutes.
* Some jurisdictions provide a more limited basis for annulment; in these states, national arbitration law prescribes no mandatory procedural requirements other than the guarantee of an equal opportunity to be heard and there is therefore only a limited basis for annulment of international awards, essentially identical to annulment for denial of an opportunity to be heard under Article 34(2)(a)(ii) or equivalent national statutory provisions. 🡪 US, France, Switzerland
* The award-debtor bears the burden of proof of noncompliance with the law of the arbitral seat. The burden of demonstrating a violation of the law of the arbitral seat, sufficient to warrant annulment of an award, is a substantial one under most national arbitration regimes.
* One of the few instances where awards are exposed to a nontrivial risk of annulment for violation of the law of the arbitral seat involves noncompliance with statutory time limits on the arbitral process.
* A tribunal’s failure to make a final award within applicable statutory time limits can provide a basis for annulling the award under applicable national arbitration legislation, either under provisions generally requiring compliance with the law of the arbitral seat or under provisions specifically addressing statutory time limits.
* As with agreements imposing time limits on the arbitration, statutory time limits should not be regarded as jurisdictional. A tribunal’s failure to comply with a time limit should therefore not generally provide grounds for annulment of an award (although it may be grounds for removal of an arbitrator).
* In general, only where the parties have not made an agreement, express or implied, regarding constitution of the arbitral tribunal is the law of the arbitral seat relevant under Article 34(2)(a)(iv) and similar statutory provisions.
* There may be instances where mandatory law in the arbitral tribunal imposes requirements concerning the arbitrators (e.g., independence and impartiality, capacity, nationality, number), but these grounds are narrow and subject to the NY Convention’s international limitations.
* In jurisdiction where arbitral statutes require the arbitral awards to be made with reasons, the failure of an arbitral tribunal to provide reasons may provide grounds for annulment of an awards.
* Even where national law prescribes particular procedural requirements, annulment of an award should ordinarily be available only in cases involving substantial departures from statutory requirements, which cause material prejudice to the award-debtor.
* Annulment applications based on noncompliance with law of the arbitral seat are subject to claims of waiver. In general, a party’s failure to object to non-compliance with statutory or other requirements of the law of the arbitral seat will be treated as a waiver of subsequent rights to seek annulment on the basis of that noncompliance.
* Waiver is particularly likely in the case of challenges to a tribunal’s composition because of the existence, under most arbitration legislation and institutional rules, of interlocutory challenge mechanisms which enable a party to immediately seek relief for failure to comply with agreed procedures for constituting the arbitral tribunal.
* In virtually all cases, a party’s failure to seek relief through such interlocutory challenge mechanisms will constitute a waiver of rights subsequently to seek to annul the award on grounds which could have been raised in a challenge.
* Arbitrator’s Lack of Independence or Impartiality
* Many national legal systems provide for the annulment of awards if the arbitral tribunal (or a member thereof) did not satisfy applicable standards of independence and impartiality.
* The arbitrator’s lack of impartiality or independence as a basis for annulment is not expressly provided for in Article 34(2), Model Law (or in the recognition of provisions of Article V of the NY Convention).
* US law contains several statutory exceptions to the general obligation to confirm arbitral awards which apply when irregularities have occurred in the constitution of the arbitral tribunal.
* Sec. 10(a)(1), FAA permits vacatur of an award where the “award was procured by corruption, fraud, or undue means,”
* Sec. 10(a)(2) allows vacatur of an award if “there was evident partiality or corruption in the arbitrators”
* Sec. 10(a)(3) permits vacatur of an award if “the arbitrators were guilty of misconduct in refusing to postpone the hearing…or of any other misbehavior by which the rights of any party have been prejudiced.
* Even in the absence of express statutory authority, national courts and commentators have frequently concluded that claims of an arbitrator’s lack of independence or impartiality are impliedly included in the general provisions of Article 34(2) or equivalent annulment provisions of other national laws.
* The impartiality of the arbitral tribunal is central to the arbitral process, and awards by partial or biased arbitrators can be annulled in most jurisdictions.
* Claims of lack of independence or impartiality can be based on Article 34(2)9a)(ii) because a partial tribunal arguably denies a party an opportunity to present its case; or on Article 34(2)(a)(iv) because a partial tribunal is arguably not constituted in accordance with the parties’ agreement or with applicable law; or on Article 34(2)(b)(2) because a partial tribunal arguable violates conceptions of procedural (or other) public policy.
* The party seeking annulment of award bears the burden of demonstrating the arbitrator’s lack of independence and impartiality.
* An arbitrator can be removed based on “justifiable doubts” regarding his or her independence or impartiality—a standard that does not require establishing that it is more likely than not that the arbitrator was biased or partial or that the arbitral tribunal’s decisions are or would be materially affected by that bias.
* An annulment of an award cannot be based upon “doubts” about (or “risks” of) arbitrator bias, but instead requires a showing, by a preponderance of the evidence, that an arbitrator was in fact biased or lacked the requisite independence; it also requires a showing of materiality and prejudicial effects of the arbitrator’s bias on the arbitral process—which can provide a substantial obstacle to annulment of an award, based on one arbitrator’s asserted lack of impartiality, made after a lengthy and otherwise satisfactory arbitral process.
* In considering challenges to an arbitrator’s impartiality and independence, courts also sometimes rely on the fact that the arbitral award was unanimous: the implicit or explicit points is often that the chairman and the party-nominated arbitrator of the party resisting enforcement agreed with the award’s result and therefore, any bias by one arbitrator was either harmless error or of minimal importance.
* Most contemporary national arbitration statutes and institutional rules require that all of the arbitrators, including the co-arbitrators, remain impartial and independent (absent contrary agreement).
* Challenges to an award based on an arbitrator’s alleged lack of impartiality raises issues of waiver. In many jurisdictions, an arbitrator’s alleged lack of independence may be raised in national courts during the arbitral proceedings, without awaiting a final award. Most institutional rules provide challenge procedures, by which an arbitrator may be removed during the course of the arbitral proceedings for lack of independence or impartiality.
* If a party fails to challenge an arbitrator’s impartiality and independence pursuant to either statutory or institutional challenge mechanisms, notwithstanding notice of the factual grounds for challenge to the arbitrator, it will generally be held to have waived the right to seek annulment of an award on these grounds.
* Where a party was fully award of facts which could possibility indicate arbitrator partiality at the time of the arbitration hearing and that party fails to make an objection during the course of the hearing, it waives its right to object. 🡪 US, France, Switzerland, England
* The failure of a party to challenge an arbitrator, either before an arbitral institution pursuant to institutional rules or before the arbitral tribunal, has been held to waive subsequent claims to annul an award on grounds of arbitrator bias.
* Where a party invokes interlocutory statutory and institutional challenge procedures during the course of the arbitration, and an arbitrator is not removed, then issues of preclusion arise. Where a court in the arbitral seat rejects a claim that an arbitrator lacks the requisite independence and impartiality, in an interlocutory challenge, then that decision may be preclusive, or at least persuasive evidence, in a subsequent proceeding to annul an award on the same grounds of arbitrator bias.
* In most jurisdictions, courts have held that an institutional decision, in an action to remove an arbitrator under institutional arbitration rules, does not have preclusive effects in a subsequent proceeding to annul an award based on the arbitrator’s lack of independence or impartiality.
* These decisions are in some instances, based on an interpretation of the relevant institutional rules, concluding that such rules cannot be interpreted as giving preclusive effects to a challenge decision in subsequent proceedings seeking annulment of an award based on an arbitrator’s lack of impartiality or independence.
* Other decisions appear to hold that, even if institutional rules expressly provided that an institutional challenge decision is preclusive in subsequent annulment proceedings, those rules would not be enforceable.
* If parties in fact agree that an institutional challenge decision will be binding and preclusive in subsequent annulment proceedings, then it should enforceable.
* In the US, were broad pretrial discovery rights exist, a number of courts have held that the Federal Rules of Civil Procedure (including the discovery provisions) are in principle applicable to actions to vacate an award under the FAA based on alleged bias of the arbitrator(s).
* US courts will generally not order discovery relating to potential bias of arbitrators unless the party resisting enforcement provides strong, independent evidence of possible bias.
* Excess of Authority
* An award may be set aside in most legal systems if the arbitral tribunal has “exceeded his authority.”
* Article 34(2)(a)(iii), Model Law provides that an award may be annulled if it “deals with a dispute not contemplated by or not falling within the terms of the submissions to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.”
* This is modelled on the grounds for non-recognition in Article V(1)(c) of the NY Convention, and paralleled in many arbitration statutes.
* This ground for annulment is directed towards cases where a valid arbitration agreement existed, but the matters decided by the tribunal either exceeded the scope of that agreement or the scope of the issues presented to the tribunal by the parties in the arbitration; also where the tribunal failed to decide matters presented to it in the arbitration.
* Award-debtor bears the burden of proof of an excess of authority.
* The burden of demonstrating an excess of authority, sufficient to warrant annulment of an award, is a substantial one under most national arbitration regimes.
* Recurrent Grounds for Excess of Authority Claims
1. Awards ruling on matters outside scope of parties’ submissions
* Article 34(2)(a)(iii) permits annulment of awards where the arbitrators “ruled on issues not presented to them by the parties” 🡪 “extra petita” or “ultra petita”
* Clear example is a tribunal’s award of relief that neither party requested
* But an award will not be subject to annulment where the arbitrators grant relief that, while different from what a party requested, is subsumed within relief that the party requested (most obviously, a lower quantum of damages than that requested by the claimant).
* Another example is deciding issues or disputes that the parties have not submitted to the arbitral tribunal.
* Further example is when the arbitral tribunal makes an award after becoming functus officio.
1. Awards failing to address mattes within parties’ submissions
* If a tribunal fails to consider all of the issues that have been submitted to it (“infra petita”), the award may be annulled under at least some national laws.
* There is no provision in the Model Law that provides for annulment in the case of infra petita.
* The better view is that awards should generally be subject to annulment on infra petita grounds, including when arbitration legislation contains no express provision to that effect, because an arbitral tribunal’s failure to consider issues presented to it in fact amounts to an excess of authority, even if it appears only to be the reverse, because it effectively rewrites the tribunal’s mandate, which is an act beyond the arbitrator’s competence; that is particularly true when a tribunal fails to consider defenses or counterclaims related to relief that it does grant.
* The presumption is that arbitrators did not decide matters infra petita, but rather decided all the disputes submitted to them (including by impliedly rejecting claims and defenses not specifically addressed). Only where it is clear that the arbitral tribunal failed to consider and resolve a particular claim should a finding of infra petita be possible.
1. Awards addressing matters outside scope of arbitration agreement.
* An award will be subject to annulment if an arbitral tribunal purports to decide issues that are not within the scope of the arbitration agreement.
* Doubts regarding the scope of such agreement will be resolved in favor of including matters within such agreement.
1. Standard of review of interpretation of scope of arbitration agreement
* Some courts have considered the scope of arbitrator’s jurisdiction de novo, without any deference to the tribunal’s jurisdictional determination.
* Other annulment decisions according varying degrees of deference to arbitral rulings on the scope of an arbitration agreement.
* Where the parties have agreed to submit the questions of the scope of a concededly valid arbitration agreement to arbitration, courts in the US and elsewhere will generally give broad deference to the arbitrator’s jurisdictional ruling treating it in the same manner as any other substantive determination.
* Even in the absence of such an agreement, some annulment courts grant a considerable degree of deference to arbitral tribunals’ decisions about the scope of their jurisdiction, usually on the basis that such determinations entail an interpretation of the parties’ underlying contract, which is for the arbitrators.
1. Incorrect substantive decision on merits of dispute
* As one US decision put it, “we are limited to determining whether the Arbitrator did the job he was told to do, i.e., whether he acted within the scope of his powers; not whether he did it well, correctly, or reasonably, but simply whether he did it.”
* The arbitrator’s construction holds, however good, bad or ugly.
* In Stolt-Nielsen SA v. AnimalFeeds Int’l Corp., the US Supreme Court held that an award may be vacated for an excess of authority if the “arbitrator stray[ed] form interpretation and application of the agreement and effectively dispense[d] his own brand of industrial justice.”
* In Oxford Health Plans LLC v. Sutter, the Court clarified that the burden of proving an excess of authority under Sec. 10(a)(4) was firmly on the award-debtor and that this was a very significant (“heavy”) burden that would be satisfied only in “very unusual” circumstances. “In Stolt-Nielsen, the arbitrators did not construe the parties’ contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators’ decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role.”
1. Awards ex aequo et bono
* Where an arbitral tribunal which has not been granted amiable compositeur or ex aequo et bono authority but renders an award not based on legal principles.
* Most national arbitration regimes provide that an arbitral tribunal may only decide ex aequo et bono if expressly authorized to do so by the parties.
1. Application of incorrect system of law
* Save where an arbitrator expressly refuses to give effect to a concededly valid choice-of-law clause, and instead applies some other legal system, an award’s disposition of choice-of-law issues falls within the arbitrator’s mandate to decide the substance of the parties’ dispute and is subject to the same (generally very limited or nonexistent) judicial review that exists for other substantive decisions.
1. Arbitrators’ remedial authority
* Most national arbitration regimes accord international arbitral tribunals broad authority over remedial matters: in general, arbitrators possess remedial authority at least as expansive as that of national courts. Arbitral awards are annulled for excess of authority with respect to exercise of remedial authority only very rarely.
1. Arbitrators’ procedural rulings
* When the arbitral tribunal’s procedural rulings do not comply with either the parties’ agreement regarding arbitral procedures or the law of the arbitral seat.
1. Class arbitrations
* Most authority addressing class arbitrations I sunder the FAA in the US.
* The recent view of the US Supreme Court is that the question whether the parties have agreed to class arbitration may be categorized as a jurisdictional issue, presumptively subject to de novo judicial review.
* It is submitted that this view appears correct: the decision whether an agreement to arbitrate contemplated a class arbitration, between a large, often indeterminate number of parties, is the sort of question concerning the fundamental character and structure of the arbitral process, as well as the identities of the parties, that commercial parties would ordinarily expect a court, rather than arbitral tribunal, to resolve.
1. Material excess of jurisdiction and prejudice
* Article 34(2)(a)(iii) requires a material excess of jurisdiction, rather than a trivial or incidental excess, in order to warrant annulment of an award.
1. Partial annulment of award
* Article 34(2)(a)(iii) provides expressly for partial recognition of an award where only part(s) of the award exceeded the tribunal’s jurisdiction.
1. Waive of excess of authority
* It is essential that the party claiming that the arbitrators exceeded the scope of the arbitration agreement or parties’ submission have raised its jurisdictional objection during the arbitral proceedings.
* Jurisdictional objections are subject to waiver, including through a failure to raise such objections in a timely manner.
* Nonarbitrability of Dispute
* Article 34(2)(b)(i) of the Model Law provides that an award may be annulled if the court finds that “the subject-matter of the dispute is not capable of settlement by arbitration” under the law of the judicial annulment forum.
* This is modeled on Article V(2) of the NY Convention, amended only slightly to confirm expressly that the nonarbitrability standards of the annulment forum apply, and is also paralleled closely by other arbitration legislation.
* The applicability of the nonarbitrability rules of the arbitral seat in an annulment action does not necessarily mean that those rules, by their own terms, apply in particular cases. Thus, if the arbitration concerned matters having no connection to the arbitral seat, governed by foreign law, there would ordinarily be no reason to apply the nonarbitrability rules of the arbitral seat to claims governed by foreign law.
* The better view is that the NY Convention imposes limits on national arbitrability rules.
* The burden of proof with respect to a nonarbitrability questions is generally on the award-debtor.
* The better view is that nonarbitrability objections should be capable of waiver. This is particularly appropriate where the asserted nonarbitrability rules exist principally for the protection of particular commercial parties, who are in principle capable of waiving those rights, as opposed to statutory regimes directed principally to the protection of third parties or public interests.
* Public Policy
* It is well settled in most jurisdictions that an arbitral award may be annulled if it violates a limited number of fundamental public policies or mandatory laws.
* Article 34(2)(b)(ii), Model Law provides that an award may also be annulled if the relevant court finds that “the award is in conflict with the public policy of the State.”
* Even in jurisdictions (such as US) where no statutory public policy basis for annulment exists, courts have recognized the doctrine as “a specific application of the more general doctrine, rooted in common law, that a court may refuse to enforce contracts that violate law or public policy.”
* It is clear that the concept of “public policy” for purposes of annulment of international arbitral awards, refers to a relatively narrow category of non-waivable rules of mandatory law that are fundamental to the legal or social order of a jurisdiction.
* In order for a public policy to provide a basis for vacating an award under the FAA, the policy must be “explicit,” “well-defined and dominant.” Public policies may only be derived “by reference to the laws and legal precedents,” and not from “general considerations of supposed public interests.”
* It is not sufficient to warrant annulment that an award contains statements or conclusions that violate applicable public policy. The dispositive provisions of the award must concretely violate applicable public policy.
* Application of the public policy doctrine in annulment actions raises choice-of-law questions. Article 34(2)(b)(i) provides that the “public policy of the State” is applicable in annulment actions, and most national courts appear to have adopted this approach.
* **Cases**
* **Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan [2010] U.K.S.C. 46 (\*skim read only\*)**

The court dispelled any doubt, from an English law perspective at least, that the

principle of competence competence was not a generally accepted principle

supporting the efficacy of international arbitration. The court emphasised,

however, that, on enforcement, the last word on whether a tribunal actually has

jurisdiction is a matter for the courts of the place of enforcement. As regards the

degree of weight and deference which should be attached to a tribunal’s

determination of its own jurisdiction, the court was clear in its view: at least where

the issue was whether a party was bound by an agreement to arbitrate at all,

rather than, say, the scope of an agreement to arbitrate, the court determining

whether a tribunal had jurisdiction should start this task with a “clean slate”. Lord

Mance, in one of two leading judgments (the other was given by Lord Collins), said

the tribunal’s own view of its jurisdiction “has no legal or evidential value”. Lord

Saville believed that to give the tribunal’s view “some special status is to beg the

question at issue”.

In the Supreme Court’s opinion, the “clean slate” approach was also necessary to

give effect to article V(1)(a) of the New York Convention. This article provides

that if a person, against whom recognition and enforcement of an award is

sought, proves that the arbitration agreement is “not valid under the law to which

the parties have subjected it, or failing any indication thereon, under the law of

the country where the award was made” then recognition or enforcement of that

award “may” be refused. Since there was no express indication in the relevant

contract of the law to which the arbitration agreement was subject, the parties

proceeded on the basis that the question was to be decided in accordance with

law of the country where the award was made, that is French law.

The Supreme Court adopted a comparative law analysis and concluded that its

“clean slate” approach was consistent with that adopted in other jurisdictions. US

authority was referred to as showing that a court “must make an independent

determination of the agreement’s validity and therefore of the arbitrability of the

dispute…” (citing the 2003 case of China Minmetals Materials Import and Export Co. Ltd. v Chi Mei

Corporation). As regards the position in France, the court referred to International

Commercial Arbitration by Fouchard, Gaillard and Goldman for the view that the French

courts have the “widest power to investigate the facts” when deciding to annul an

award made in France for lack of jurisdiction or when dealing with an issue

regarding the jurisdiction of a foreign tribunal.

Having determined the applicable approach, the Supreme Court turned to

consider the question of whether Pakistan was a party to the agreement to

arbitrate as a matter of French law.

Guided by the views of the party appointed

experts, the Supreme Court

concluded that French law ultimately required evidence of a common intention of

the parties that Pakistan would be a party to the arbitration agreement. Applying

this test, there were certainly facts showing a link between Pakistan and the

Dallah Awami

Trust contract. First, before the contract was signed, Pakistan and

Dallah had concluded a memorandum of understanding between them in relation

to the proposed housing. Secondly, the trust’s secretary was also the secretary of

the Ministry of Religious Affairs and used ministry letterheaded

paper when

writing to Dallah. Thirdly, Pakistan had agreed to act as the trust’s guarantor and

the DallahAwami

Trust contract stated that the trust could assign rights and

duties to Pakistan without Dallah’s permission.

Ultimately, however, the court concluded that because there was a deliberate

change in the structure of, and the parties to, the transaction as recorded in the

final agreement, compared with the approach originally adopted in the

memorandum of understanding, this made it clear that Pakistan had distanced

itself from any direct contractual involvement.

**Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan, French Court of Appeals**, 17 February 2011

While the court does not expressly state the test that it applied in order to

determine whether or not Pakistan was party to the arbitration agreement, its

approach does not appear to be inconsistent with the Supreme Court’s

determination of the relevant test under French law. Similarly, in reviewing the

facts as it did, the Paris Court of Appeal appears to have adopted a procedure

consistent with that outlined by Fouchard, Gaillard and Goldman, to which the

Supreme Court referred.

In considering the facts, the Paris Court of Appeal placed particular emphasis on

the links between Pakistan and Dallah. The decision makes several references to

the memorandum of understanding between Pakistan and Dallah and the

correspondence on the ministry’s letterheaded

paper. That the court thought this.

Difference between UK SC and Paris CA

It would, perhaps, have been preferable had both the English and French courts

reached the same conclusion. What is reasonably clear, however, is that both

courts proceeded to address the question of the jurisdiction of the tribunal and

the validity of the arbitral award on the same basis – that is, to consider the

matter afresh. Neither the Supreme Court nor the Paris Court of Appeal accepted

the validity of the arbitration award without further enquiry (although the scope of

that enquiry may have differed) or indicated that the tribunal’s determination of its

own jurisdiction ought to be conferred with some special status. In this way, a

fundamental part of the ethos underlying the New York Convention that

only

awards which are valid should be recognised and enforced is

upheld by the two

decisions. In Lord Collins’ words, this approach “safeguards fundamental rights

including the right of a party who has not agreed to arbitration to object to the

jurisdiction of the tribunal

conclusion

The case demonstrates clearly just how important it is to draft an arbitration

agreement appropriately and accurately. Where an arbitration agreement arises

out of the dealings of several parties, the Dallah judgments confirm the need to

determine which parties are intended to be caught by the agreement and ensure

this is expressly provided for in the contractual documents and not contradicted

by the parties’ behaviour. Where parent companies negotiate agreements to be

entered into by special purpose vehicles, it may be prudent to state specifically

that only named parties to the agreement are party to the agreement to arbitrate,

even though this may appear superfluous.

The parties may also wish to enhance an arbitral tribunal’s ability to determine its

own jurisdiction to guard against this being reviewed by a court subsequently.

Although the Paris Court of Appeal did not address this issue, Lord Mance in the

Supreme Court confirmed that such an “opt out” was possible in principle, albeit this would likely be rare and require a clear and unambiguous agreement. Such

an “opt out” is unlikely to be conclusive in a case such as Dallah, however, where

a party is asserting that it was never a party to the arbitration agreement in the

first place.

If a party disputing jurisdiction, such as Pakistan, wishes to challenge the validity

of an award made against it, the Supreme Court has confirmed that, in England

at least, there is no requirement for that party to challenge the award in the

jurisdiction of the seat. Indeed, there may be tactical reasons for raising such a

challenge in another jurisdiction (or in the jurisdiction of the seat plus another).

This does not remove the possibility that different courts may reach different

conclusions, as the Dallah judgments show, and that assets in certain

jurisdictions may be subject to enforcement whereas those in others are not.

For a party seeking to bind a nonsignatory

to an arbitration agreement, the

choice of venue for arbitration and recognition and subsequent enforcement of an

award may be crucial. Dallah highlights the risk that the courts at the seat and the

courts of the places of enforcement will reach differing views on jurisdiction, and

so clear decisions on enforcement strategy are required from the outset.

Whether or not Pakistan appeals the Paris Court of Appeal’s decision to France’s

highest court, the Court of Cassation, it is clear that the debate concerning Dallah

is far from over.

**2015 School of International Arbitration – 30th Freshfields Lecture by Lord Mance (November 4, 2015)**

 This article**1** argues that theses advocating an independent or transnational system of arbitration lack coherence. Arbitration is not, and should not become, a law unto itself. Arbitration already faces problems in maintaining coherence in its jurisprudence and confidence in its efficacy as a dispute-resolution mechanism, particularly given that no general means exist to ensure that awards are consistent. These problems could only be exacerbated by a declaration of unilateral independence.

Decisions of the court of the seat should in the ordinary case be treated as final and binding. This reflects the choice of the parties. Empirical evidence suggests that the choice of seat is usually the result of a careful consideration of the legal consequences and not merely a matter of convenience. To view arbitral awards as autonomous of national courts is a step back in terms of the comity of nations and also contradicts the wording of the New York Convention. Siren calls for complete or yet further autonomy for arbitration should be viewed with skepticism. An increasingly inter-connected world needs mutually supportive and inter-related systems for the administration of law, not more legal systems.

* **Telenor v. Storm LLC, 524 F. Supp. 2d 332 (S.D.N.Y. 2007) (introductory paragraph and Part II.A.2.a.; review also Part II.A.2.b.)**

To modify or vacate an arbitration award, as

being in “manifest disregard” of controlling law,

a court must find both that the arbitrators knew of

a governing legal principle yet refused to apply

it or ignored it altogether, and the law ignored

by the arbitrators was well defined, explicit, and

clearly applicable to the case.

Arbitrators did not act in manifest disregard

of law, allowing American court to set aside

arbitration decision in favor of Norwegian

shareholder of Ukrainian corporation and

against Ukranian shareholder, under the New

York Convention on the Recognition and

Enforcement of Foreign Arbitral Awards (New

York Convention), when arbitration panel heard

arbitration case brought pursuant to arbitration

clause of shareholders' agreement despite

Ukranian court decisions holding that agreement

and arbitration clause were invalid; Ukrainian

litigation was collusive, brought by subsidiary

of Ukrainian shareholder and only nominally

defended, while Norwegian shareholder was not

notified of suit. 9 U.S.C.A. § 207; Convention

on the Recognition and Enforcement of Foreign

Arbitral Awards,

Rule of Arbitration Agreement and the United

Nations Commission on International Trade

Law (UNCITRAL), that arbitration tribunal had

power to rule on objections that it had no

jurisdiction, did not preclude court review of

whether dispute was required to be submitted to

arbitration.

Under New York law, “actual authority” is the

authority that a principal invests in its agent,

which, upon its exercise, binds the principal.

Decision by Ukrainian courts, that shareholders'

agreement including arbitration agreement was

null and void, did not bar American court from

enforcing arbitration award under New York

Convention on the Recognition and Enforcement

of Foreign Arbitral Awards (New York

Convention); decisions were based on Ukrainian

law, which was not controlling, Ukrainian court

proceedings were collusive, and court had never

considered whether arbitration agreement was

severable from rest of shareholders' agreement.

Arbitration award, in favor of one shareholder

of Ukrainian corporation and against the other,

would be enforced despite claim that award

violated public policy of New York, and

was consequently unenforceable under New

York Convention on the Recognition and

Enforcement of Foreign Arbitral Awards (New

York Convention); there was no showing that

enforcement would violate most basic notions

of morality and justice, as required for public

policy violation.

While an arbitrator may not award relief

expressly forbidden by the agreement of the

parties, an arbitrator may award relief not sought

by either party, so long as the relief lies within

the broad discretion conferred by the Federal

Arbitration Act (FAA).

Arbitral Awards (New York Convention),

allowing for nonenforcement of arbitration

awards when agreement was incapable of

enforcement under “law to which the parties

have subjected it,” did not bar enforcement, due

to existence of Ukrainian court decision that

stock purchase agreement containing arbitration

provision was void; agreement provided for

arbitration in New York, rendering Ukrainian

decision inapplicable.

Provision of New York Convention on the

Recognition and Enforcement of Foreign

Arbitral Awards (New York Convention),

allowing for nonenforcement of arbitration

awards when aggrieved shareholder was

unable to present its case, did not bar

enforcement of award obtained in New

York arbitration proceedings, despite existence

of Ukrainian court order declaring void

shareholders' agreement containing arbitration

agreement; despite decision shareholder had

been afforded ample opportunity to be heard

in arbitration proceeding, and had availed itself

of opportunity.

* **BG Group, PLC v. Republic of Argentina, 134 S.Ct. 1198, U.S. (2014)**
1. local court litigation requirement in arbitration provisions of treaty was procedural condition precedent to arbitration, whose interpretation and application, if requirement were found in ordinary contract, would presumptively be primarily for arbitrators;

2 ordinary contract-based presumptions applied, despite fact that arbitration provisions appeared in treaty, and that parties thereto were sovereign nations;

3 primary responsibility for interpretation and application of local court litigation requirement lay with arbitrators, such that court, on competing motions to confirm and vacate arbitration award, had to grant appropriate deference to arbitrators' decision; and

4 arbitrators' decision, in concluding that foreign investor in Argentinian entity was excused from having to comply with local court litigation requirement, did not stray from interpretation and application of arbitration provisions in treaty, and could not be disturbed by court.

* **Iran Aircraft Industries v. Avco Corp., 980 F.2d 141 (1992)**

Terms “final” and “binding” merely reflect

contractual intent that issues joined and resolved

in arbitration may not be tried de novo in any

court.

Even a “final” and “binding” arbitral award

by Iran-United States Claims Tribunal was

subject to defenses to enforcement provided

for in New York Convention. Convention on

the Recognition and Enforcement of Foreign

Arbitral Awards.

Enforcement and recognition of awards

Award of Iran-United States Claims Tribunal

which resulted in balance due from domestic

corporation to agencies and instrumentalities of

Islamic Republic of Iran was not enforceable,

in light of showing by domestic corporation

that tribunal denied it the opportunity to present

its claim in a meaningful manner as required

by New York Convention.

* **Termo Río S.A. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007) (except Part E)**

Under Convention on the Recognition and

Enforcement of Arbitral Awards (New York

Convention), Colombian arbitration award,obtained by contractor against public utility

owned by Colombian government, would not

be enforced in United States after highest

administrative court in Colombia had set it aside

as contrary to laws of Colombia, regardless of

whether grounds relied upon by administrative

court would have been valid in United States;

administrative court was “competent authority,”and there was no showing that its proceedings

had been tainted or that its judgment had been

other than authentic.

Class 11 **RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS I**

Emanuel Gaillard, “The Representations of International Arbitration”, *New York Law Journal* (Oct. 4, 2007) La

In this article, Emmanuel Gaillard discusses the competing mental constructs that

allow an understanding of international arbitration as a coherent phenomenon. The

author identifies three such mental constructs, or representations, each of which

sheds light on the entire law and practice of arbitration, and captures the

underlying beliefs of the different schools of thought in the field. The three

representations approach the fundamental question of the source of validity and

legitimacy of the arbitral process through the prism, respectively, of the legal order

of the seat of the arbitration, the different legal orders that are willing to recognize

the award resulting from the arbitral process, or a distinct transnational legal

order—which the author characterizes as the arbitral legal order. Each of these

philosophies of international arbitration lead to distinct branding, imaging,

vocabulary, and concrete conduct of all players in the field, be it practitioners,

arbitrators or courts. With the study of these three representations and their

consequences, as well as their foundation in cognitive sciences, Emmanuel Gaillard

delivers one of the first general scientific accounts of international arbitration.

*Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974) pub policy

Public policy defense of the United Nations

Convention on the Recognition and Enforcement

of Foreign Arbitral Awards should be construed

narrowly.

Enforcement of foreign arbitral awards may

be denied on the basis of the public policy

defense of the United Nations Convention on

the Recognition and Enforcement of Foreign

Arbitral Awards only where enforcement would

violate the forum state's most basic notions of

morality and justice.

To read the public policy defense of the

United Nations Convention on the Recognition

and Enforcement of Foreign Arbitral Awards

as a parochial device protective of national

political interests would seriously undermine the

Convention's utility.

Public policy defense of the United Nations

Convention on the Recognition and Enforcement

of Foreign Arbitral Awards was not meant to

enshrine the vagaries of international politics

under the rubric of “public policy”; rather,

a circumscribed public policy doctrine was

contemplated by the Convention's framers and

every indication is that the United States, in

acceding to the Convention, meant to subscribe

to such supranational emphasis.

Fact of the United States' falling out with

Egypt in recent years was not ground for

denying enforcement, under “public policy”

defense to the United Nations Convention on

the Recognition and Enforcement of Foreign

Arbitral Awards, of a foreign arbitral award

made against American corporation and in favor

of Egyptian corporation.

Mere fact that an issue of national interest

may incidentally figure into the resolution, in

a foreign arbitration proceeding, of a breach of

contract claim does not make the dispute not

arbitrable; rather, certain categories of claims

may be nonarbitrable because of the special

national interest vested in their resolution.

Provision of the United Nations Convention

on the Recognition and Enforcement of

Foreign Arbitral Awards authorizing denial of

enforcement of such an award if the defendant

can prove that he was “not given proper notice \*

\* \* or was otherwise unable to present his case”

essentially sanctions the application of the forum

state's standards of due process.

By agreeing to submit disputes to arbitration,

a party relinguishes his courtroom rights,

including that to subpoena witnesses, in favor

of arbitration with all its well-known advantages

and drawbacks.

American corporation's due process rights

under American law, rights entitled to full

force under the United Nations Convention on

the Recognition and Enforcement of Foreign

Arbitral Awards as a defense to enforcement

of a foreign award, were in no way infringed

by foreign arbitral tribunal's decision not to

reschedule its hearing for the convenience of

a witness of the American corporation, since

the inability to produce witnesses is a risk

inherent in an agreement to submit to arbitration,

since logistical problems of scheduling a hearing

date convenient to parties scattered about the

globe argues against deviating from an initially

mutually agreeable time plan, and since the

tribunal did have before it an affidavit of the

absent witness.

Even assuming that the “manifest disregard” of

law defense applies under the United Nations

Convention on the Recognition and Enforcement

of Foreign Arbitral Awards, no such “manifest

disregard” was in evidence in the instant case

Extensive judicial review frustrates the basic

purpose of arbitration, which is to dispose of

disputes quickly and avoid the expense and delay

of extended court proceedings.

***Westacre Investments Inc v. Jugoimport-Sdrp Holding Company Limited* 1999**

**FACTS:** Westacre entered into a contract to sell military equipment in Kuwait. In return, Westacre was to get substantial value of contracts from the Directorate of Ministry of Defense of Kuwait. The respondents banks guaranteed payment of all fees to Westacre. The arbitration was to be governed by Swiss law, the dispute resolution was to be done on the basis of arbitration rules of International Chamber of Commerce with its seat in Geneva.

In 1989 after receiving the contract from the Minsitry of Defense, the Directorate repudiated the contract. The arbitration tribunal held in favour of Westacre and awarded costs in the amount of $50 million and £1.02 million. The directorate appealed against the order citing that it was against international public order.

**ISSUES:** Whether the award should be set aside on the grounds of public policy. Whether respondents could dispute issues of facts in enforcement proceedings.

**PROCEDURAL HISTORY:** The Swiss dismissed the Directorate’s appeal for annulment of the award. One of judges (Buxton, J) granted an ex parte order for enforcement of the award in the United Kingdom.

**HOLDING:** Once the issue of bribery has been made and rejected by the tribunal which was governed by the law agreed upon in the arbitration agreement, it is not open to the enforcement courts to dispute and relitigate the facts.

**JUDGEMENT:** Dismissed with costs.

**REASONING:** First, there was evidence before the Tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award. The seriousness of the alleged illegality to which Waller LJ gives weight is not, a factor to be considered at the stage of deciding whether or not to mount a full scale inquiry. It is something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely, should the award be enforced.

**RULES:** s.5(3) of the Arbitration Act 1975 which provides: “Enforcement of Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.”

Under Swiss law, contract to buy personal influence short of bribery is not against public policy.

**DISSENT:** Waller J- what the court is concerned to do is to see whether the public policy of finality in litigation is overridden by some more important public policy based on the unenforceability of illegal contracts.

If matters that have already been decided by an arbitrator has been brought before a court, it can be relitigated in exceptional circumstances. All issues of estoppel must be worked towards achieving justice and not injustice.

***Baxter Intern., Inc. v. Abbott Laboratories,* 315 F.3d 829 (7th Cir, 2003), US Court of Appeals**

**FACTS:** Baxter invented sevoflurane and got process patent over it. It could not sell it in USA due to lack of FDA approval. It granted exclusive worldwide license to Maruishi Pharmaceutical Company of Japan. Abbot got sublicense and sold it in US after obtaining FDA approval.

Ohio Medical Associations (Ohmeda) invented around Baxter’s patent to make sevoflurane equally cheap as Baxter’s process. Before Ohmeda could market it, Baxter acquired Ohmeda and decided to sell it in the US.

Abbott initiated arbitration under the Baxter-Maruishi agreement. Tribunal awarded in favour of Abbott. Baxter appealed.

**ISSUES:** Whether the excusive license agreement prevents Baxter itself to compete with Maruishi/Abbott? And if the license does forbid Baxter, whether the agreement violates the Sherman Act?

**PROCEDURAL HISTORY:** The tribunal held that the exclusive license would be upheld and any reduction in competition was due to Baxter’s purchase of Ohmeda. On appeal, the district judge asked Baxter to comply with the award.

**JUDGEMENT:** Dismissed.

**HOLDING:** Licensor was bound by the arbitration tribunal’s conclusion that the license was lawful.

**REASONING:** Following award under Convention on Recognition and Enforcement of Foreign Arbitral Awards, licensor could not reargue its antitrust claim that exclusive license, construed to keep product off the market until patent expired, constituted unlawful territorial allocation, and thus, licensor was bound by

tribunal's conclusion that license, as construed to provide strong exclusivity, was lawful.

Arbitrators have completely free rein to decide law as well as facts and are not subject to appellate review.

At the award enforcement stage, substantive review by courts must be minimal.

US government, Federal Trade Commission or consumers can sue for anti-trust claims as they are not bound by the award.

Antitrust problem lies in Baxter acquiring Ohmeda and the solution would be to divest its interests in it as the exclusive license agreement with Maruishi came first.

**RULES:** In the case of Mitsubishi, the courts have held that arbitration tribunal can decide claims of antitrust.

**DISSENT:** Cudahy, J- The arbitrators in the Dispute Resolution Agreement were asked to maintain Original Commercial Relationship which was an unusual step. The arbitrators had conceded that the exclusive licensing agreement did not preclude Baxter from offering generic competition to the licensors of the original patent as this was different from the one step patent process. But the majority found under the Dispute Resolution Agreement and Original Commercial Relationship would reduce Abbott’s monopoly revenues even though competition from generic manufacturers was expected and was nothing new.

The majority has decided that when the tribunal has decided on the antitrust claims, courts should show extreme deference in enforcing the award. But once the award violates public policy, as in this case where Abbott was awarded a monopoly in sale of sevoflurane violated the Sherman Act.

The majority says that unlawful conduct cannot be commanded by arbitrtors but if the arbitrators themselves say that what they have commanded is not unlawful, their decision is conclusive.

The absence of a Covenant not to compete also shows that the exclusive license was no guarantee against competition.

The interest of public is also at stake here as they would have to pay the higher price charged by Abbott now. When public rights are stake, there is a good reason to not show deference towards the arbitration award. The interests of consumers was not represented in the arbitration forum and it is upto the courts to defend the rights of the consumers or the public.

***MGM Productions Group, Inc. v. Aeroflot Russian Airlines,*** 91 Fed.Appx. 716 (2nd Cir, 2004). US Court of Appeals

**FACTS:** MGM was an assignee of an arbitration award in favour Russo. Aeroflot had violated a contract with Russo in which Russo provided consulting services to Aeroflot for leasing airplanes and other equipment to Iran Air. MGM sought to enforce the award in the US.

**ISSUES:** Whether the award was against public policy.

**PROCEDURAL HISTORY:** The arbitrator considered Aeroflot’s argument and concluded that since the contract was only between Aeroflot and Russo, it did not contravene the Iranian Transaction Regulations (ITR). The district court confirmed the award, and the Russian Airline appealed.

**JUDGEMENT:** Affirmed.

**HOLDING:** Public policy defense did not apply to bar the enforcement of the award.

**REASONING:** Even if Executive Orders and regulations promulgated by the Office of Foreign Assets Control were violated by a contract between a Russian airline and a New York consultant, the public policy defense did not apply to bar enforcement of an arbitral award against the airline in an arbitration held in Sweden; while the airline alleged that the contract violated the United States' foreign policy respecting Iran, it did not establish that the contract violated the United States' most basic notions of morality and justice.

**RULES:** Article V(2)(b) of New York Convention. Enforcement of award in breach of public policy.

An arbitration award cannot be avoided solely on the ground that the arbitrator may have made an error of law or fact.

***OAO Rosneft v. Yuoks Capital* (Supreme Court of Netherlands, 2010)**

**FACTS:** Yukos and Yuganskneftegaze entered into loan agreements with each other. The contract provided for dispute resolution in the International Commercial Arbitration Court in Russia. The tribunal awarded in favour of Yukos and asked Yuganskneftegaz to pay Yukos 13 billion ruble. Yuganskneftegaz merged with Rosneft and ceased to exist. Roseneft appealed and got decision in its favour. Yukos applied for enforcement in Netherlands.

**ISSUES:** Whether Yukos award can be enforced in Netherlands.

**PROCEDURAL HISTORY:** The Arbitrazh granted Rosneft its leave to set aside the awards. The Federal Arbitrazh affirmed the decision of the lower court. The Supreme Arbitrazh Court of Russian Federation affirmed the appellate court’s decision. Yukos sought enforcement in Netherlands.

The Court of First Instance in Netherlands denied enforcement as award had been set aside by the Russian Courts. Amsterdam court of appeals reversed the order. Rosneft appealed to Supreme Court of Netherlands.

**HOLDING:** The Supreme Court of the Netherlands: (1) declares that Rosneft's appeal is inadmissible; (2) orders Rosneft to pay the costs of the proceedings in cassation, estimated so far on the side of Yukos Capital at € 358,38 for disbursements and € 1,800 in fees.

**JUDGEMENT:** Affirmed.

**REASONING:** Art. III ensures that arbitral awards under the Convention can be enforced through a simple and expedited procedure, which at any rate may not be

considerably more onerous than the enforcement procedure for domestic arbitral awards.

“Further, the ‘conditions’ in Art. III concern procedural rules rather than the substantive conditions for recognition and enforcement, which are exclusively governed by the Convention itself. Thus, the provisions in Art. III simply mean that the recognition and enforcement of foreign arbitral awards may not be subject to

conditions that are considerably more burdensome, or legal costs that are considerably higher, than those to which the recognition and enforcement of domestic arbitral awards are subject.

“When answering the question of whether there exists a ‘substantially more onerous condition’ it is necessary to compare the procedural rules of the country of enforcement with respect to domestic arbitral awards on the one hand and foreign arbitral awards falling under the Convention on the other hand. A comparison with

the procedural rules of the country where the arbitral award was rendered is not at issue. Thus, when reviewing whether there is a ‘substantially more onerous condition’, there is no need to consider whether and in what manner, under the law of the country where the arbitral award was rendered, it is still possible to set aside or revoke the arbitral award after leave to enforce has been granted.

It may first be considered that, as stated that the non-discrimination provision aims to guarantee that a simple and expedited procedure for recognition and enforcement,

which at any rate may not be considerably more onerous than the proceedings for granting leave to enforce domestic arbitral awards, is applied to arbitral awards falling under the Convention. Favoring the recognition and enforcement of arbitral awards falling under the New York Convention by applying the non-discrimination provision laid down in the New York Convention does not by itself violate any rights protected by Art. 6 ECHR.

**RULES:** New York Convention – which is required under Art. III Convention and favors enforcement – is not a violation of due process of law or the principle of “equality of arms”.

Art. III of the New York Convention, which, insofar as relevant, reads:

‘There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.’

The question whether a foreign arbitral award can be challenged by setting aside or revocation must be answered according to the laws of the country where the arbitral award was rendered. Under the New York Convention, in fact, the jurisdiction to hear a claim to set aside or revoke [an award] is exclusively granted to the competent

authorities of that country.

**Class 12. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS II**

**Jan Paulsson, Enforcing Arbitral Awards Notwithstanding Local Standard Annulment (LSA)**

By now, national courts should be prepared to allow the arbitral process to become truly international, by enforcing awards rendered in other countries on the basis of internationally accepted criteria and nothing else.

I propose that the annulment of an award by the courts in the country where it was rendered should not be a bar to enforcement elsewhere unless the grounds of that annulment were ones that are internationally recognised.

The anathema of 'local particularities' might conveniently be referred to as 'Local Standard Annulments' or LSAs.

It is my conclusion that Article V(1)(e) is not a bar to disregarding LSAs, and that they should be disregarded. Even if Article V(1)(e) were such a bar, it may, as we shall see, be overcome by Article VII.

**The Chromalloy** award was rendered in 1994 for USD$16.2 million against Egypt. The arbitral tribunal applied the Egyptian Civil Code instead of the Egyptian administrative law. Under the Egyptian Law on Arbitration an award could be set aside “if the arbitral award fails to apply the law agreed by the parties to the subject matter of the dispute” So the Egyptian court set aside the award. In France, the *Tribunal de Grand Instance* granted *exequator* (declaration of enforceability) several months before the annulment in Cairo. Egypt asked the Court of Appeals of Paris to overturn the *exequator*. French law is more favourable than the NY Convention inasmuch as it does not recognise foreign annulment of an award as a grounds to refuse to enforce it. The Court stated flatly that as a consequence the Convention was 'put to the side' (écartée).

Article V(1) allows but does not require rejection of foreign awards that fall under any of the five subparagraphs. The relevant language reads 'recognition and enforcement may be refused... only if' one of the subparagraphs applies. The conditional 'may' leaps out at any lawyer, since it necessarily contemplates 'or may not'. There is no other guidance in the text of the Convention. 0 One therefore may fairly conclude (unless the national implementing statute provides to the contrary) that enforcement notwithstanding annulment is a matter of judicial discretion."

**Decisions like Chromalloy do not violate the New York Convention. The fact is that courts cannot violate the Convention by enforcing a foreign award. Rather, a violation would occur if a court of a State bound by the Convention were to refuse enforcement in the absence of one of the limited exceptions defined in Article V. This requires some elaboration**

The New York Convention was not intended to establish a regime for the international enforcement of awards.

**Geneva Convention and New York Convention.** The New York Convention succeeded in overturning the two principal obstalces of the Geneva Protocol and Convention. First and foremost, Articles III and IV of the NY Convention compel enforcement of awards without requiring proof of finality in their country of origin.  Secondly, Article V(1)(d) of the New York Convention allows the arbitral procedure to be defined by the parties alone; national law comes into play only with respect to procedural issues not covered by their agreement

**NY Convention Lege Lata**

The text of the Convention contains a set of absolute obligations on the part of signatory States. Their courts 'shall' defer to arbitration agreements (Art. II). They 'shall' recognise and enforce foreign awards presented in accordance with the formalities defined in Article IV without imposing more onerous conditions than on domestic ones (Art. III). The Convention 'shall not' prevent enforcement under treaties or laws which are more favourable than the Convention (Art. VII). The Convention also contains discretionary provisions: Article V, under which enforcement 'may' be denied under the five familiar paragraphs; and Article VI, under which enforcement 'may' be adjourned pending the outcome of a challenge against the award in its country of origin.

This does not seem to require exalted legal analysis. By virtue of the combined effects of Articles V and VII, a country bound by the Convention may require its judges to refuse enforcement under the circumstances defined in Article V, or to the contrary require them to allow enforcement notwithstanding Article V unless stricter criteria for non-enforcement are met, or yet again leave them discretion (more or less explained) to decline enforcement under the circumstances defined in Article V. **The French courts in Chromalloy and the other cases cited in note 5 found themselves operating under the second of these possibilities; they were bound to enforce awards that passed muster under French law irrespective of annulment in their country of origin.** The same is true for any other country where the law is more favourable to enforcement, such as the US (if the Chromalloy court was right) where an award cannot be neutralised by reference to the objection which underlay the annulment by the Cairo Court of Appeal.

**An award annulled has no existence**

P. 12 There is a world of difference between submission to the jurisdiction of a court and the choice of a venue for arbitral proceedings which by their nature are susceptible of being conducted anywhere. The international arbitrator cannot be deemed a manifestation of the power of the State. His mission, conferred by the parties' consent, is one of a private nature, and, as Professor Pierre Lalive has put it: “it would be a rather artificial interpretation to deem his power to be derived, and very indirectly at that, from a tolerance of the State of the place of arbitration”

**Inconsistent Results Must Be Avoided.**

The Hilmarton case has become a popular paradigm: an ICC award in Switzerland rejected a contractual claim on the basis that it contravened Algerian anti-corruption norms; the award was set aside in Switzerland on the (since-abolished) ground that it was arbitrary; the award was nevertheless granted recognition in France where the defect of 'arbitrariness' is not known as a reason to reject awards; subsequently a second award was rendered in Switzerland which disregarded the corruption defence and ordered the defendant to pay a consulting fee under the contract; whereupon both the Swiss judgment (that set aside the first award) and the second award itself were successfully presented for recognition by the French courts - without any retraction of the recognition of the first award.

Hilmarton, for example, is a two-headed white rhinoceros which might give us a thrill in the cinema but does not really endanger our daily walk to work. Its oddity, I believe, reveals precisely why this concern is more theoretical than real. In most situations in contemporary practice, an award sufficiently defective to be set aside in country A will not pass muster under the enforcement criteria of country B, whereas the Swiss annulment criterion in Hilmarton ('arbitrariness') was an old and much-criticised concept which would not have been applicable if that case had arisen under contemporary Swiss law. Likewise, in most situations a court granting annulment could also require restitution of any sums paid out in consequence of the award,2 7 whereas in Hilmarton the first application for recognition in France was purely tactical, since the award had rejected the claim and there was therefore no enforcement in France, nor therefore any reason to ask for restitution in Switzerland.

In order to be intellectually honest, anyone who maintains that inconsistent results are intolerable - no matter how rare in practice or how inconsequential in concrete effect - would have to accept that enforcement should never be granted until any possibility of challenge to the award in its country of origin has been disposed of. To the purist, there cannot be a difference between 'annulled' and 'might be annulled.'29 In other words, 'may' should be understood as 'shall' in Article V of the New York Convention, and 'binding' in Article V(1)(e) should be understood as 'final', with the effect that no enforcement is possible until the applicant proves that the award can no longer be set aside in its country of origin. This would in effect take us back to the Geneva Convention of 1927.

**Why and How to Disregard LSAs**

Since neither abstract territorialism nor the fear of inconsistent results pose insurmountable barriers to the enforcement of awards set aside in their country of origin, **I suggest that the proper enforcement criterion should be whether the foreign-based decision was a 'local standard annulment' (LSA) as opposed to an 'international standard annulment' (ISA).** The rich experience of international trade law since 1958 has taught us what an ISA is: something which falls within the scope of the first four paragraphs of Article V(1) of the New York Convention and Article 36(1)(a) of the UNC1TRAL Model Law. Everything else would be an LSA, and entitled only to local effect.

Under my proposed approach, applications to adjourn enforcement actions should not be granted unless the enforcement court considers that an ISA is likely to materialise. 66 In no case should it grant an adjournment if the resisting party cannot show that it has invoked an internationally recognised standard as a grounds for annulment and that the circumstances lend credence to its objection.

**Conclusion** Participants in international transactions should play according to the same rules. The approach to the New York Convention advocated here will create incentives for national courts to conform to internationally accepted standards. As they come to see the futility of LSAs in the international context, national law-makers and judges will limit their censure to arbitral misconduct of a kind which is recognised everywhere as justifying non-recognition. The unfortunate (though not intolerable) spectre of inconsistent results will materialise only as a consequence of court rulings in the most obtuse or chauvinistic jurisdictions. The foundation of this approach is the modern consensus as to the usefulness of a reliable international arbitral process. This consensus is reflected in the widely accepted UNCITRAL Model Law, as well as in innumerable court decisions, treaties, high-level political declarations and influential scholarly writings. It should allow us now to achieve, by using the discretionary features built into the New York Convention, something that was premature half a century ago.

**Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (“COMMISA”) v. PEMEX–Exploración y Producción (“PEP”), --- F.3d ----, 2nd Cir. (N.Y.), August 02, 2016**

**FACTS:** COMMISA contracted with PEP to build oil platforms in the Gulf of Mexico. Contracts provided arbitration as the sole mechanism for dispute resolution.COMMISA initiated arbitration. PEP informed COMMISA that it was effecting administrative rescission. COMMISA filed an *amparo* action in the Mexican DC, and lost.

In 2006 the arbitration panel issued its Preliminary Award and found that it had jurisdiction and enjoined PEP from collecting the performance bonds until the issuance of the final award. PEP  requested a consideration of the award since administrative rescission was exempt from arbitration as an act of authority of the Mexican government. The tribunal rejected this argument in the Final award.

In 2007, the forum to litigate public contracts changed to the Tax and Administrative Court. The switch triggered an statute of limitation. Before it was ten years and now 45 days. In 2009, the Congress modified the Works Law which barred administrative rescission from arbitration.

In 2009, COMMISA prevailed in the  the arbitration and an award of $300 million was rendered.

**ISSUES:** whether annulled award could be enforced**.**

**PROCEDURAL HISTORY:**   COMMISA petitioned the US District Court for the Southern District of NY for confirmation of the award, which was done. PEP appealed and simultaneously attacked the arbitral award in the Mexican courts. The Eleventh Collegiate Court in Mexico set aside the award on the ground that PEP, as an entity of the Mexican government, could not be forced to arbitrate. Armed with that decision, PEP moved to NY to vacate the Southern District’s judgment and remand the First appeal in light of the Eleventh Collegiate Court’s decision. The Southern District confirmed the award, and PEP appeals this decision.

**HOLDING:** the Southern District properly exercised its discretion in confirming the award because giving effect to the subsequent nullification of the award in Mexico would run counter to United States public policy and would (in the operative phrasing) be "repugnant to fundamental notions of what is decent and just" in the U.S. The Southern District did not exceed its authority by including in its judgment $106 million attributed to performance bonds that PEP collected.

**JUDGEMENT:** Affirmed.

**REASONING:** In reviewing a DC’s confirmation of an arbitral award, the standard is *de novo* and findings of fact for clear error. In this case, because the DC’s holding necessarily encompassed its decision to deny comity to a foreign judgment, the standard of review is modified to abuse of discretion, and de novo for underlying conclusions of law and clear error for the underlying findings of fact.

Panama Convention and NY Convention govern domestic enforcement of arbitral awards, both are substantially similar, and both evince a “pro-enforcement bias.”

Article V of the Panama Convention sets out--and limits--the discretion of courts in enforcing foreign arbitral awards: "The recognition and execution of the decision *may* be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested" one of seven defenses. Panama Convention art. V(1), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (emphasis added). "Article V provides the exclusive grounds for refusing confirmation under the Convention, [and] one of those exclusive grounds is where [[\*\*26]](https://advance.lexis.com/document/?pdmfid=1000516&crid=faa883f0-86aa-47a1-bd82-9748fa7cfb74&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pddocid=urn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pdcontentcomponentid=6386&pdshepid=urn%3AcontentItem%3A5KBB-4761-J9X6-H1P3-00000-00&pdteaserkey=sr2&ecomp=q85tk&earg=sr2&prid=46b276b1-888a-4bd3-9fe7-0e0931a62009)  't[he] award . . . has been [annulled] or suspended by a competent authority of the country in which, or under the law of which, that award was made.'"

At first look, the plain text of the Panama Convention seems to contemplate the unfettered discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction. However, discretion is constrained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the Panama Convention.

**Retroactive Application of Laws**

Retroactive legislation that cancels existing contract rights is repugnant to United States law. That repugnance is "deeply rooted in [Supreme Court] jurisprudence, and embodies a legal doctrine centuries older than our Republic." [Landgraf v. USI Film Prods., (1994)](https://advance.lexis.com/document/?pdmfid=1000516&crid=faa883f0-86aa-47a1-bd82-9748fa7cfb74&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pddocid=urn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pdcontentcomponentid=6386&pdshepid=urn%3AcontentItem%3A5KBB-4761-J9X6-H1P3-00000-00&pdteaserkey=sr2&ecomp=q85tk&earg=sr2&prid=46b276b1-888a-4bd3-9fe7-0e0931a62009). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Id. Anti-retroactivity is a principle embedded in "several provisions" of the Constitution,

The sequence of events and the circumstances in which Section 98 was enacted thus resulted in a retroactive application of Section 98 as a matter of United States law. That PEP is part of the government that promulgated the law does not help at all.

**Availability of a Forum**

If the Southern District had recognized and implemented the nullification of the arbitral award, COMMISA would have had no sure forum in which to bring its contract claims. The imperative of having cases heard--somewhere--is firmly embedded in legal doctrine.

Absent confirmation of the award, COMMISSA would lose the opportunity to bring its claims because of the change in Mexican law subjecting COMMISSA's claims to the 45-day statute of limitations in the Tax and Administrative Court. It is no conjecture that COMMISSA's suit would be dismissed as time-barred; the Tax and Administrative Court did precisely that.

COMMISA’s inability to have its breach claims heard magnifies the injustice.

**Government Expropriation Without Compensation**

PEP, acting on behalf of the Mexican government, rescinded the contracts and forcibly removed COMMISA from the project sites. Then, by legislation, Mexico frustrated relief that had been granted to COMMISA in the arbitral forum and consigned it to a forum in which relief was foreclosed both by the statute of limitations and res judicata. The enforcement of such Mexican law amounted to a taking of private property without compensation for the benefit of the government. In the United States, this would be an unconstitutional taking

**Bonds**

Pursuant to the contracts, COMMISA posted $106 million in performance bonds. After entry of the Final Award in favor of COMMISA, PEP collected on the bonds. The Southern District's judgment includes the $106 million.

"[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." [Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984)](https://advance.lexis.com/document/?pdmfid=1000516&crid=faa883f0-86aa-47a1-bd82-9748fa7cfb74&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pddocid=urn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pdcontentcomponentid=6386&pdshepid=urn%3AcontentItem%3A5KBB-4761-J9X6-H1P3-00000-00&pdteaserkey=sr2&ecomp=q85tk&earg=sr2&prid=46b276b1-888a-4bd3-9fe7-0e0931a62009). The pertinent question, then, is whether the performance bonds were part of the "final arbitration award." The order enjoining PEP from collecting on the performance bonds was therefore part of the Final Award itself.

**RULES:**

In sum, a district court *must* enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses; if one of the defenses is established, the district court *may* choose to refuse recognition of the award.

"a final judgment obtained through sound procedures in a foreign country is generally conclusive . . . *unless* . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought." [Ackermann v. Levine, 788 F.2d 830, 837 (2d Cir. 1986)](https://advance.lexis.com/document/?pdmfid=1000516&crid=faa883f0-86aa-47a1-bd82-9748fa7cfb74&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pddocid=urn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pdcontentcomponentid=6386&pdshepid=urn%3AcontentItem%3A5KBB-4761-J9X6-H1P3-00000-00&pdteaserkey=sr2&ecomp=q85tk&earg=sr2&prid=46b276b1-888a-4bd3-9fe7-0e0931a62009) "A judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.'"

The public policy exception does not swallow the rule: "[t]he standard is high, and infrequently met"; "a judgment that 'tends clearly' to undermine the public interest, the public confidence in the administration of the [[\*\*28]](https://advance.lexis.com/document/?pdmfid=1000516&crid=faa883f0-86aa-47a1-bd82-9748fa7cfb74&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pddocid=urn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pdcontentcomponentid=6386&pdshepid=urn%3AcontentItem%3A5KBB-4761-J9X6-H1P3-00000-00&pdteaserkey=sr2&ecomp=q85tk&earg=sr2&prid=46b276b1-888a-4bd3-9fe7-0e0931a62009)  law, or security for individual rights of personal liberty or of private property is against public policy." [Ackermann, 788 F.2d at 841](https://advance.lexis.com/document/?pdmfid=1000516&crid=faa883f0-86aa-47a1-bd82-9748fa7cfb74&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pddocid=urn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pdcontentcomponentid=6386&pdshepid=urn%3AcontentItem%3A5KBB-4761-J9X6-H1P3-00000-00&pdteaserkey=sr2&ecomp=q85tk&earg=sr2&prid=46b276b1-888a-4bd3-9fe7-0e0931a62009) (quoting [Somportex, 453 F.2d at 443](https://advance.lexis.com/document/?pdmfid=1000516&crid=faa883f0-86aa-47a1-bd82-9748fa7cfb74&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pddocid=urn%3AcontentItem%3A5KCD-0GF1-F04K-J41J-00000-00&pdcontentcomponentid=6386&pdshepid=urn%3AcontentItem%3A5KBB-4761-J9X6-H1P3-00000-00&pdteaserkey=sr2&ecomp=q85tk&earg=sr2&prid=46b276b1-888a-4bd3-9fe7-0e0931a62009)). The exception accommodates uneasily two competing (and equally important) principles: [i] "the goals of comity and res judicata that underlie the doctrine of recognition and enforcement of foreign judgments" and [ii] "fairness to litigants."

although the Panama Convention affords discretion in enforcing a foreign arbitral award that has been annulled in the awarding jurisdiction, and thereby advances the Convention's pro-enforcement aim, the exercise of that discretion here is appropriate only to vindicate "fundamental notions of what is decent and just" in the United States.

**Manu Thadikkaran, Enforcement of AnnulledArbitral Awards:What Is and WhatOught toBe?, Journal of International Arbitration, (©Kluwer LawInternational; Kluwer LawInternational 2014, Volume 31 Issue 5) pp. 575 - 608**

However, the use of the word ‘may’ in NYC, Article V as opposed to the use of the word ‘shall’ in Articles II, III and VII does have some bearing on the discretionary nature of the provision. In certain exceptional cases, this discretion can be used by an enforcing court to deviate from the judgment of the court with primary jurisdiction. The annulment decision of a court which abuses such procedure need not be given deference. In such cases, to protect the will of the parties and the integrity of international arbitration, a court with secondary jurisdiction would be justified in enforcing an annulled award. A court exercising this discretion, thus, must consider fraud, undue influence, deviation from the parties’ intent, extent of judicial review contemplated by the parties and the need for uniformity in international commercial arbitration. Nevertheless, this discretion should be interpreted as a narrow one while maintaining the general rule that annulment of an award by the country of origin is a ground for non-enforcement of the award.

One of the major reasons for the rival approaches on this issue is the fact that an annulment decision, in essence, is a foreign judgment. The sovereign authority of every state, accordingly, can decide on its own terms whether to give deference to such foreign judgment. It is suggested that the likelihood of enforcement of annulled awards subsists in Austria, Brunei, Croatia, Denmark, Hong Kong, Ireland, Lebanon, Luxembourg, Mexico, Panama, Poland, Spain, and Turkey. (66)At the same time, countries such as England, Germany, Hungary, India, Italy, Japan, Korea, and Switzerland are likely to refuse recognition and enforcement of annulled awards. (67) In this regard, the formation of an international body such as the IAC has the potential to reduce these inconsistencies in enforcing annulled awards. The annulment decisions from the IAC would not be a foreign judgment, and the contracting states would be bound by the NYC to give deference to the decisions of the IAC. At the same time, the IAC has a narrow scope of authority which would not unduly undermine the sovereignty of the contracting states. However, page "607" the task would be to gather the consensus of the contracting states of the NYC for the establishment of the IAC, which would require an amendment of the NYC. (68)Nevertheless, the efforts for the same would be worth it in view of the benefits that would accrue to the uniformity, predictability and effectiveness of international arbitration

**Conclusion**

The scheme of the NYC envisages the concepts of setting aside of an award by a court of primary jurisdiction and refusal to enforce awards by courts of secondary jurisdiction. However, the rival approaches on enforcement of annulled awards, classic and internationalist, have led to some uncertainty as to the status of annulled awards. On the one hand, the classic approach grants the court of arbitral situs the power to determine the international validity of an award, whereas the internationalists argue for an arbitral award as an international judicial decision, the validity of which needs to be assessed by the country where the enforcement is sought. While the classic approach relies on NYC, Article V(1)(e) which recognizes annulment as a ground for non-enforcement, the internationalists rely on the word ‘may’ used in NYC, Article V(1), along with the ‘more favourable law’ provision of Article VII.

A close reading of these provisions, however, reveals that the true scope and nature of international commercial arbitration under the NYC supports the relevance of granting universal effect to annulments at the seat of arbitration. Once an award is annulled by the rightful authority, it ceases to exist in every jurisdiction as per the parties’ agreement. In this regard, the parties have complete autonomy to page "606" pick any country as the seat of arbitration, pursuant to which they must abide by the laws of that country. Further, a de novo review by every court where enforcement is sought under the internationalist approach poses the risk of conflicting judgments on the same award across various jurisdictions, leading to reduced predictability and increased instances of judicial review in international commercial arbitration. However, the use of the word ‘may’ in NYC, Article V as opposed to the use of the word ‘shall’ in Articles II, III and VII does have some bearing on the discretionary nature of the provision. In certain exceptional cases, this discretion can be used by an enforcing court to deviate from the judgment of the court with primary jurisdiction. The annulment decision of a court which abuses such procedure need not be given deference. In such cases, to protect the will of the parties and the integrity of international arbitration, a court with secondary jurisdiction would be justified in enforcing an annulled award. A court exercising this discretion, thus, must consider fraud, undue influence, deviation from the parties’ intent, extent of judicial review contemplated by the parties and the need for uniformity in international commercial arbitration. Nevertheless, this discretion should be interpreted as a narrow one while maintaining the general rule that annulment of an award by the country of origin is a ground for non-enforcement of the award.

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 **Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards, Under the Federal Arbitration*** *Act,* St. John's Law Review, Volume 76, Summer 2002

The primary purpose of the FAA is to place contracts to

arbitrate on equal footing with other contracts. 168 Accordingly, if

parties decide to expand the scope of review and sacrifice some of

the perceived benefits of arbitration, the agreement should be

enforced according to its terms. Yet the circuit courts remain split on whether freedom of contract allows parties to expand the

scope of judicial review of arbitration awards. The available case

law suggests that if parties make no modifications with respect

to review within their arbitration agreements, then the

arbitration award will be reviewed under the standards set forth

under section 10 of the FAA. Arbitration is based, however,

upon freedom of contract, and as such, parties should be able to

structure arbitration agreements according to their wishes.

Furthermore, parties can expand the scope of review without

raising any jurisdictional or constitutional issues by limiting an

arbitrator's discretion in the arbitration clause.

As has been seen, the courts have already granted expanded

review of arbitration awards made under statutory claims

because of the nature and importance of the claims. Although

permitting parties to modify the scope of judicial review may

impose issues of efficiency and finality upon the courts,169 parties

will be more likely to submit to arbitration if they feel that they

have some control over the outcome of the process. In order to

promote arbitration as an alternative to litigation, as opposed to

"ta preliminary step before litigation,"170 the importance of

freedom of contract and individual rights must be recognized.

The practice of allowing parties to contractually modify the scope

of review of arbitration awards effectively promotes the

legislative intent of the FAA and, equally as important, is not

unconstitutional.