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RECOGNITION AND ENFORCEMENT OF ANNULLED ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

Dinis Braz Teixeira[*]

Abstract

*In the 60 years since its inception, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] has become one of the most successful international treaties ever, having been adopted by 157 of the 193 United Nations Member States.*

In this paper, I shall focus my attention on its regime since it represents the internationally accepted standards on the recognition and the enforcement of foreign arbitral awards. I shall be analysing Article V(1)(e) of the Convention which is the cause of a rather intense debate among international scholars. It revolves around the possibility of recognition of annulled foreign arbitral awards.

This paper starts with the introduction of central concepts relating to the debate surrounding Article V(1)(e) of the Convention and the positions that have been put forward in the past decades. I will contextualize the appearance of the New York Convention as well as elaborate on the concepts of 'recognition', 'enforcement' and 'setting aside' of awards, the way they were dealt with by the drafters of the Convention, and the interests at play. I will also cover the controversies over the nationality of the award and the discretionary power of the courts in enforcing annulled arbitral awards. I

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will finish by analysing the regime under other conventions, and the situation of pending and set-aside proceedings.

I. Introduction

Behind the New York Convention lies a long evolution, which is still taking place even in the present day. Thus, to adequately understand the regime of the New York Convention, we must first understand the context in which it came into being.

The New York Convention was drafted in 1958 with the intention of addressing the shortcomings of the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 ["**Geneva Convention**"] and therefore, to facilitate (and encourage) the recognition and enforcement of international arbitration agreements and awards. The requirement of recognition and enforcement of awards was also to provide a maximum level of control which the Contracting States may exert over arbitral awards and to serve international trade and commerce and promote cross-border arbitrations by providing a common international minimum standard that is applicable worldwide. Indeed, for international trade to properly flourish, the recognition and enforcement of arbitral decisions should not be limited, for instance, by the fact that the goods might be located outside the State's territory.[1]

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[1] Albert Jan van den Berg, Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, 27(2) J. INT'L ARB. 181 (2010) [hereinafter "Albert Jan van den Berg"]; Jan Paulsson, Enforcing Arbitral Awards Notwithstanding Local Standard Annulments, 6(2) ASIA PAC. L. REV. 9 (1998) [hereinafter "Paulsson"]; UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 77, G.A. Res. 62/65, U.N. Doc. A/RES/62/65 (Dec. 6, 2007) (United Nations Publications, Vienna, 2016 ed.) [hereinafter "UNCITRAL Guide"]; Robert Briner, Philosophy and Objectives of the Convention, in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION EXPERIENCE AND PROSPECTS 9 (1999);

These goals were pursued through the establishment of universal deference to foreign arbitral awards that sought recognition abroad. Further, once an arbitral award met the minimum formal requirements, the arbitral award was granted safeguards so that to refuse its recognition, the resisting party would have to prove one of the grounds under Article V of the New York Convention.[2]

A great part of the debate stems from the controversy on whether the New York Convention was intended to be a thorough regime regulating the recognition and enforcement of international arbitral awards or whether it was just supposed to facilitate recognition and to solve the shortcomings of that time.[3]

I will concentrate on Article V(1)(e), where the drafters established a set of criteria to be followed by the enforcing courts when facing a plea to, or not to, recognize and enforce an award.

GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3412, 3608 (2d ed. 2014) [hereinafter "BORN"]; Nadia Darwazeh, Article V(1)(e), in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 302 (Herbert Kronke et al. eds., 2010) [hereinafter "Darwazeh"]; William W. Park, Duty and Discretion in International Arbitration, in ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 360 (2d ed. 2012) [hereinafter "PARK"]; Nobumichi Teramura, Recognisability and Enforceability of Annulled Foreign Arbitral Awards: Practical Perspectives of Enforcing Countries, 66(4) DOSHISHA L. REV. 113-114 (2014) [hereinafter "Teramura"]; LUÍS LIMA DE PINHEIRO, DIREITO INTERNACIONAL PRIVADO 562 (2d ed. 2012) [hereinafter "PINHEIRO"].

2 Interestingly, the goal was to expand the circumstances under which the award could be recognized, and not to restrict them. This should not be mistaken for an obligation to not recognize nor to establish a unitary regime, since they were not trying to fix unbroken things, but simply face the challenges of the time and tackle the under-enforcement (and not any potential over-enforcement) that was resulting from the double exequatur requirement, which will be addressed *infra*. *See* BORN, *supra* note 1, at 3429; Jaba Gvelebiani, *Recognition of Foreign Arbitral Awards Set Aside in the Country of Origin*, 1 (Mar. 29, 2013), *available at* http://www.etd.ceu.hu/2013/gvelebiani_jaba.pdf [*hereinafter* "Gvelebiani"].

3 BORN, *supra* note 1, at 3431.

In Article V(1)(e), one finds two grants of power: (i) to the enforcing courts, to decide on the enforceability of arbitral awards rendered in foreign jurisdictions, and (ii) to the courts of the country of origin, to set aside the arbitral awards. Regarding the first power, scholars are divided as to whether the enforcing court can still enforce an award under any one of the grounds predicted in Article V. Some hold the view that the interpretation of the New York Convention should be pro-enforcement (*favor arbitrandum*; the pro-enforcement bias, as the U.S. Supreme Court has recognized)[4] and narrow (in order to be easy for enforcements), while some consider that discretion should be granted to the judge, as Article V states that "*the judge may exercise*", when a case falls under any one of the grounds mentioned in Article V.[5]

The recognition of the *second* power of Article V may be found from the power it gives to refuse recognition to an award specifically set aside in the country of origin (Article V(1)(e)). This has led to some authors calling for a "*world-wide nullifying effect*" of set aside decisions,[6] while others try to apply delocalization theories, i.e., detachment of the award from the jurisdiction where it was rendered. Finally, a third party identifies a rebuttable presumption of unenforceability when it comes to vacated awards.[7]

In arbitration, the State allows its adjudicatory prerogatives to be contracted out which means that the result of this private justice administration system will be first integrated into the legal order and then

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4 Glencore Grain Rotterdam BV v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1120 (9th Cir. 2002), wherein it was held that "the Convention and its implementing legislation have a pro-enforcement bias, a policy long-recognized by the Supreme Court [of the USA]".

5 Nigel Blackaby et al., Redfern and Hunter on International Arbitration 634 (6th ed. 2015) [*hereinafter* "Blackaby et al."]; Born, *supra* note 1, at 3415.

6 Based on the sovereignty of the country of situs. *See* Gvelebiani, *supra* note 2, at 3.

7 Gvelebiani, *supra* note 2, at 2.

see its effects be recognized and carried out.[8] Naturally, in order for States to accept it, they require that a certain amount of scrutiny be maintained over arbitrations and the resulting awards.[9] Judicial annulment has been one of the legal mechanisms through which the States have exerted control. It poses many interesting questions, some of which we have to deal with before we go any further. If the parties decided to remove a certain dispute from the courts, to what extent should judicial annulment operate? And how should it be recognized by other States?

As we may see, we are contending with interests of various types. Deference to the set-aside decision may be, in some situations, the decision which is most in line with party autonomy. The parties may have agreed to arbitrate with a special regard for the chosen seat – for instance, because either they were aware of a certain Local Standard Annulment ["**LSA**"], or they wanted to limit the arbitrators' powers in a certain way, or even because they desired an extensive judicial review and by choosing that arbitral seat, were knowingly trying to preserve that *remedy*. However, the reasons behind the choice are usually more in line with topics like the place's neutrality, faster resolution or mere geographical convenience and may not always relate to encompassing the possible challenge to the award in the country. In fact, it would not be realistic to describe an eventual *extensive judicial review of the arbitral award* as a common motif for the parties

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8 When operating internationally, there are some concerns that should not be forgotten, such as which will be the State with jurisdiction to decide on the validity of the award and the arbitral proceedings? Given how arbitration found its way into the legal world, as a substitute to judicial courts in some manner, it is understood that it should be the country where the award was rendered to exert its control.

9 Vladimir Pavic, *Annulment of Arbitral Awards in International Commercial Arbitration*, *in* INVESTMENT AND COMMERCIAL ARBITRATIONS – SIMILARITIES AND DIVERGENCES 132 (Christina Knahr et al. eds., 2010) [*hereinafter* "Pavic"]; PARK, *supra* note 1, at 358. *Cf.* Henry Fraser, *Sketch of the History of International Arbitration*, 11(2) CORNELL L. REV. 179 (1926).

to arbitrate somewhere.[10] Despite the adagio of the *ignorantia juris non excusat*, one should not get completely out of touch with the reality of situations where the place of arbitration is not even chosen by parties, but by the arbitrators or the institution.[11] In the field of international arbitration, the possibility of an award to produce its effects within other legal orders is of the utmost importance as parties usually tend to choose a neutral seat with no connection to any of them. Later, if a losing party does not voluntarily comply, the wining party will try to see the award enforced in another jurisdiction where the losing party has its assets.

One of the problems presented by the Geneva Convention was the *double exequatur* requirement, according to which the party seeking enforcement would have to demonstrate that in the country of origin, the award was *final*. This meant that it was no longer appealable, nor subject to pending proceedings regarding the award's validity. The party would be required to obtain two decisions of *exequatur*: one in the country of arbitration and the other in the enforcing country. This ended up having the adverse effect of leading to some unnecessary delays provoked by the losing party taking advantage of the system, and rendering the need to obtain *exequatur* in the country of origin before seeking enforcement anywhere else.[12] When

10 BORN, *supra* note 1, at 3645; PARK, *supra* note 1, at 352; Jan Paulsson, *Arbitration Unbound: Award Detached from its Country of Origin*, 30(2) INT'L & COMP. L. Q. 18 (1981) [*hereinafter* "Paulsson – Arbitration Unbound"].

11 Paulsson, *supra* note 1, at 1-2.

12 Convention on the Execution of Foreign Arbitral Awards, arts. 1(d) and 2, Sept. 26, 1927, 92 L.N.T.S. 301 [*hereinafter* "Geneva Convention"]. Alongside the double *exequatur* requirement, the Geneva Convention was much criticized due to the placement of the burden of proof on the party seeking enforcement instead of charging the resisting party, having too broad grounds to refuse enforcement, and the most criticized: it required the enforcing courts to refuse the enforcement in the cases where the award had been vacated in the country of the arbitration, lack of proper notice or situation of legal incapacity, and in the case of *ultra petita* (when the award goes beyond the parties request), *extra petita* (when the award grants something different from the relief requested); UNCITRAL Guide, *supra* note 1, at 124, 207; Paulsson, *supra* note 1, at 8; BORN, *supra* note 1, at 3607**;** Darwazeh, *supra* note 1, at 304-305.

faced with this issue, the New York Convention drafters received the suggestions of the Dutch delegation and abandoned the *double exequatur* requirement, balancing this modification by moving the burden of proof from the enforcing party to the resisting party. They also adopted a provision according to which the non-binding nature of the award would still be considered a valid ground for denying recognition and enforcement (albeit not mandatory), and passed from a mandatory formulation[13] to a rather permissive one, granting some discretion to the enforcing court.[14] This understanding is further supported by the contrast of the term 'may' used in Article V, and the term 'shall' as present in Articles III and IV, as we shall see *infra*.[15]

II. Recognition, Enforcement and Set aside

When it comes to the effectiveness of an award in another jurisdiction, there are three processes we should pay close attention to: recognition, enforcement, and set aside. Recognition is the legal process by which the award is integrated into the State's legal system, and can be granted independently of the enforcement, for example, to prove that the dispute has already been settled in a binding form between the parties.[16] Enforcement, in turn, is the legal process under which the award's provisions are carried out by the legal means available. It presupposes the previous step of recognition.[17] The judgment carried out by the enforcing

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13 Geneva Convention, art. 2(1).

14 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1), June 10, 1958, 330 U.N.T.S 4739 [*hereinafter* "New York Convention"].

15 UNCITRAL Guide, *supra* note 1, at 124-25, 207-08; BORN, *supra* note 1, at 3608-3609; Darwazeh, *supra* note 1, at 308-309; Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29(2) ICSID REV. 263, 268 (2014) [*hereinafter* "Albert Jan van den Berg – Setting Aside"]; Paulsson, *supra* note 1, at 9.

16 Recognition consists of granting the arbitral decision a parallel value to a sentence issued by the judicial authorities of the enforcing State, *see* MAURO RUBINO-SAMMARTANO, IL DIRITTO DELL'ARBITRO 1023 (3d ed. 2002).

17 Teramura, *supra* note 1, at 80.

judge should not be a new analysis on the facts of the case or a new ruling (a new judgment on the merits), but rather a verification of the adequacy of the foreign arbitral decision so as to produce its effects and integrate it into the legal order, and a scrutiny of its procedural aspects.[18] Finally, set aside is the annulment procedure that takes place in the courts in which, or under the law of which, the award was made. It differs from the refusal of enforcement due to its territorial effect. Whereas the refusal of enforcement has its effects limited to the jurisdiction of the country where it took place, it is argued whether set aside decisions, on the other hand, carry an *erga omnes* effect and are consequently enforceable abroad.[19] It follows the legal distinction between primary jurisdiction (of the courts of the country that may annul the award) and secondary jurisdiction (other jurisdictions where the enforcement is sought). The first may set aside the arbitral award, while the second might just grant or refuse its enforcement.

Professor Michael Reisman advances a theory according to which, in spite of the discretion granted on the enforcement of annulled awards, there would be an *implicit bargain* between signatory States to the New York Convention. By virtue of this bargain, the courts of the arbitral seat would commit to control awards against the counter-promise of the enforcing courts to respect the outcome of that given control in order to also grant

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18 SAMMARTANO, *supra* note 16, at 1023; Pavic, *supra* note 9, at 152.

19 PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal, [2014] 1 SLR 372, at ¶ 77 (Sing.), wherein the Tribunal explained, "While the wording of Art. V(1)(e) of the New York Convention and Art. 36(1)(a)(v) of the Model Law arguably contemplates the possibility that an award which has been set aside may still be enforced, in the sense that the refusal to enforce remains subject to the discretion of the enforcing court, the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce".

some stability and prevent abusive behaviour.[20] This would mean, in exchange, that the courts of the country of origin would be empowered to invalidate a defective arbitrator's decision. Nonetheless, the opinion is not homogeneous: the most favourable provision as well as the permissive language present in the New York Convention – "*may*" – underpins the contrary argumentation: supporting the discretion of the enforcement courts when dealing with annulled awards. It allows, in some circumstances, the overriding of the more restrictive interpretations of the New York Convention's terms.[21]

Jan Paulsson reminds the international community that this distinction of primary and secondary jurisdictions as well as Michael Reisman's theory are not supported in any provision of the text but in the rather vague notions of *assigned functions* and *coherent theory,* and that they contradict the New York Convention's purpose of facilitating the enforcement of the awards.[22]

III. Nationality of the Award

When it comes to determining the nationality of the award[23] and consequently its primary jurisdiction, two main criteria are applied: first, the procedural criterion, according to which the award's nationality would be determined by the procedural environment in which the award had been rendered and second, the territorial approach,[24] according to which

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[20] By abusive behaviors one means, for example, the situation of a dishonest losing party running around the world trying to find a court willing to enforce an invalid award, and subsequently claiming that the decision would be valid worldwide.

[21] PARK, *supra* note 1, at 361.

[22] Paulsson, *supra* note 1, at 22.

[23] The award's nationality matters to the extent of determining its effects in a certain legal order. *See* PINHEIRO, *supra* note 1, at 561.

[24] It conforms with the development of the modern States, where judicial decisions were understood as sovereign prerogatives and their authority was limited to the national borders. *See* ANTÓNIO MENEZES CORDEIRO, TRATADO DA ARBITRAGEM: COMENTÁRIO À LEI

the award's nationality corresponds to the legal seat, i.e., the place where the award had been rendered. The second criterion has been prevailing ever since the widespread transposition of the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"] by States resulted in the adoption of the territorial criterion that underpins the whole system.[25]

When parties agree to arbitrate their disputes, they commit to a relevant seat. With this choice comes the expectation of having the proceedings subject to that country's mandatory procedural provisions. Not respecting (directly or indirectly) the choice of *situs* would end up allowing one side to change its mind about judicial review once it knows who would end up in the disadvantaged position.[26] The rationale behind it is that activities taking place in a certain country should be subject to the law of that country.

According to scholars, there is a need to concentrate judicial control over the arbitral process to the courts of the country where the award was rendered as the award can be seen as an *output* of the legal regime of the place of arbitration and it also solves the problem of having a party running around the world trying to enforce the award in every single country.

The controversy that we are dealing with lies not only on different estimations over the advantages and disadvantages resulting from one position or another. It mostly stems from different jus-philosophical understandings and pre-comprehensions over where the legitimacy of the

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63/2011, DE 14 DE DEZEMBRO [ARBITRATION TREATY: IN COMMENTARY OF LAW 63/2011 OF 14TH DECEMBER] 530 (2015).

25 Pavic, *supra* note 9, at 134; Darwazeh, *supra* note 1, at 324.

26 PARK, *supra* note 1, at 365.

arbitration lies, and under what criteria should we examine the validity of arbitration.

F. A. Mann, for instance, sustains that the term *international arbitration* is rather misleading since it would all be based in national law where every arbitral proceeding is subject to a given national system of law.[27] In his view, arbitral proceedings arising from private contractual stipulation will have a national character, and treaties are only operative because they have been accepted by the State controlling the arbitration, which helps sustain the position of supremacy of the national legal system where the arbitral proceedings are carried out.

In his line of argumentation, the idea of party autonomy itself[28] (just like every right or legal power) exists due to a given system of domestic law, which also explains why it takes different shapes in different systems: it is their source.[29] The binding nature is said to be derived from a legal system that is exclusively competent and national due to the following reasons: (i) the principle according to which contracts are governed by the law chosen by the parties exists as a part of a rule rooted in a specific legal system; (ii) the binding nature of the election of a national forum also stems from a given national legal system; (iii) the most effective control of the constitution and functioning of the arbitral tribunal will be carried out by the judges of the place of arbitration and under that given law; (iv) local sovereignty only yields before granted freedoms; (v) arbitration can be deemed as a part of the judicial public service of the country where it

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27 Paulsson – Arbitration Unbound, *supra* note 10, at 360; F.A. Mann, *England Rejects "Delocalised" Contracts and Arbitration*, 33(1) INT'L & COMP. L. Q. 193, 198 (1984).

28 As Lima Pinheiro mentions, given the fact that arbitration has contractual foundations, the recognition of its effects would correspond to the arbitration agreement regulating purpose, *see* PINHEIRO, *supra* note 1, at 562.

29 Paulsson – Arbitration Unbound, *supra* note 10, at 360.

takes place; and (vi) even if the arbitration is governed by a foreign law, they will still have to respect the local laws.[30]

It seems that a reasonable way to determine the nationality has fallen under heavy criticism due to the fact that the choice of seat might have been taken on a purely random basis, or simply because it responds to some other concerns completely detached from the realities of international arbitration.

When the award and the whole arbitration are rooted in the national legal system and a competent authority of the given system annuls such award, it ceases to exist under the applicable arbitration law. So then, how can it be enforced at a later stage? Moreover, the combination of Articles III and V(1)(e) further argues against such recognition and enforcement. The Contracting States committed to recognize arbitral awards as binding but when an arbitral award is set aside in the country of origin, it is no longer binding upon the parties.[31]

When it comes to determining the nationality of the award, the following arguments have been put forward in support of the territorial approach:

1. As Jan van den Berg and Sanders framed it, the award would be rooted in the legal system of the country of origin, and with the annulment, it would become non-existent. As there is nothing left to enforce (it would even run against the public policy of the enforcing country), it would be deprived of force worldwide.[32]

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30 *Id.* at 361.

31 Albert Jan van den Berg, *supra* note 1, at 190.

32 Darwazeh, *supra* note 1, at 325-326; Pieter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 NETH. INT'L L. REV. 43, 55 (1959).

When we theorize about the legal order, we must always start from reality and then proceed to the abstraction. The truth is that the New York Convention grants courts a discretionary power, which is at odds with this theory.[33] If there was nothing left, on what ground would the courts exercise their discretion?

2. While not determining the extent of the jurisdiction taking place in the country of origin, the New York Convention limits the jurisdiction of review taking place in the country of enforcement. Consequently, the enforcing court should defer to the set aside decision, which the drafters intended to grant more competence. This argument has been rebutted for undermining arbitration as an effective international dispute resolution mechanism, given that the court would always have to refuse enforcement, even if the annulment was based on LSA.[34]

3. Courts should also show respect by not insulting the courts of other countries via not paying deference to the nullification decisions rendered there,[35] and watch out for the rather perverse incentive to chase a nullified award around the world and the creation of inconsistent results. To this, it has been contented that each country is entitled to define its own set of rules concerning setting aside awards, without those applying in an international arena, or to other jurisdictions. Accordingly, they say that the inconsistency of results is a more theoretical hypothesis rather than real as it is most likely that if an award found to be defective

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33 Darwazeh, *supra* note 1, at 325-326.

34 *Id.* at 326.

35 It should be noted that there are dangers in the over credence granted to the law of the place of arbitration, namely the incitation to courts to assist losing parties' attempts in overthrowing/resisting and invalidating the arbitrators' decision, and the destruction of legitimate (and maybe settled) expectations. *See* Paulsson, *supra* note 1, at 24.

enough to be set aside in country A, it will not be enforced in country B.[36]

In this regard, courts have frequently raised the issue of the principles of international comity, according to which it would be inappropriate to recognize an annulled arbitral award.[37]

4. The territorial approach would also be in line with the will of the parties. When the parties agree to submit their conflict to a country's arbitration laws, it also covers the right to recourse allowed by their legislation, and parties may expect the enforcing countries to respect that. Nonetheless, it is far from uncommon that parties either don't choose the seat of arbitration, or have their arbitrators' panel choosing for them.[38]

In response to the territorial approach, we saw the emergence of the detachment/delocalization theory. According to this theory, the award should be free from local constraints (instead of being controlled at its origin) and be subject only to international law and the law of the enforcing country, where it was due to see its effects played out.[39] This way, the award would not be anchored in the legal order of the seat of arbitration, and consequently, the choice of the seat would weigh less, since the validity of the award would not depend on the assessment of the

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36 *Id.*; Darwazeh, *supra* note 1, at 328.

37 These principles of comity are normally understood to be the rules observed by states among themselves, not obeying international law, but rather as courtesy or simply convenience. *See* BORN, *supra* note 1, at 3412; ANTÓNIO SAMPAIO CARAMELO, O RECONHECIMENTO E EXECUÇÃO DE SENTENÇAS ARBITRAIS ESTRANGEIRAS 192 (2016).

38 Darwazeh, *supra* note 1, at 328.

39 Pavic, *supra* note 9, at 134; Darwazeh, *supra* note 1, at 331-334.

court of the country where it had been rendered.[40] The detachment theory has also seen some arguments put forward in its favour:

1. A literal interpretation of Article V(1) is unambiguous in finding a grant of discretionary power to the courts of the country where the recognition is sought, to either enforce it or refuse the enforcement.[41]

2. Judgments deciding the underlying dispute should receive a higher degree of deference than those which just set aside foreign arbitral awards. As the United States' Supreme Court noted in the case of *Hilton* v. *Guyot*, we should bear in mind the notion of *res judicata*: "*once a court with jurisdiction has decided the dispute, the parties should not have to re-litigate the dispute elsewhere*".[42] In response, some authors have waived the *chase of nullified awards* and the eventual inconsistencies.[43]

3. The award may suffer from another internationally recognized reason for the court to enforce the award, regardless of the annulment, like estoppel (the party might be estopped from invoking a certain argument or ground).[44]

4. International arbitration is built on the premise that a country's control and oversight upon the arbitration is reduced to the bare

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40 Paulsson – Arbitration Unbound, *supra* note 10, at 358-359, 367; Francisco González De Cossío, *Enforcement of Annulled Awards: Towards a Better Analytical Approach*, 32(1) ARB. INT'L 6 (2016) [*hereinafter* "De Cossío"].

41 Darwazeh, *supra* note 1, at 331.

42 *Id.* at 332; Henry Hilton v. Gustave Bertin Guyot, 159 U.S. 113 (1895).

43 Darwazeh, *supra* note 1, at 331.

44 *Id.*

minimum. It is hence assumed that the New York Convention will be the basis for enforcement of the award in any State.[45]

5. One should also note that Article VII's more favourable right provision manifests this idea of minimum requirements: if a country presents a more favourable legal framework, it should apply.[46]

   An international arbitration may create obligations even if the *lex fori* will not recognize such effect, and a party, when operating internationally, may have greater or lesser rights, with respect to the same relationship depending on which national system it is brought to bear.[47]

6. The legal force of transnational arbitration stems out of the parties' contract and the effect of the proceedings would be left to be controlled by the legal system that is requested to recognize the award.[48] This runs against the argument put forward previously, according to which this internationally binding nature of the contract must be rooted somewhere.

This theory is no longer just theoretical, having been tried in the Swedish decision, Gö*taverken,*[49] which opposed Götaverken Arendal Aktiebolag ["**Götaverken**"] against the Libyan General National Maritime Transport Company ["**Libyan Maritime Co.**"] for the delivery ships and payment of the purchase price. The arbitral tribunal of the International Chambers of Commerce ["**ICC**"], with its seat in Paris, ruled in favour of

45 *Id.* at 333.
46 *Id.*
47 Also, most award rulings are followed by the parties voluntarily.
48 Paulsson – Arbitration Unbound, *supra* note 10, at 363.
49 *Id.* at 367; Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 1979 Ö 1243-78 (Swed.).

Götaverken for payment with a reduction of 2%. Libyan Maritime Co. appealed against the decision of the tribunal in France and also opposed the enforcement of the award in Sweden, claiming that the decision was not binding anywhere since it had been challenged in the courts of the country where it had been rendered. The French courts refused jurisdiction for the following reason: France had only been chosen for being a geographically neutral ground for litigation as both parties were foreign to France and the case had no connection whatsoever with this country,[50] so its recognition was not necessary for recognition elsewhere. Additionally, because the ICC Rules no longer mandated the application of the law of the seat in absence of choice, the French court ruled that the award was not "*French in nationality*" and was, therefore, not subject to the French legal order.[51]

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50 This argumentation reasons with two legislative measures adopted by Belgium and Switzerland. The first country's law excluded jurisdiction when it came to applications to set aside awards rendered in Belgium, but among foreigners (to Belgium); whereas the Swiss laws allowed an agreement between the parties, whereby if none was a Swiss national or resident, they could agree not to challenge the award within Swiss jurisdiction. These two norms were perceived by some in the international arena as self-interested and contrary to the scheme provided by the New York Convention. Consequently, a national of a signatory country to the New York Convention deprived of protection might seek reparation of the injury, understood as a treaty violation, against either Belgium or Switzerland. Jan Paulsson argues back as it is not possible to fundament that position, since there is no provision for that in the text requiring any eventual complaint to be based on the rather vague notions of assigned functions and coherent theory, and which are – in Paulsson's view – contradicted by the New York Convention's purpose of facilitating the enforcement of the award. One other thought is that usually, complaints appear from the courts' excessive control, not the other way around. Since the New York Convention does not use the notions of primary and secondary jurisdictions, maybe we should pay more attention to where the consequences of the awards (economic or not) are sought. Finally, the unfair competitive advantage argument also does not stick: parties prefer a rather predictable and reasonable level of control, and consequently we are not seeing a rush for their jurisdictions. *See* Pavic, *supra* note 9, at 145; Paulsson, *supra* note 1, at 21-22.

51 Paulsson – Arbitration Unbound, *supra* note 10, at 358-359, 367; De Cossío, *supra* note 40, at 6.

However, the Swedish court enforced the award despite being challenged in the country of origin. This was viewed by some as representing a shift of control from the place of arbitration to the country of enforcement and sustaining the theory that the binding force of an arbitral award would not necessarily derive from the legal system of the country of origin.[52]

That is not to say that the national law of the seat of arbitration may not work as the foundation of the proceedings, as for instance: (i) if the parties decide to resort to municipal judges in order to have sanctions or assistance beyond their powers; (ii) if a losing party considers an award defective, it will want to have a jurisdiction where it may challenge the award; and (iii) if the award was truly *a-national,* one could ask if it would actually fall under the scope of the New York Convention.[53]

If we were to accept the detachment theory, the effects of the award would be controlled by no authority besides its contractual foundation and the requirements put in place by each jurisdiction. The creditor under an award would see the effects recognized and enforced as a consequence of both national and international legal systems.[54]

To assume that national level decisions to set aside awards in a given country could have the effect of extinguishing their existence in foreign jurisdictions would be to labour against the intention of the drafters of the New York Convention, who wanted international awards to be recognized and enforced, completely independent of national laws.[55]

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52 Paulsson – Arbitration Unbound, *supra* note 10, at 375.
53 *Id.* at 375-376.
54 *Id.* at 358-359, 367; De Cossío, *supra* note 40, at 6.
55 Teramura, *supra* note 1, at 86.

Now we are in a position to ask: do the arbitral awards cease to exist once they are set aside by a competent authority?

As per the territorial approach (also known as the traditional one), the court should not enforce annulled awards, no matter what the circumstance is. This is justified by the logical reasoning that, if the award has been annulled in its country of origin, where it was legally rooted to the arbitration law, it ceases to exist.[56] This is not liquid: as we saw, other scholars claim that the legitimacy of the award does not derive itself from the law of the seat, but rather, from the enforcement forum, in the same way as a contract void in one nation can still be enforced elsewhere. As Jan Paulsson remembers, a contract, a marriage or an adoption can be invalid, and yet its effects can still be felt in a given country which recognized it as valid, even though the courts of the country of origin had annulled it. The same would apply to arbitral awards, clearly showing that it might take its legitimacy from the enforcement forum.[57]

Furthermore, the idea that the award would cease to exist once it is annulled is at odds with the permission granted to the States in the second part of Article V(1)(e), where the New York Convention granted the enforcing courts a discretionary power.[58] So, if it continues to exist, how should the enforcing country deal with the set aside decision?

According to Article V(1)(e), the enforcing countries' courts may refuse recognition and enforcement if the seeking party proves that the award

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56 According to Sanders, it would even be against public order of the enforcing country to enforce a non-arbitral award. *See* Albert Jan van den Berg, *supra* note 1, at 187.

57 Paulsson, *supra* note 1, at 11; PARK, *supra* note 1, at 356; Teramura, *supra* note 1, at 84.

58 Teramura, *supra* note 1, at 86.

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.[59]

This means that there are two authorized jurisdictions to carry out the setting aside of an arbitral award: both the jurisdiction of the country in which, or under the law of which, that award was made. The first term is usually understood to be referring to the courts of the *seat of arbitration*, and not necessarily the place of the hearing or signature.[60] It was the sole jurisdiction authorized in the 1927 Geneva Convention for primary review over an arbitral award but was then extended in 1958 in the New York Convention.[61]

As for the "*law under which the award was made*", it can be read as meaning: (i) the law governing the arbitration proceedings; (ii) the parties' arbitration agreement; or (iii) the substantive law governing the parties' underlying dispute. Nadia Darwazeh adopts the first interpretation, claiming that it refers to the arbitration law in a case where the parties have chosen to submit their award to a different arbitration law, from the arbitration law of the place of arbitration. Nevertheless, it should be noted that in practice, the procedural law tends to coincide with the law of the place where the award was made.[62]

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59 "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:…(e) The 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."

60 This may be problematic in situations such as when the arbitration takes place over the internet or on a document basis. The solutions advanced have been: (i) to determine a fictitious place of arbitration; (ii) the place where the arbitrator is; and (iii) use the geographical location of the computer server. *See* Darwazeh, *supra* note 1, at 320.

61 Gvelebiani, *supra* note 2, at 6.

62 Darwazeh, *supra* note 1, at 321; Gvelebiani, *supra* note 2, at 6.

The U.S. Court has come out and supported this understanding in *International Standard Electric Corporation* v. *Bridas Sociedad Anonima Petrolera, Industrial y Comercial*. The Court stated that "*under the law of which*" referred to the arbitral procedural law, and not the substantive law of the contract.[63] With a different understanding, courts in Pakistan and India have sustained that the term refers to the law governing the arbitration agreement and that, consequently, the award could be set aside by the competent authorities of the country governed by the same law as the arbitration agreement. For instance, in *Hitachi* v. *Rupali*,[64] the parties had chosen the law of Pakistan to govern the contract and agreed on the application of the ICC Rules and London as the seat. Later, the Supreme Court of Pakistan held that it had jurisdiction since the parties had chosen the law of Pakistan to govern the arbitration agreement, even if the law governing the arbitration proceedings was the English one. A similar understanding was expressed by the Supreme Court of India in the case of *NTPC* v. *Singer*,[65] where it claimed that matters in respect of the arbitration agreement fall in the jurisdiction of the laws governing the arbitration agreement.[66] However, in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Service, Inc.*, the Indian Supreme Court recognized the lack of jurisdiction of Indian courts when the seat of arbitration lay outside India.[67]

With respect to the authority competent to set aside an award, the law applicable to the award, as mentioned in the New York Convention, is commonly accepted to be referring to the courts with jurisdiction to set

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63 Darwazeh, *supra* note 1, at 322; Int'l Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172 (S.D.N.Y. 1990).

64 BLACKABY ET AL., *supra* note 5, at 639-640.

65 National Thermal Power Corporation v. Singer Co., (1992) 3 SCC 551 (India).

66 Darwazeh, *supra* note 1, at 322-323.

67 Bharat Aluminium Co v. Kaiser Aluminium Technical Service Inc., (2012) 9 SCC 552 (India).

aside an award in each country and the procedural law governing the arbitration.[68]

IV. Discretion of the Enforcing Court

The drafters' choice of words for Article V(1) has been heavily debated. There are five versions of the New York Convention that are equally authentic: English, French, Chinese, Russian and Spanish.[69] The problem is that they do not mean exactly the same thing: where the English (together with the Chinese, Russian and Spanish) version reads that the judge *may* refuse the enforcement in case one of the grounds is verified (a rather permissive phrase construction), the French version opted for a more imperative word composition by using "*ne seront refusées*" (in a more obligatory sense).[70]

This idea that the French version presents a mandatory sense is rather controversial. There are authors who propose a more permissive approach, sustaining that the French courts do not require the refusal of enforcement in the event of an annulled award, with an interpretation more in line with the French practice, which is famous for resorting to Article VII.[71] Furthermore, one should not overlook the interpretative principles of international law applicable to plurilingual treaties which make a solid case against an *exception française*, i.e., the principle of equal authority of authentic texts, together with the presumption that the chosen terms in each language were intended to share the same meaning in conformity with the unity of the treaty – all together.[72]

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[68] UNCITRAL Guide, *supra* note 1, at 217-18; Albert Jan van den Berg – Setting Aside, *supra* note 15, at 263, 266.
[69] New York Convention, *supra* note 14, art. XVI(1).
[70] Teramura, *supra* note 1, at 107.
[71] BORN, *supra* note 1, at 3429-3431.
[72] Darwazeh, *supra* note 1, at 309.

It is also the interpretation more in line with the principles of interpretation of treaties as enshrined in the Vienna Convention on the Law of Treaties, which established the *objective* theory of interpretation in Article 31, although mitigated by the acceptance of a certain subjectivism (Article 31(4)). We should also consider the context of where it is inserted, the historical background and its subsequent application.

However, this is far from unanimous with authors sustaining an interpretation more in the line of the French one (a *mandatory* sense) rather than following the English version (the *permissive* one). Consequently, such scholars support the lack of discretion on the refusal of the annulled awards, sustaining that the judges would be obliged to deny recognition in these cases. To them, annulled awards would not be enforceable any longer.[73]

According to Gary Born, it would be wrong to read Article V as requiring the Contracting States to deny recognition to an arbitral award. The problem – that justified bringing the New York Convention into existence – was of under-recognition and enforcement of foreign arbitral awards and not the other way around. Article III requires Contracting States to recognize foreign arbitral awards provided that the minimum proof requirements of the Convention are verified. However, if any of the situations under Article V is satisfied, the Contracting States no longer remain under the obligation to recognize the award. As Gary Born puts it, we should not take the exceptions of Article V for affirmative obligations in their own right, but rather read them in their context as exceptions to an affirmative obligation established in Article III to recognize foreign arbitral awards.[74] This understanding is later supported by Article VII by extending the possibilities of seeing the award enforced when it enshrines

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73 Teramura, *supra* note 1, at 107; Gvelebiani, *supra* note 2, at 8; PARK, *supra* note 1, at 352.

74 BORN, *supra* note 1, at 3428.

the most favourable provision: an arbitral award can be enforced by the law of the country or other applicable treaties if they allow recognition and enforcement, when the New York Convention does not. This article is a better representative of the objectives of the New York Convention, i.e., the expansion of the circumstances of recognition of the international arbitral awards.[75] If Article V was commanding the Contracting States to not recognize, Article VII would have no purpose since it expressly opens the possibility to recognize annulled awards, which would be absurd if they had ceased to exist.[76]

While the permissive nature of that norm used to be controversial, nowadays it is widely accepted that Article V is indeed a permissive norm granting the Contracting States discretion. In fact, most scholars do not read it as an affirmative obligation to deny recognition as is also supported by the French practice.

This presumption by Born would serve better as a default rule whereby parties do not accept grounds of judicial review beyond Article V(1), unless stipulated otherwise.[77] Hence, if the parties have agreed to broader judicial review than that provided in Articles V(1)(a) to (d), they have contractually accepted judicial review from the arbitral seat, and there is no basis to deny them the efficacy of their accord.[78]

Getting back to the sphere of the discussion about competence, one can always try to defend the mandatory nature of the norm based on the argument that courts at the place of arbitration should have some control

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75 *Id.* at 3429.
76 *Id.* at 3427-3430, 3641.
77 *Id.* at 3645; PARK, *supra* note 1, at 352.
78 BORN, *supra* note 1, at 3645; Paulsson, *supra* note 1, at 18.

over the awards and the arbitral proceedings conducted in their territory, even if just to avoid fraud, corruption, or other misdeeds.[79]

Consequently, to a section of the scholars, we would not be witnessing any treaty violation if annulled awards were not recognized. This can be further understood when comparing the terms used in Articles III (*shall*) and V *(may)*.[80]

In short, while some understand that the text of Article V(1)(e) leaves room for judicial discretion on the part of the enforcing court regarding whether an award must be enforced or refused, others believe that the enforcing court is under an obligation of refusing enforcement.[81]

Despite the divergence, it is not controversial that for the setting aside or the refusal of enforcement of the award to take place, the courts must observe a *rule of de minimis*: for taking such decisions, the violation must be substantial.[82]

V. Recognition and Enforcement of Foreign Arbitral Awards

According to Article III, the Contracting States are bound to recognize and enforce arbitral awards, unless one of the grounds listed in Article V is applicable. Those grounds have been understood by scholars to be exhaustive and exclusive when it comes to denial of recognition of foreign awards under the New York Convention, which balances the permissive tone, as it fits perfectly with the teleological element of the interpretation and its drafting history.[83]

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79 BLACKABY ET AL., *supra* note 5, at 635.
80 PARK, *supra* note 1, at 362.
81 BORN, *supra* note 1, at 648-649.
82 Albert Jan van den Berg – Setting Aside, *supra* note 15, at 263, 268.
83 BORN, *supra* note 1, at 3426.

Following Jan van den Berg's method of exposition, we identify five possible ways to treat the recognition and enforcement of foreign annulled arbitral awards: (i) when presented with an annulled award, the court should refuse its enforcement; (ii) there should be a discretionary power granted to the enforcing court to decide whether to enforce such award or not; (iii) analyse the recognition of the judicial judgment which set aside the award; (iv) the court should apply domestic law through Article VII of the New York Convention (the *more favourable right* provision); or (v) amend the New York Convention to adapt to the needs and wishes of the international community.[84]

The first approach tells us to interpret Article V(1)(e) as a command for the enforcing court to refuse enforcement if the defendant manages to prove that the arbitral award (i) has been set aside; (ii) by the competent authority; (iii) in the country in which it was rendered. This has been the approach followed by most American cases where the judge shows a certain level of *deference* towards the judge with primary jurisdiction such as in *Termo Rio* v. *Electranta*[85] ["**Termo Rio**"], *Thai-Lao Lignite* v. *Laos*,[86] ["**Thai-Lao Lignite**"] and *Baker Marine* v. *Chevron* ["**Baker Marine**"].[87] Jan van den Berg justifies the legal policy of concentrating judicial control over the arbitral process and the courts at the place of arbitration with the fact that the arbitration and the award tend to be an output of the legal

84 Albert Jan van den Berg, *supra* note 1, at 179, 181.

85 The *Termo Rio* case got attention, among other reasons, for the refusal in recognizing the vacated award. "For us to endorse what appellants seek would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made." *See* Termo Rio v. Electranta, 487 F.3d 928 (D.C. Cir. 2007).

86 Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, 10 Civ. 5256, 2011 WL 3516154 (S.D.N.Y. Aug. 03, 2011).

87 Baker Marine (Nigeria), Ltd. v. Chevron (Nigeria), Ltd., 191 F. 3d 194 (2d Cir. 1999); Albert Jan van den Berg, *supra* note 1, at 183; CARAMELO, *supra* note 37, at 191.

regime of the place of arbitration and of the arbitration proceedings.[88] It presents the advantage that once the award is annulled, the party cannot go around the world trying to find a flexible court system.[89]

A more recent case where the U.S. District Court showed deference to the set aside decision was in the *Thai-Lao Lignite* case involving two private companies and the Government of Laos. It was later confirmed by the U.S. District Court[90] and the High Court of Justice in England.[91] However, the Paris Court of Appeal[92] denied enforcement for excess of jurisdiction, since the arbitrators had awarded compensation for damages related to a contract which was not the one that contained the arbitration clause. After the U.S. decision to enforce the award, the Government of Laos successfully challenged the award before the Malaysian High Court on the same ground under the Malaysian Arbitration Act of 2005. Subsequent to the setting aside of the award, the Government of Laos filed with the District Court a motion for relief[93] from the court's earlier judgment granting enforcement, which was granted and the award, thus, became no longer enforceable under the U.S. jurisdiction.[94]

The second possible method would be of exercising the discretionary power granted by Article V to allow enforcement despite the existence of grounds for refusal. The enforcing court may only refuse enforcement if

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88 Albert Jan van den Berg, Enforcement of Annulled Awards, 2 ICC INT'L CT. ARB. BULL. 15 (1998) [*hereinafter* "Albert Jan van den Berg – Enforcement"].

89 *Id.*

90 Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, No. 10 Civ. 5256, 2011 WL 3516154 (S.D.N.Y. Aug. 03, 2011).

91 Thai-Lao Lignite & Hongsa Lignite v. Government of the Lao People's Democratic Republic, [2012] EWHC (Comm) 3381 (U.K.).

92 Cour d'appel [CA] [regional court of appeal] Paris, Feb. 19, 2013, 12/09983 (Fr.).

93 Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, 924 F. Supp. 2d 508 (S.D.N.Y. 2013).

94 Luca Radicati Di Brozolo, The Enforcement of Annulled Awards: Further Reflections in Light of Thai Lao-Lignite, 25 AM. REV. INT'L ARB. 49 (2014) [hereinafter "Luca"].

the case would fall under a ground laid out in the New York Convention and even if the ground is met, there would still be a residual discretion to decide on the refusal or enforcement.[95] Consequently, decisions like *Chromalloy* v. *Egypt*[96] ["**Chromalloy**"], where the court enforced the arbitral award, are not in violation of the New York Convention. That would happen if the court were to refuse enforcement to an award not tainted with any of the described faults in Article V.[97]

In *Chromalloy*, the U.S. Court enforced an arbitral award, vacated in Egypt on the grounds of misapplication of Egyptian law, against the Arab Republic of Egypt, sustaining their argumentation on the contrast between the permissive nature of Article V and the mandatory nature of Article VII, which, as Born describes it, preserves any provision of the national law which happens to be more favourable. The court, therefore, interpreted the Federal Arbitration Act in a compatible way with a pro-arbitration policy. It also ruled that the set aside decision violated the U.S. public policy.[98]

This understanding is based on the English wording of the New York Convention where the word *may* (that has parallels in three of the other

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95 For example, Lew and Mistelis seem to follow this. *See* LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 707 (2003).

96 In *Chromalloy*, the court held that Article V(1)(e) does not require the court to not recognize the annulled award, which was a decision widely applauded by Gary Born, since the New York Convention would not forbid the recognition in these cases. The *Chromalloy* court decision on whether or not to recognize the award did not actually focus much on the specific grounds upon which the Egyptian annulment decision had been taken, or in the arbitration agreement. Instead, the U.S. court observed that it violated its public policy (which is against "substantive judicial review of awards") and the arbitration agreement. *See* In the Matter of the Arbitration of Certain Controversies between Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corporation and The Arab Republic of Egypt, 939 F. Supp. 906 (D.C. Cir. 1996) *cited in* BORN, *supra* note 1, at 3630-3631.

97 Paulsson, *supra* note 1, at 7; BLACKABY ET AL., *supra* note 5, at 637.

98 BLACKABY ET AL., *supra* note 5, at 637; BORN, *supra* note 1, at 3628.

four official translations) was chosen to grant a permissive/discretionary power, rather than an order.[99] Nevertheless, the *travaux preparatoires* have no mention, whatsoever, of a discussion regarding the choice of words, between 'may' or 'shall'.[100] The weight of this argument diminishes considerably once we notice the effective change that took place from the use of *shall* in the Geneva Convention to the term *may* in the New York Convention. Adding to this, we should remember that, as I previously pointed out, the goal of the New York Convention was not to create a unified system to regulate international arbitration but rather to establish an international minimum standard, while tackling the problems present in the Geneva Convention.

Given this discretion, the court should examine whether the set aside judgment is in conformity with international standards and, depending on the answer, it can decide whether to enforce the award or not.[101] Other than that, the discretion has also been used in two situations: (i) when the situation can be described as a *de minimis* case (an insignificant violation of the arbitration rules applicable) or (ii) if the invoking party has not invoked the ground in a timely fashion.[102]

When defining the terms of the usage of this discretion, authors have suggested that the other grounds in Article V (1)(a)–(d) could be of some utility as to guide the enforcing courts on the matter.[103]

It is in this context that Jan Paulsson categorized the annulment standards as local and international. If the ground upon which the award was set aside was compliant with the substantive provisions of the first four

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99 *See* New York Convention, *supra* note 14, at 14, 15.

100 Albert Jan van den Berg, *supra* note 1, at 186.

101 Teramura, *supra* note 1, at 122-23.

102 Albert van den Berg, *supra* note 1, at 186-187; Gvelebiani, *supra* note 2, at 9.

103 BORN, *supra* note 1, at 3431; Albert Jan van den Berg, *supra* note 1, at 179, 185.

paragraphs of Article V(1) of the New York Convention, it should be refused since these paragraphs represent the internationally accepted grounds to refuse recognition. Otherwise, the court would be free to exercise its discretion, since it would be a LSA when the practices do not fall within these four paragraphs and consequently, do not match the contemporary international standards. For example, the requirement for the award to be signed by all the arbitrators, as it used to be in Austria until 1983.[104] This was the solution adopted in Article IV(2) of the European Convention on International Commercial Arbitration, 1961.[105]

LSAs are not necessarily a bad thing. We must remember that the international community gathers people with very different legal traditions and despite the efforts undertaken in the past decades to harmonize some rules and sectors of the legal traffic, individual systems are still entitled to enact their own local rules that are more in line with their specificities without the responsibility of having every legislative measure be adequate for every legal system, as they legislate for their own countries and not for the entire world.[106]

Against this, van den Berg roots the award in the national legal order of the country of the place of arbitration and believes that the award has ceased to exist after the annulment. The author advocates this solution as a future one to adopt, but sustains that it does not correspond to the New York Convention in force.[107]

According to Jan Paulsson, the New York Convention focused on imposing certain obligations on the judge at the place of enforcement and not on the courts of the place of arbitration as it would have exceeded the

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104 Paulsson, *supra* note 1, at 2, 25.
105 *Id.* at 1-2.
106 *Id.* at 18.
107 Albert Jan van den Berg, *supra* note 1, at 189.

scope of the New York Convention. The New York Convention was aimed at ensuring recognition and enforcement of foreign arbitral awards rather than binding the courts of the place of arbitration to set aside only under specific grounds, hence, letting each country define the grounds upon which they might invalidate an award rendered in their jurisdiction.[108]

Predicting a qualification problem, Paulsson advances that the *enforcing judge* should focus on the content of the decision, rather than the qualification given by the *vacating judge*. In his view, due to the impact of the decision on the resources located in his country, the enforcing judge cannot have lesser authority than the courts of the country of origin to assess whether the award meets the demands of international standards of arbitration, or not.[109] Even if that does happen to be the case, the court still possesses its discretionary power (under Article V) to enforce, or not enforce the award and the *more favourable right* provision (Article VII).

Another argument brought by Paulsson is that if we do not give any *res judicata* effect to a non-annulment decision internationally, why should it be any different when it comes to the annulment ones? Following his approach would grant court decisions equal authority, whether they uphold the award or not. This may be obtained either through Article VII

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108 In 1979, when preparing the UNCITRAL Model Law on International Commercial Arbitration [*hereinafter* "Model Law"], the UNCITRAL Secretariat prepared a study on the New York Convention and noted that it allowed Local Standard Annulments (LSA) to deter the enforcement of the award around the world, and so proposed to adopt the approach of Article IX of the European Convention on International Commercial Arbitration, 1961, with the consequence that the annulment of an award would only deter its enforcement in a Model Law country if the award had been vacated based on the invalidity grounds as acknowledged in the Model Law. However, this was seen as too ambitious and its application would lead to some difficulties. *See* Paulsson, *supra* note 1, at 26; Paulsson – Arbitration Unbound, *supra* note 10, at 24.

109 Paulsson, *supra* note 1, at 26.

or through the term 'may' in Article V(1): it is not quite relevant the technical solution adopted by the State when trying to disregard the LSAs.[110]

When arguing in favour of his proposal, Paulsson notes that it will encourage national courts to conform and act with respect to internationally accepted standards, since their grounds for LSA will not have any effect in the international context, unless they limit themselves to censure solely the kind of behaviour which would lead to non-recognition everywhere.[111]

Distancing from the *Chromalloy* case wherein the U.S. courts had declared that a vacated award was enforceable, in *Baker Marine*,[112] the Second Circuit of Appeals was clear in clarifying that once a court with primary jurisdiction has decided to vacate an award, the U.S. courts will step out of the way and respect the primary jurisdiction of the other country. *Termo Rio's*[113] decision went in the same direction when it claimed that a second jurisdiction court should not enforce an award that has been set aside in the country of origin. This discretion to enforce would be rather narrow and should only be exercised in case the vacating judgment is repugnant to the fundamental notions of recognition and enforcement law or rather if it clearly violates the basic notions of justice where enforcement is sought. It should be noted that the standard is pretty high and not easily met, which is why the doctrine tends to demand a pretty obvious case.[114]

As was pointed out by George Bermann, the enforcing court should autonomously determine whether there exists any ground for refusal,

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110 Pavic, *supra* note 9, at 148; Paulsson, *supra* note 1, at 27.
111 Paulsson, *supra* note 1, at 28.
112 Baker Marine (Nigeria), Ltd. v. Chevron (Nigeria), Ltd., 191 F. 3d 194 (2d Cir. 1999).
113 Termo Rio v. Electranta, 487 F.3d 928 (D.C. Cir. 2007).
114 Luca, *supra* note 94 at 50; Albert Jan van den Berg, *supra* note 1, at 193.

regardless of a previous determination by the court of the seat of arbitration on the matter.[115]

The third option would be the recognition of foreign judgment of annulment under Article V(1)(e), similar to what happened in *Yukos* v. *OAO Rosneft*[116] wherein the Dutch court held that the set aside decision taken by the Arbitrazh Court of the City of Moscow – on the grounds of violation of the right to equal treatment, appearance of lack of impartiality and independence, and violation of the agreed rules of procedure and later confirmed by the Federal Arbitrazh Court of the Moscow District and the Supreme Arbitrazh Court of the Russian Federation – could not be recognized in the Dutch legal order. This way, the annulled award would be denied recognition if the annulment decision was itself entitled to be recognized.[117] It should be subject to criticism; since if we were to give *res judicata* here, we should do it to whoever decides the dispute.

This kind of recognition is at odds with Article V(1)(e) of the New York Convention, which does not provide for any need of recognition of foreign court judgments when it comes to setting aside an award. In fact, most international legal instruments specifically exclude the recognition and enforcement of court judgments related to arbitration.[118] Given the discrepancies among the legislations, this could have a chaotic effect and would conflict with the uniform treatment of arbitral awards envisaged by the drafters of the New York Convention.[119]

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115 George A. Bermann, International Arbitration and Private International Law: General Course on Private International Law (Volume 381), in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 466 (2017).

116 Yukos Capital SARL v. OAO Rosneft, Hof's-Amsterdam [ordinary court of appeal in Amsterdam], Apr. 28, 2009, 34 Y.B. COM. ARB. 703 (2009) (Neth.).

117 BORN, *supra* note 1, at 3637; Albert Jan van den Berg, *supra* note 1, at 179, 191.

118 Albert Jan van den Berg, *supra* note 1, at 191.

119 *Id.*

It is not the responsibility of the foreign courts to determine which Contracting States have a deficient judiciary.[120] Jan van den Berg pictures this as a bad application of the New York Convention. Furthermore, the importance of the *erga omnes* effect should not be underestimated as it provides predictability to the parties and prevents parties from chasing the other around the world trying to enforce the award everywhere.[121] Also, it would be far from coherent if a national law would grant competence to its national courts to set aside arbitral awards but not respect the same competence when exercised by foreign courts at the arbitral seat.[122]

According to Teramura's point of view, if we were to go down this road and stick to the *third option,* we should do it in consideration of the objectives and standards of the New York Convention, i.e., it should facilitate the enforcement of arbitral awards, while respecting the principles of justice and sovereign rights of States.[123]

What the enforcing judge will do here is, essentially, determine if the grounds to vacate the award were in conformity with international standards and enforce it or not depending on the findings. It would also be consistent with the European Convention on International Commercial Arbitration, 1961.

The fourth alternative is to apply domestic law through Article VII(1), as the French do. Unlike the other three approaches, this approach works outside the New York Convention and it is known as the "*more-favourable-right provision"*. It essentially provides that if there is any other national or

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120 *Id.* at 192.

121 *Id.*

122 PINHEIRO, *supra* note 1, at 604.

123 Also, the "Convention says nothing about proper or improper annulment standards but leaves each country free to establish its own grounds for vacating awards made within its territory." PARK, *supra* note 1, at 360; Teramura, *supra* note 1, at 113-114.

international provision granting a more favourable regime for the enforcement of foreign arbitral awards, the party should be allowed to avail himself of it.[124]

But how should this provision operate? Does it allow the parties to cherry-pick the best provisions from all the national and international legal instruments? Scholars have been answering this question in the negative, that one cannot cherry-pick but must apply the most-favourable law/treaty in its entirety.[125]

As we said, France is known for resorting to this alternative. It was seen in the case of *PT Putrabali Adyamulia (Indonesia)* v. *Rena Holding*[126] ["**Putrabali**"] that this practice is derived from the idea that the arbitral award is not attached to any national legal order, but is, instead, a decision of international justice whose regularity should be controlled in the country where enforcement is sought with regards to their applicable law (in this case, by French courts under French law).[127]

It can lead to highly undesirable results, such as in the *Putrabali* case wherein the enforcing court recognized the partially annulled award but not the improved one. This case revolved around the sale of pepper, from Putrabali to Rena Holding. When a certain dispute arose, the parties

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124 LEW ET AL., *supra* note 95, at 698.

125 The distinction between enforcing the award according to the New York Convention and according to the national regime is also present in the Dutch law. This would justify the low amount of French case-law interpreting the New York Convention, since the parties seeking enforcement usually invoke Article VII and order, consequently, the application of French national legal regime (in French legal order, the annulment of the award does not count among the grounds to refuse enforcement); Gvelebiani, *supra* note 2, at 11; Albert Jan van den Berg, *supra* note 1, at 194; Albert Jan van den Berg – Enforcement, *supra* note 88, at 15.

126 Cour de cassation [Cass.] 1e civ., June 29, 2007, 05-18.053, Bull. civ. I, No. 250 REVUE DE L'ARBITRAGE [REV. ARB.] 2007, 507 (Fr.).

127 De Cossío, *supra* note 40, at 5; Albert Jan van den Berg, *supra* note 1, at 195; UNCITRAL Guide, *supra* note 1, at 126.

commenced arbitration in London, having the arbitral award later partially set aside by the High Court of London. In response, the International General Produce Association made an improved arbitral award. Nevertheless, in the meantime, the French Court ruled in the sense of enforcement of the first award, basing its argumentation on the detachment of the award from any legal order, and on Article VII.[128]

While close to this alternative, Teramura draws his own path: the way to go would be to start by examining the applicability of Article VII(1): if there are provisions which are more pro-enforcement than the New York Convention, then the domestic law should apply. If that is not the case, we should turn to the New York Convention and analyse the applicability of Article V(1)(e). Here, the court should assess whether or not the vacating sentence was carried out by the competent authority of the country of origin.[129]

The fifth possibility is an amendment to the New York Convention. We could adopt the solution of Article IX(2) of the European Convention on International Commercial Arbitration, 1961 by which the refusal of enforcement would be limited to the cases where the award has been set aside on grounds that are equivalent to the commonly recognized grounds for setting aside an arbitral award in international arbitration.[130]

As van den Berg suggested, it would lead to the same effects of Jan Paulsson's proposal, by which parochial grounds would not be binding on the enforcing courts.[131]

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128 Albert Jan van den Berg, *supra* note 1, at 195-196.
129 Teramura, *supra* note 1, at 122-123.
130 Albert Jan van den Berg, *supra* note 1, at 197.
131 Sampaio Caramelo mentions an international trend to abandon this hypothesis: not only have most countries – like France or Germany –been taking it out in the past few years, as

The fact that three years later there was a need to create Article IX(2) of the European Convention shows that the drafters of the New York Convention were aware that the provision laid down in Article V(1)(e) was too broad and relatable to all possible grounds. The drafters, thus, felt compelled to restrict this possibility by reducing the grounds to the first four listed in Article V(1).[132]

A last alternative to all of these proposals would be for the countries within the international *mainstream* to sign a treaty, whereby they would commit to recognize the *res judicata* effect of each other's judicial decisions regarding awards. This would, in turn, create little *clubs* of trustworthy countries, in contrast with the untrustworthy ones, which cannot be seen as a great advancement,[133] although it would deter future attempts to enforce the award within the jurisdiction.

However, it would be patently disproportionate. As Gary Born points out, why should a party be forbidden to correct a failure in the documentation that is present in the application?[134] Denying the *res judicata* effect would be more coherent with the proportionality principle, but would be overlooking the concentration principle.[135] The Model Law provides for

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the ones who have not only no longer applied it, but also view it with bad eyes (like the English legal order). In 1981, van den Berg claimed the dispensability of the formula in his commentary to the New York Convention. Nowadays, only India and Pakistan are still trying to breathe life into it, and have been receiving a fair amount of push back for that. *See* CARAMELO, *supra* note 37, at 181; Albert Jan van den Berg, *supra* note 1, at 197.

132 Albert Jan van den Berg, *supra* note 1, at 198; BORN, *supra* note 1, at 3641.

133 Jan Paulsson, *Awards Set Aside at the Place of Arbitration*, *in* Enforcing Arbitration Awards under the New York Convention: Experience and Prospects 24-26 (1999).

134 BORN, *supra* note 1, at 3405-3406.

135 The parties should exhaust all the legal and evidential allegations relevant to the disputed facts and to indicate the relevant evidence in a timely fashion. *See* Vanlentina Popova, *Popova v. Principles of Bulgarian Civil Procedure*, 2(2) CIV. PROC. REV. 71-72 (2011).

an analogous solution in its Article 23(2),[136] when it comes to the submission of claim and defence during the arbitral proceedings.

In the case of S*ociété Hilmarton Ltd* v. *Société Omnium de traitement et de valorisation (OTV)*, the French courts exposed the flaw of their system by recognizing twice an annulled award rendered in Switzerland.[137] The court failed to address the possibility of a preclusive effect from the annulment decisions and only mentioned that the award was not integrated into the Swiss legal system, consequently remaining in existence regardless of the set aside.[138]

VI. Annulment of Awards

As previously pointed out, some scholars believe the arbitral award to be rooted in the legal order of the country where the award has been rendered. This means that once the award is set aside, it would cease to legally exist and, hence, it may not be brought back to life during an enforcement procedure in a foreign country.[139] As such, the annulment would be enough of a ground for refusal of enforcement abroad, which may be further sustained by: (i) the right of the losing party to have the validity of the arbitral award finally adjudicated in one jurisdiction; and (ii) the clear distinction made by the New York Convention as to the role each court has to play.[140]

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

137 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, 92-15.137 REVUE DE L'ARBITRAGE [REV. ARB.] 1994, 327 (Fr.).

138 BORN, *supra* note 1, at 3626; BLACKABY ET AL., *supra* note 5, at 636-637.

139 Albert Jan van den Berg, *supra* note 1, at 186-187.

140 *Id.* at 185.

This author emphasizes the need to have a *safety valve* in the system in order to neutralize improper awards. In *Commisa* v. *Pemex*,[141] for instance, the U.S. District Court for the Southern District of New York enforced an annulled arbitral award on the grounds that it had been set aside under a law that was not in existence at the time that the parties had entered into the contract.[142]

Jan Paulsson counter argues that this is a scenario less usual than what one might think. Not only because the awards are very rarely set aside, but also because even when they are, it is far from common to be on local standards.[143] He adds that the system can stand some occasional inconsistent decisions. The eventual inconsistent decisions, from time to time, should not be considered an obstacle as they are a normal part of a world where each country considers its legal system as sovereign. Moreover, nowadays, it is far from likely that an award defective enough to be vacated in the country of origin will manage to be enforced in another country. According to a study by van den Berg, Article V(1)(e) is rarely invoked as a ground to set aside an award and even when it is invoked, it is hardly successful.[144]

If we were to take van den Berg's position to its ultimate consequences, as Paulsson does, one could only enforce an arbitral award if there was no possibility of challenge left to be undertaken in the country of origin. In the purist perspective, there would be no difference between 'have been annulled' and 'might be annulled' thereby turning the term 'may' in Article V(1)(e) into 'shall' and 'binding' into 'final' and, consequently, making us

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141 Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción, 962 F. Supp. 2d 642, 644 (S.D.N.Y. 2013).

142 BLACKABY ET AL., *supra* note 5, at 637-638.

143 Local standards are the ones falling outside Article V (1)(a)-(d); Paulsson, *supra* note 1, at 17.

144 *See also* BORN, *supra* note 1, at 3622; Paulsson, *supra* note 1, at 13-21; Darwazeh, *supra* note 1, at 324.

retrocede back to the days of the Geneva Convention of 1927.[145] His criticism goes on to say that to be consistent, one would also have to turn Article VI from a permissive norm into an obligatory one (despite the copious number of applications, in contrast with the small number of them succeeding), allowing an unfair room to the losing party to apply delay tactics and other strategies incoherent with the values that underpin international arbitration and law in general. Nonetheless, van den Berg does not campaign for the granting of adjournments in all situations or against any enforcement until the final saying of the country of origin's courts. In fact, he sets high standards for parties when it comes to trying to impede the award's enforcement. The standards invite the enforcement courts to assess, by themselves, the grounds presented by the party in the application to vacate the award and grant enforcement unless a defect which is likely to lead to the setting aside of the award is proven. These high standards, promoted by Professor van den Berg, have been applied since 1987.[146]

In the perspective of the authors who do not place the foundations of the arbitral awards in the legal system of the country of origin, this approach does not give adequate treatment to the countries' sovereignty. In fact, if we were to attend to it, the effect of the setting aside of the award should be limited to the territory of the country of origin. This is because if the enforcing courts of the sovereign country have the power to enforce an award, a third country cannot simply *disallow* the efficacy of the judicial acts of the enforcing country's courts.[147]

We might be tempted to subscribe to this approach due to the certainty and the predictability it provides us, but it cannot stand when we regard

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145 Paulsson, *supra* note 1, at 15.
146 *Id.* at 16.
147 Teramura, *supra* note 1, at 85.

the legislative history and the *ratio* of the New York Convention, the foreign countries' sovereignty, and the parties' reasonable expectations.[148] Hence, once set aside, the arbitral award does not cease to exist as such. It will merely cease to be enforceable in the country of origin due to the loss of legal effect in the jurisdiction.[149]

Regardless of the whole dispute, cautious judges from the country of origin would be careful when it comes to the exercise of their authority to set aside, especially in international arbitration situations where neither of the parties have any connection to the country nor do the judges have any interest in the conflict or any understanding of the parties' culture and expectations. The same would not serve to the situation of a party being local.[150]

VII. Other Conventions

Three years after the New York Convention came into being, the Economic Commission for Europe of the United Nations ventured to enhance European trade by removing certain difficulties that were deterring the operation of international commercial arbitration. Among such ventures is Article IX, where the drafters laid down the grounds upon which a set aside award could be refused enforcement as well as how to deal with the provisions of the New York Convention.[151] Jaba Gvelebiani identifies, in the Geneva Convention, an objective to limit the effect of set aside decisions on foreign countries, instead of actually guaranteeing the enforceability of annulled awards.[152]

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148 *Id.* at 84-87.

149 Darwazeh, *supra* note 1, at 323.

150 Paulsson, *supra* note 1, at 17-18.

151 Dominique T. Hascher, *European Convention on International Commercial Arbitration of 1961*, *in* ICCA Y.B. COMM. ARB. 507 (Albert Jan van den Berg ed., 2011) [*hereinafter* "Dominique"].

152 Gvelebiani, *supra* note 2, at 12-14.

Article IX essentially reproduces the first four grounds set forth in Article V(1) with the caveat of, in its paragraph 2, providing that with respect to the signatory parties of the New York Convention, "*paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above*."[153] From here, we can see that the understanding of drafters of the European Convention of Article V(1)(e) was closer to van den Berg than to either Born or Jan Paulsson, in the sense that they saw it as a *barrier* and that they tried to solve it.[154]

The Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation, 1972 ["**Moscow Convention**"] regulates the arbitration of disputes arising from economic, scientific and technical cooperation among the members of the Council for Mutual Economic Assistance in some Eastern European and Asian states. The grounds for refusal of enforcement under the Moscow Convention are: (i) lack of jurisdiction; (ii) denial of a fair hearing; and (iii) the award has been set aside. Clearly, it was modelled after the New York Convention.[155]

The Inter-American Convention on International Commercial Arbitration, 1975 ["**Panama Convention**"] shares the New York Convention's grounds in its Article 5, since it was intended to achieve the same results. This comes after a presumptive obligation to recognize foreign awards.[156]

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153 European Convention on International Commercial Arbitration, art. IX(2), Apr. 21, 1961, 484 U.N.T.S. 7041.

154 Dominique, *supra* note 151, at 507; BLACKABY ET AL., *supra* note 5, at 663; LEW ET AL., *supra* note 95, at 694-95; BORN, *supra* note 1, at 3435, 3624; Paulsson, *supra* note 1, at 10.

155 BLACKABY ET AL., *supra* note 5, at 664; LEW ET AL., *supra* note 95, at 695.

156 LEW ET AL., *supra* note 95, at 695; BORN, *supra* note 1, at 3435.

The role of bilateral conventions should not be underestimated. Although they make it easier to solve conflicts, they could have an adverse effect on the harmonization that was promoted by the New York Convention.[157] Fortunately, like most national legislations on the matter, many of the recent bilateral treaties either refer to the New York Convention or reproduce its content.[158]

These articles have been interpreted in the sense that the list of grounds to refuse as present in Article 36 is exclusive and should be subject to a narrow interpretation. Courts of the Model Law jurisdictions have been defending that there should be no jurisdiction to refuse enforcement beyond the grounds expressed in Article 36(1). The bare use of the term *shall* in Article 35(1) of the Model Law renders the mandatory sense perfectly clear.[159]

Despite the developments and achievements brought by the New York Convention, there were still too many differences among the jurisdictions. This was why the Model Law came to light, although it basically reproduced the same legal provisions on the governance of recognition and enforcement of annulled awards in its Article 36. [160]

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157 As examples, we have the judicial cooperation agreement between Portugal and Angola, Portugal and Mozambique, Portugal and Cape Vert, etc. *See* ELSA DIAS OLIVEIRA, *Reconhecimento de Sentenças arbitrais estrangeiras*, *in* REVISTA INTERNACIONAL DE ARBITRAGEM E CONCILIAÇÃO, 74, 75 (2012).

158 LEW ET AL., *supra* note 95, at 696; BORN, *supra* note 1, at 3435.

159 BORN, *supra* note 1, at 3436.

160 Teramura, *supra* note 1, at 79; *See* United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006): "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice"; *See also* Commonwealth Secretariat, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION,

Until the enactment of the Model Law, each arbitration law had its own grounds for vacating an award. With its wide adoption, more than 60 countries conformed their regimes to the Model Law, despite slight deviations here and there. Nevertheless, some of the most influential jurisdictions when it comes to international commerce, such as France, Switzerland, United Kingdom, or the United States, have not adopted the Model Law.[161]

VIII. Article VI

Article VI of the New York Convention leads to local remedies in cases of court judgment deficiencies. Under this article, pending the setting aside proceedings, the enforcement court may suspend the enforcement application until the courts of the country of origin issue a final and binding decision on the matter.

When deciding to grant, or not, the suspensive effect to the appeal, Article VI works as a *media via* since otherwise it could provide too great a space for delaying tactics.[162]

Given that arbitration works as an alternative to the inefficiencies of international litigation, courts should be exigent when deciding on granting suspension to recognition. Delaying recognition will only frustrate the parties' goal and encourage abusive tactics by the losing party. This might even provide enough time for the debtor to become insolvent, or be unable to satisfy the award due to any other reason.[163]

EXPLANATORY DOCUMENTATION PREPARED FOR COMMONWEALTH JURISDICTIONS 5 (1991); Paulsson, *supra* note 1, at 24.

161 Pavic, *supra* note 9, at 144.

162 UNCITRAL Guide, *supra* note 1, at 124, 207-08; BORN, *supra* note 1, at 3608-3609; Darwazeh, *supra* note 1, at 308-309; Albert Jan van den Berg – Setting Aside, *supra* note 15, at 263, 286; Paulsson, *supra* note 1, at 9.

163 BORN, *supra* note 1, at 3724-3725.

Paulsson's proposal[164] would also impact the interpretation given to Article VI: by only granting the adjournment of the enforcement action, if an international standard annulment is likely to materialize in a given case, then it would place the burden of proof on the resisting party.[165]

It has been generally understood that when it comes to examining their recognisability, set aside judgements fall within the scope of domestic laws on recognition and enforcement of foreign judgments.[166]

When it comes to the recognition and enforcement of domestic awards, the national legislator is completely free to legislate as he deems fit, since there is no international legal instrument as we have for governing foreign awards. Nonetheless, arbitration laws have also been adopting a pro-enforcement approach when it comes to domestic awards, providing refusal only under a very short list of reasons (sometimes the recognition is even automatic, with any decision having only a declaratory character).[167]

As we touched upon previously, the New York Convention represented a series of victories, which can be attested by its rate of implementation and adoption. However, it did not represent the end of the development of international arbitration. There were still needs to take care of, such as the need for more harmonized international standards and less differences among jurisdictions. The Model Law was meant to bring exactly that: Articles 35 and 36 provided that the awards should be recognized, unless

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164 *See* Paulsson, *supra* note 1, at 17.
165 *Id.* at 27-28.
166 Teramura, *supra* note 1, at 116.
167 LEW ET AL., *supra* note 95, at 691-92.

one of the specific listed grounds was present in the case. This list of grounds essentially reproduces Article V of the New York Convention.[168]

IX. Conclusion

The New York Convention was intended to: (i) address the shortcomings of the Geneva Protocol and Convention and by doing so, facilitate (and encourage) the recognition and enforcement of international arbitration agreements and awards; (ii) provide a maximum level of control which Contracting States may exert over arbitral awards; (iii) serve international trade and commerce and (iv) promote cross-border arbitrations by providing a globally applicable common international minimum standard.

These goals were pursued through the establishment of universal deference to foreign arbitral awards seeking recognition abroad, once they met the minimum formal requirements. The parties were also granted safeguards provided in Article V, in the form of grounds laid down for refusing the recognition of foreign arbitral awards, which would have to be proven by the resisting party. The New York Convention was not intended to establish a unitary regime for the refusal of recognition and enforcement, but was rather just facing the challenges of the time and providing uniform international grounds on which enforcing courts might refuse recognition.

Regarding the recognition of arbitral awards, the New York Convention is structured in the following way: Article III requires Contracting States to recognize foreign arbitral awards, provided that the minimum proof requirements are met. Except if any of the situations given in Article V are satisfied, then the Contracting State is no longer under the obligation to recognize the award, rendering the situations of this provision as exceptions to the affirmative obligation established in Article III.

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168 BORN, *supra* note 1, at 3436.

Nevertheless, according to Article VII, the provisions shall not affect the validity of other legal, bilateral or multilateral agreements, if found more favourable than the New York Convention standards.

There have been five different ways presented to treat the recognition and enforcement of foreign annulled arbitral awards: (i) the court should refuse its enforcement; (ii) there would be a discretionary power granted to the enforcing court to decide whether to enforce the award or not; (iii) the court should analyse the recognition of the judicial judgment which set aside the award; (iv) the enforcing court could apply domestic law through Article VII of the New York Convention (*the more favourable right provision*); and (v) there could be amendments made to the New York Convention, adapting it to the needs and wishes of the international community.

Despite the fact that annulment of an award does not put an end to its existence, the arbitration proceedings and the award's validity are closely related to the legal order where the arbitration takes place, not only for the arbitration to be able to proceed properly and to render effective the arbitrator's decisions, but also for the States to be comfortable enough to provide room for the arbitration to flourish.

At the same time, despite the fact that both the objectives of the New York Convention and the sovereignty of the countries should not be neglected, the author does believe that judgments that decide the underlying dispute should receive a higher degree of deference than those which set aside foreign arbitral awards. The consequences of the recognition and enforcement are mostly felt in the enforcing country. Consequently, the right way to solve this problem would be through the third solution of analysing the recognition of the judicial judgment which sets aside an award, with a presumption of its validity, which is also respected by the placement of the burden of proof on the counter party. Thus, it becomes the Contracting State's responsibility to re-examine the judicial decision.

What the enforcing judge will do here is essentially, determine if the grounds to vacate the award were in conformity with international and its national (*vide* Article VII) standards, and enforce it, or not, depending on the findings. If an award is in conformity, the court would simply enforce it.

EVEN-NUMBERED ARBITRAL TRIBUNALS

*Régis Bonnan**

Abstract

Even-numbered arbitral tribunals are rare. Many national laws and institutional rules discourage or prohibit them. The fear of deadlock between the arbitrators seems to be the main, and sometimes the only, underlying objection. Using a comparative method, this article outlines the various nuances in the approach adopted across a multitude of jurisdictions and attempts to explain the extent to which this fear is justified. Three key points stand out: first, the legal uncertainty in relation to even-numbered tribunals may actually be more problematic than that of a deadlock; second, recourse to even-numbered tribunals could work well under certain specific conditions; and third, the widespread prohibition or reluctance towards allowing even-numbered tribunals, combined with their rarity in practice, is indicative of the problems associated with today's physiognomy of international arbitration.

I. Introduction

The usual immediate reaction from lawyers to even-numbered arbitral tribunals is an objection. The main purpose of this article is to observe how this objection translates into practice and whether it is justified. In the course of this article, emphasis will be placed on two-member tribunals, the most prevalent (but not exclusive) configuration of even-numbered tribunals.

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The nature of this objection is essentially practical: arbitration runs the risk of being unworkable if the arbitral tribunal is composed of even number of arbitrators with conflicting views, and is unable to render a majority decision as a result. With two-member tribunals, a majority decision requirement will have to effectively require a unanimous decision, i.e., no dissenting opinion will be possible. The objection is mainly a result of the fear of "blockage" in the tribunal's ability to conduct the arbitration during and until a final award is issued. Despite the surprising level of rule diversity, the fear of the arbitration being rendered ineffective is often reflected in the arbitration laws and rules across jurisdictions and arbitral institutions, which either discourage or prohibit even-numbered arbitral tribunals. This will be discussed in the next part of this article.

Discouraging or prohibiting even-numbered arbitral tribunals protects the parties, especially those not well-versed with the arbitral procedure, from agreeing to a tribunal composition which may be a source of predictable and unpredictable difficulties. These difficulties may be avoided by simply mandating or opting for an odd number. The key avoidable difficulty or issue is the legal uncertainty in the parties' right to agree to such tribunals (in some jurisdictions and under some institutional rules). Another difficulty concerns the validity and recognition of awards rendered by such tribunals. The need to avoid such uncertainties may be more justified in law and in fact than the fear of deadlock.

Nevertheless, even-numbered arbitral tribunals raise separate, and often less discussed, questions of the direction in which arbitration is headed, and its possible improvement. In addition to undermining the principle of party autonomy, the general objection to even-numbered arbitral tribunals reflects a rather pessimistic view of the arbitrators' ability to comply with their obligation of objectivity, resulting in a possible stalemate, and not merely the anticipation of a legitimate disagreement between the arbitrators. The result is paradoxical and unfortunate because, however

rare their existence may be in practice (perhaps less than commonly imagined), even-numbered tribunals can facilitate conciliation between the parties and encourage greater objectivity in the decision-making process.

If the achievement of conciliatory outcomes and restoration of peace in business relations remains one of the key objectives of arbitration, then the categorical prohibition – under some arbitral rules – of even-numbered tribunals reflects a negative state of affairs (despite the expansion of arbitration). This should not serve as the ideal long-term solution.

This article is divided into four parts. **Part II** introduces the diversity of rules and approaches to even-numbered tribunals, particularly analysing the prohibitory and institutional approaches. The author then analyses the link between amiable composition and conciliation and even-numbered arbitral tribunals in **Part III**. Finally, the author concludes with his observations in **Part IV**.

II. The Diversity of Rules

Upon reviewing various national laws and arbitral rules, six main approaches can be observed:

1. The first approach is permissive: The parties are at liberty to choose an uneven or even number of arbitrators. If they choose an even number, there is no imposed or presumed third arbitrator who will have to be nominated. The United Nations Commission on International Trade Law [“**UNCITRAL**”] Model Law on International Commercial Arbitration [“**Model Law**”], and countries such as Switzerland and France follow this approach for international arbitration; separate regimes apply for domestic

arbitrations in both jurisdictions.[1] In practice, some of the Model Law jurisdictions depart from the textual authorization, for example, Egypt, India, and Tunisia. Article 15(2) of the Egyptian Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters states that "*[i]f there is more than one arbitrator, the tribunal must consist of an odd number, on penalty of nullity of the arbitration*"; Section 10(1) of the Indian Arbitration and Conciliation Act, 1996 states that "*[t]he parties are free to determine the number of arbitrators, provided that such number shall not be an even number*"; Article 18 of the Tunisian Law No. 93-42 of 26 April 1993 states that "*In case of plurality of the arbitrators, their number must be odd.*"

In the 1980s, a French legal comparatist observed that several Latin American countries, i.e., Argentina, Chile, Ecuador, Mexico and Panama, allowed even-numbered arbitral tribunals.[2] According to the available information, Peru and all of the

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1 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), art. 10(1) [*hereinafter* "UNCITRAL Model Law"]; *See* LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, RS 291, art. 179(1) (Switz.) [*hereinafter* "Swiss PILA"]: "The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties", *translation available at* https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf; *See also* CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1451 (Fr.) [*hereinafter* "French Civil Procedure Code"] states that an arbitral tribunal must consist of an odd number of arbitrators and if the parties provide for an even number of arbitrators, the tribunal will have to be "completed", i.e., a third arbitrator will be chosen. However, the same is not a requirement for international arbitration. *See* French Civil Procedure Code, art. 1506; The French Civil Procedure Code, art. 1508 provides that "An arbitration agreement may designate the arbitrator(s) or provide for the procedure for their appointment, directly or by reference to arbitration rules or to procedural rules".

2 René David, L'arbitrage dans le commerce international, 34 ECONOMICA ¶ 250 (1982) [hereinafter "David"].

previously mentioned countries, with the exception of Panama, do not explicitly prohibit even-numbered arbitral tribunals.[3]

No such rule is seen which goes so far as providing an even number of arbitrators as the preferred default position. Surprisingly, this was reportedly not always the case; Germany and Japan are examples at hand.[4]

2. The second approach is also permissive, but discourages an even number of arbitrators by creating a rebuttable presumption that an agreed even-numbered tribunal requires the appointment of an additional arbitrator as chairperson. This is the position in England and Wales and under Swiss domestic arbitration law. Section 15(2) of the (English) Arbitration Act 1996 states that "*Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the*

[3] Luis E. Dates, *New Law on International Commercial Arbitration in Argentina*, BAKER MCKENZIE (July 27, 2018), *available at* https://www.bakermckenzie.com/en/insight/publications/2018/07/new-law-on-international-commercial-arbitration; Cristián Conejero et al., *Commercial Arbitration: Chile*, GLOBAL ARB. REV. (Mar. 21, 2018), *available at* https://globalarbitrationreview.com/jurisdiction/1004942/chile; Alejandro Ponce Martinez & Maria Belen Merchan, *Ecuador: International Arbitration 2019*, THE ICLG TO: INTERNATIONAL ARBITRATION LAWS AND REGULATIONS (Aug. 22, 2019), *available at* https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/ecuador; Luis Enrique Graham Tapia & Orlando F. Cabrera C., *Mexico: International Arbitration 2019*, THE ICLG TO: INTERNATIONAL ARBITRATION LAWS AND REGULATIONS, *available at* https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/mexico; José Carrizo, *Panama*, GLOBAL ARB. REV. (Aug. 29, 2017), *available at* https://globalarbitrationreview.com/chapter/1146881/panama; Alberto José Montezuma Chirinos & Mario Juan Carlos Vásquez Rueda, *Peru: International Arbitration 2019*, THE ICLG TO: INTERNATIONAL ARBITRATION LAWS AND REGULATIONS (Aug. 22, 2019), *available at* https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/peru.

[4] David, *supra* note 2, ¶ 251.

tribunal". Similarly, Article 360(2) of the Swiss Code of Civil Procedure states that "*If the parties have agreed on an even number of arbitrators, it is presumed that an additional arbitrator must be appointed as the chairperson*".[5] The approach is visibly less liberal in Swiss domestic arbitration law than in the Swiss international arbitration law.[6]

In practice, this means that parties will have to provide clear and explicit wording in their agreement if their intention is indeed to have their dispute decided by an even-numbered tribunal. Clear-worded language providing for an umpire, still a relevant possibility in certain common law jurisdictions including England, should effectively displace the rebuttable presumption. This is because an umpire cannot be assimilated in to a chairperson, whose functions will be exercised from the very commencement of the proceedings.

As will be seen in the course of this article, it is difficult to express any firm reliable view on even-numbered tribunals without examining the umpire. The umpire necessarily brings legal history back to the forefront, especially that of common law jurisdictions.

3. The third approach is also permissive, but instead of creating a rebuttable presumption in favour of an even-numbered tribunal, and unlike the second approach, it gives the right to any of the two arbitrators to request either the appointment of a third

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5 CODE DE PROCÉDURE CIVILE [C.P.C.] [CODE OF CIVIL PROCEDURE] Dec. 19, 2008, SR 727, art. 360(2) (Switz.) reads as follows (in French): "Lorsque les parties sont convenues d'un nombre pair d'arbitres, il est présumé qu'un arbitre supplémentaire doit être désigné en qualité de president".

6 Swiss PILA, *supra* note 1, art. 179(1), which states that "[t]he arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties."

arbitrator who will be the chairperson, or the appointment of an umpire. This is the position under the Israeli Law of 1968 and the Hong Kong Arbitration Ordinance (Cap. 609).[7] It is unclear how and when this unusual approach – in seemingly affording full discretion on any of the two arbitrators to request at any time the appointment of a chairperson or umpire – applies in practice.

4. The fourth approach is prohibitory, but with a remedial solution: the arbitration will proceed with an imposed third arbitrator, who will be the chairperson. This approach differs from the second one above where there was only a rebuttable presumption for the appointment of a third arbitrator, i.e., the chairperson. Here, the third arbitrator would be appointed by the two other arbitrators. This approach is followed in France for domestic arbitration; the Netherlands— under the rules of the Netherlands Arbitration Institute; the Organization for the Harmonization of Business Law in Africa ["**OHADA**"] Uniform Act on Arbitration, and reportedly in Austria, Belgium and Italy.[8]

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7 Arbitration Law, 5768-1968, add., § 2 (Isr.) reads as follows: "In an arbitration before an even number of arbitrators, the arbitrators will, on the demand of one of them, appoint an additional arbitrator. When an additional arbitrator has been appointed, he will be the arbitration chairman"; Arbitration Ordinance, (2011) Cap. 609, § 30 (H.K.) provides that "[i]n an arbitration with an even number of arbitrators, the arbitrators may, unless otherwise agreed by the parties, appoint an umpire at any time after they are themselves appointed".

8 Bij wet van 2 juli 1986, Stb. 1986, 372, art. 1026(3) (Neth.) [*hereinafter* "Netherlands Arbitration Institute"] reads as follows: "If the parties have agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chairman of the arbitral tribunal"; Netherlands Arbitration Institute, art. 12(3) reads as follows: "If the parties have agreed an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chair of the arbitral tribunal"; The French Civil Procedure Code, art. 1451 reads as follows: "If an arbitration agreement provides for an even number of arbitrators, an additional arbitrator shall be appointed. If the parties cannot agree on the appointment of the additional arbitrator, he or she shall be appointed by the other arbitrators within one month of having accepted their mandate or, if they fail to do so, by

This approach clearly aims to prevent even-numbered tribunals. Still, one must not lose sight of the fact that it represents, at least in some jurisdictions, including the Netherlands, a relaxation of the former rule which outrightly prohibited even-numbered tribunals. This would result in the nullity of the arbitration.

5. The fifth approach is prohibitory, with no remedial solution: if an even number of arbitrators is chosen, the arbitration and award will be, in principle, invalid. This seems to be the solution of choice in investment arbitration. It is found not only under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"], but also under the International Centre for Settlement of Investment Disputes ["**ICSID**"] Additional Facility Rules and the 2017 Singapore International Arbitration Centre ["**SIAC**"] Investment Arbitration Rules.[9]

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the judge acting in support of the arbitration (*juge d'appui*) referred to in Article 1459." Acte Uniforme relatif au Droit de l'Arbitrage [UNIFORM ACT ON ARBITRATION], Mar. 11, 1999, 8 JOURNAL OFFICIEL DE L'OHADA [J.O. OHADA], May 15, 1999, art. 8; ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 586(1) (Austria), *available at* https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699; CODE JUDICIAIRE [C.JUD.], art. 1681(1) (Belg.); Codice di procedura civile [C.p.c.] [Code of Civil Procedure] art. 809 (It.).

[9] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 37(2)(a), Mar. 18, 1965, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"] reads as follows: "The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree." This rule is mandatory. *See* CHRISTOPHER H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 478-80 (2d ed. 2009) which states as follows: "The requirement that a tribunal must have an uneven number of arbitrators is one of the Convention's few mandatory provisions concerning the constitution and composition of the tribunal. The parties may not deviate from this rule by agreement. It is designed to avoid a stalemate if the tribunal is evenly divided […]. The early drafts to the Convention did not provide for an uneven number of arbitrators. The Working Paper and the Preliminary Draft made reference to a sole arbitrator or several arbitrators (History, Vol.

Interestingly, this approach has been taken by many Arab jurisdictions, including Egypt, Jordan, the Kingdom of Saudi Arabia ["**KSA**"], Lebanon, Oman, Qatar, Syria, Tunisia, and the United Arab Emirates ["**UAE**"].[10] Further, the rules of several Indian arbitral institutions, such as Rule 5 of the Madras High Court Arbitration Proceedings Rules, 2017 and Rule 8 of the Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018 only second the literal prohibition found in the (Indian) Arbitration and Conciliation Act, 1996 (amended in

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I, pp. 176, 178). A suggestion to specify that an uneven number of arbitrators must be appointed in order to avoid a possible impasse was incorporated into the later drafts (History, Vol. II, pp. 329, 416)"; *See also* Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, sch. A, art. 6(3), Sept. 27, 1978, as amended on Jan. 01, 2003 and Apr. 10, 2006, mandating an even number of arbitrators, and Investment Arbitration Rules of the Singapore International Arbitration Centre r. 5.8, Jan. 01, 2017 [*hereinafter* "SIAC Rules"].

[10] *See* Federal Law No. (11) of 1992 (Concerning Issuance of the Civil Procedures Code), art. 206(2) (U.A.E.) [*hereinafter* "UAE Civil Procedures Code"]: "If there is more than one arbitrator, the number shall, at all times be odd"; Federal Law No. (6) of 2018 on Arbitration (U.A.E.) [*hereinafter* "UAE Arbitration Law"] specifies the sanction in case of non-compliance with the rule: "The number of arbitrators, if several, shall be uneven, otherwise the Arbitration is void"; Law No. 27 of 1994 (Law concerning Arbitration in Civil and Commercial Matters), *al-Jarīdah al-Rasmīyah*, vol. 16, Apr. 21, 1994, art. 15(2) (Egypt) [*hereinafter* "Egypt Arbitration Law"]: "If there is more than one arbitrator, the tribunal must consist of an odd number, on penalty of nullity of the arbitration"; Law of Arbitration in Civil and Commercial Disputes, Royal Decree 47/97, art. 1516(2) (Oman) [*hereinafter* "Oman Arbitration Law"]: "In case, the arbitrators are multiple in number, their number shall have to be uneven, otherwise the arbitration shall be treated as invalid". The prohibition of an even number of arbitrators is also found under the laws of Jordan, Lebanon, Saudi Arabia, Syria, and Tunisia as stated in Ahmed M. Al-Hawamdeh & A. Ababneh, *Odd vs. Even: The Case of Arbitral Tribunals,* DIRASAT, SHARI'A & L. 413, 421 (2018) [*hereinafter* "Al-Hawamdeh & A. Ababneh"]; *See also* Law No. 2 of 2017 (Promulgating the Law of Arbitration in Civil and Commercial Matters), art. 10 (Qatar) [*hereinafter* "Qatar Arbitration Law"], which states that "[t]he Arbitral Tribunal shall comprise one or more arbitrators, in accordance with the agreement of the Parties. If the Parties do not agree on the number of arbitrators, the number shall be three. In the event of several arbitrators, their number must be odd; otherwise the Arbitration shall be void".

2015).[11] However, the Supreme Court of India has adopted a *contra legem* solution that places the Indian position closer to the fourth approach mentioned above, where the arbitration and award will not in principle be invalidated,[12] regardless of whether the arbitration is international or domestic.

6. The sixth approach is 'institutional,' which is, admittedly, a misnomer. It is identified by the element of ambiguity of seemingly mandating an odd number of arbitrators, without expressly stating the same in the arbitral rules. While the institutional approach is not universal, with arbitrations under the ICSID Convention and the London Maritime Arbitrators Association ["**LMAA**"] being the major notable exceptions,[13] it is quite widespread, as seen in the Dubai International Financial Centre ["**DIFC**"] – London Court of International Arbitration

11 The Arbitration & Conciliation Act, No. 26 of 1996, § 10(1) (India) [*hereinafter* "Arbitration Act, 1996"] reads as follows: "The parties are free to determine the number of arbitrators, provided that such number shall not be an even number".

12 Instead of invalidating the arbitration, a clause providing for two arbitrators and an umpire (at least in relation to clauses pre-dating the 1996 Act) will not be deemed unenforceable and will be interpreted as requiring the appointment of a third arbitrator who will act as the presiding arbitrator (the validity of an arbitration agreement not being found dependent on the number of arbitrators specified therein) – *see* M.M.T.C. Ltd. v. Sterlite Industries India Ltd., (1996) 6 SCC 716 (India). Moreover, the challenge of an award rendered by two arbitrators only will not be sustained simply on the ground that the tribunal was even-numbered (the statutory prohibition of an even number of arbitrators was found to be derogable) – *see* Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572 (India).

13 ICSID Convention, *supra* note 9, art. 37(2)(a); *See also* the terms of the London Maritime Arbitrators Association, r. 8, 9, May 01, 2017: Rule 8(a) states as follows: "If the arbitration agreement provides that [the LMAA] Terms are to apply but contains no provision as to the number of arbitrators, the agreement shall be deemed to provide for a tribunal of three arbitrators […]" and Rule 9 states as follows: "Subject to the terms of the arbitration agreement, if the tribunal is to consist of two arbitrators and an umpire […]" which rule then provides further details with this arbitral configuration.

["**LCIA**"] Rules, 2016,[14] International Chamber of Commerce ["**ICC**"] Arbitration Rules, 2017,[15] LCIA Arbitration Rules, 2014,[16] the Swiss Rules of International Arbitration, 2012 of the Swiss Chambers' Arbitration Institution ["**SCAI**"][17]and SIAC Arbitration Rules, 2016.[18]

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14 The Dubai International Financial Centre (DIFC) – London Court of International Arbitration (LCIA) Arbitration Centre is headquartered at the DIFC, which has its own arbitration law. When parties opt for the DIFC as the seat, the DIFC Law No. 1 of 2008 (Arbitration Law) applies as the governing law. DIFC Law No. 1 of 2008, art. 16 [*hereinafter* "DIFC Arbitration Law"] provides the following: "The parties are free to determine the number of arbitrators provided that it is an odd number. If there is no such determination, the number of arbitrators shall be one." *See* Arbitration Rules of the DIFC-LCIA Arbitration Centre, art. 5(8), Oct. 01, 2016 which provides that "[a] sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)".

15 Compare the Rules of Arbitration of the International Chamber of Commerce, art. 12 (1), Mar. 01, 2017 [*hereinafter* "ICC Rules 2017"] which states that "[t]he disputes shall be decided by a sole arbitrator or by three arbitrators" with art. 11(6): "Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13".

16 *See* Arbitration Rules of the London Court of International Arbitration, r. 5.8, Oct. 01, 2014 [*hereinafter* "LCIA Rules 2014"] which states that "[a] sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)".

17 *See* Swiss Rules of International Arbitration, art. 6(1), June 01, 2012 [*hereinafter* "SCAI Rules 2012"] ("If the parties have not agreed upon the number of arbitrators, the Court shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances") and the Swiss Chambers' Arbitration Institution Rules 2012, art. 6(3) ("If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, and this appears in-appropriate in view of the amount in dispute or of other circumstances, the Court shall invite the parties to agree to refer the case to a sole arbitrator.").

18 SIAC Rules 2016, *supra* note 9, r. 9.1 provides that "[a] sole arbitrator shall be appointed in any arbitration under these Rules unless the parties have otherwise agreed; or it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators." *See also* SIAC Rules 2016, *supra* note 9, r. 9.3 which states that: "[i]n all

> Even-numbered tribunals will accordingly be rare under the rules of the previously mentioned institutions because the prohibition and ambiguity can be prudently avoided by simply agreeing to a sole arbitrator or three-member panel. Even-numbered tribunals will be found more often in *ad hoc* arbitrations, and under the rules of the institutions, which unambiguously allow even-member tribunals. An example is the LMAA, which does not truly administer the arbitrations.[19]

The fifth and sixth approaches, i.e., the prohibitory approach with no remedial solution and institutional approach respectively, call for further comments. They present certain issues not discussed before, as well as the greatest need for change or clarification.

A. The Prohibitory Approach

The categorical prohibition of even-numbered tribunals is prevalent in investment arbitration. It is found equally in many Arab jurisdictions with no remedial "saving" mechanism by which a third arbitrator, acting as the chairperson, would be imposed on the parties, at least according to the

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cases, the arbitrators nominated by the parties, or by any third person including by the arbitrators already appointed, shall be subject to appointment by the President [of the Court of Arbitration of SIAC] in his discretion."; SIAC Rules 2016, *supra* note 9, rr. 10, 11 discuss the appointment of a sole arbitrator or three arbitrators respectively; SIAC Rules 2016, *supra* note 9, r. 11.3 states that "unless the parties have agreed upon another procedure for appointing the third arbitrator, or if such agreed procedure does not result in a nomination within the period agreed by the parties or set by the Registrar, the President shall appoint the third arbitrator, who shall be the presiding arbitrator."

19 *See* Paulo Fernando Pinheiro Machado, *The advantages of London ad hoc Maritime Arbitrations*, CIARB. FEATURES (Mar. 12, 2019), *available at* https://www.ciarb.org/resources/features/the-advantages-of-london-ad-hoc-maritime-arbitrations: "[…] the LMAA is an association of maritime arbitrators and does not itself administer the proceedings […]."

wording of the cited applicable laws.[20] Parties contemplating recourse to even-numbered tribunals in such cases should be careful.

The question of why such a prohibitory approach is followed in investment arbitrations as well as in many Arab jurisdictions, but not elsewhere, requires consideration. The participation of States in investment arbitration and the greater expectation that the party-appointed arbitrators will advocate the position and further the interests of the appointing party, finally resulting in the fear of 'blockage', appear to be the two main explanatory factors.

With the Arab jurisdictions, an additional religious explanation is tempting. Major differences exist between religious traditions and national legal systems, especially in international commerce. While there is no reported Islamic general prohibition of even-numbered tribunals,[21] Islamic law requires unanimous decisions, regardless of whether there is an odd or even number of arbitrators.[22] The Sharia practice of sole arbitrators is probably linked with the requirement of unanimous decisions. Moreover, as Samir Saleh opined, "*[t]he avoidance of an even number of arbitrators, common to most of the Arab countries, stems, inter alia, from the shari'a practice of one sole arbitrator [...].*"[23]

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20 UAE Civil Procedures Code, *supra* note 10; UAE Arbitration Law, *supra* note 10; Egypt Arbitration Law, *supra* note 10; Oman Arbitration Law, *supra* note 10; Qatar Arbitration Law, *supra* note 10; Al-Hawamdeh & A. Ababneh, *supra* note 10.

21 "According to the four Islamic Law Schools, contracting parties could appoint one arbitrator or more, whether it be an odd or even number", Al-Hawamdeh & A. Ababneh, *supra* note 10 at 415.

22 *Id.* at 419; *See also* Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 SANTA CLARA J. INT'L L. 169, 183 (2006).

23 SAMIR A. SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: SHARI'A, LEBANON, SYRIA, AND EGYPT 388 (2d ed. 2006).

The present-day position in the Arab jurisdictions and several other institutions do not require unanimity in rendering an award.[24] In law, most of them, if not all, do not even prohibit dissenting opinions. The general prohibition of even number of arbitrators in Arab jurisdictions is better explained by pragmatic considerations, namely, the fear of deadlock which itself is largely linked with the practice of the advocate-arbitrator, i.e., the arbitrator favouring the appointing party. This may well be a pragmatic and even necessary solution to a real problem. It is not, however, indicative of a positive state of affairs. The fact that none of the major European arbitral seats, including Geneva, London and Paris, explicitly prohibit even-numbered tribunals in international arbitration should give pause for reflection.

B. The Institutional Approach

The reference to an "institutional" and textually ambiguous approach is a generalization. By definition, the generalization is not always true. Certain institutional rules are perfectly clear regarding the permissible number of arbitrators, for example the Casablanca International Mediation and

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24 *See, e.g.,* Royal Decree No. M/34 (Approving the Law of Arbitration) dated 24/5/1433H, art. 39(1) (Saudi Arabia) states that "[i]f the arbitration tribunal is composed of more than one arbitrator, its decision shall be made by majority vote of its members. Deliberation shall be in camera"; Law No. 11 of 1995 (organizing Ministerial Resolutions and the Civil & Commercial Procedure, Code No. 38 of 1980), art. 183 (Kuwait) states that "[t]he arbitrators' award shall be rendered by a majority opinion in writing […]. If one or more arbitrators refuse to sign the award this fact shall be stated therein. The award is deemed appropriately valid if signed by the majority of arbitrators"; Oman Arbitration Law, art. 40 states that "[a]rbitration board comprising of more than one arbitrator shall pass its award with majority vote after due deliberations in the manner specified by the arbitration board, unless the parties to the arbitration agree upon otherwise."; Qatar Arbitration Law, art. 29 states that "[w]hen there is more than one arbitrator, any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators"; UAE Arbitration Law, art. 12 states that "[i]n arbitral proceedings with more than one Arbitrator, any decision of the Arbitral Tribunal shall be made, unless otherwise agreed by the Parties, by a majority of all its members."

Arbitration Centre ["**CIMAC**"] Arbitration Rules, Dubai International Arbitration Centre ["**DIAC**"] Arbitration Rules, 2007,[25] the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID, 2006,[26] LMAA Terms, 2017 [**"LMAA Terms"**] and the UNUM Arbitration Rules, 2018.[27]

However, many leading arbitral institutions discourage even-numbered tribunals without including an explicit prohibition or clear solution. As will be seen in this part of the paper, the prohibition, if there is one, has to be implied by an exclusive reference to a sole arbitrator or three arbitrators, or by the application of a separate provision regarding the formulation of the award, or by the spirit and distinctive features of the rules themselves.

For instance, the ICC and OHADA Arbitration Rules refer exclusively to a tribunal composition of either a sole arbitrator or three arbitrators.[28] An even number of arbitrators is arguably prohibited in the previously mentioned arbitral rules, but this is only an implication. There is no clear and simple provision stating that an even number of arbitrators is

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25 Arbitration Rules of the Dubai International Arbitration Centre, art. 8.1, May 07, 2007 states that: "[t]he Tribunal shall consist of such number of arbitrators as has been agreed by the parties. If there is more than one arbitrator, their number shall be uneven."

26 ICSID Rules of Procedure for Arbitration Proceedings, rr. 1, 3, Apr. 10, 2006.

27 Arbitration Rules of the UNUM Transport Arbitration & Mediation, r. 3.1, Sept. 2018 [*hereinafter* "UNUM Arbitration Rules"] provides that "[the disputes shall be settled by three arbitrators, unless the parties agree that the dispute shall be settled by a sole arbitrator."; *See also* Arbitration Rules of the Casablanca International Mediation and Arbitration Centre, art. 8.1, Jan. 01, 2017 [*hereinafter* "CIMAC Rules 2017"] states as follows: "Disputes will be determined by one arbitrator or more arbitrators in an uneven number."

28 *See* ICC Rules 2017, *supra* note 15, art. 12 ("The disputes shall be decided by a sole arbitrator or by three arbitrators"); Arbitration Rules of the Common Court of Justice and Arbitration, May 15, 1999, 8 JOURNAL OFFICIEL DE L'OHADA [J.O. OHADA], arts. 8 and 3.1 [*hereinafter* "CCJA Arbitration Rules"] ("The dispute may be settled by a sole arbitrator or by three arbitrators").

forbidden. In fact, both set of rules include other provisions that cast doubt on the implied prohibition. Article 11(6) of the ICC Arbitration Rules *prima facie* allows the parties to agree to an even-numbered tribunal by stating that "*[i]nsofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.*"[29] Further, the OHADA Arbitration Rules, unlike many other institutional rules, seem to be compatible with an even-numbered tribunal insofar as they do not require that the award be made by a majority (or failing a majority, by the presiding arbitrator), both of which would be factually impossible in the case of two-member tribunals with no agreed, presumed or imposed third arbitrator or umpire.

In light of the above, would a practitioner advise a client who wishes to obtain a relatively quick and enforceable decision, to agree to a two-member tribunal under the ICC Rules, OHADA Arbitration Rules, or other similarly worded rules? The answer to this question is almost certainly negative. By reviewing the rules and commentaries thereof, the practitioner would realize that certain other provisions in the rules could create some additional difficulties. With the ICC Rules in particular, the question arises whether the ICC Court would allow the arbitration to continue, as an even-numbered tribunal with an umpire may be incompatible with the ICC Court's expectation that all members of the tribunal participate in the arbitral procedure. It could also lead to complications in relation to the Terms of Reference (for instance where such document was not signed by the umpire), and to the possible and

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29 Compare the CIMAC Rules 2017, *supra* note 27, arts. 4(1), 1(1) and 14(1) with ICC Rules 2017, *supra* note 15, art. 11(6).

unusual need to divide the arbitration into different stages in case the tribunal is deadlocked.[30]

To give another example, many other institutional rules do not explicitly prohibit an even number of arbitrators, or exclusively refer to a tribunal composition consisting of either a sole arbitrator or three arbitrators, for example, the arbitral rules of LCIA, Mumbai Centre for International Arbitration ["**MCIA**"], SCAI, and UNCITRAL Arbitration Rules, 2010.[31]

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30 *See* Thomas H. Webster & Dr. Michael Buhler, Handbook of ICC Arbitration: Commentary, Precedents, Materials 196 (4th ed. 2018); Yves Derains & Eric A. Schwartz, A Guide to the ICC Rules of Arbitration (2d ed., 2005).

31 *See* LCIA Rules 2014, *supra* note 16, arts. 5.2 and 5.8 ("The expression the 'Arbitral Tribunal' includes a sole arbitrator or all the arbitrators where more than one" and "A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three))"; Arbitration Rules of the Mumbai Centre for International Arbitration, art. 1.3 and 3.1(g), Jan. 15, 2017 [*hereinafter* "MCIA Rules 2017"] ("'Tribunal' includes a sole arbitrator or all the arbitrators where there is more than one, and includes any arbitral tribunal constituted under these Rules" and (re: the specifics to be mentioned in the Request for Arbitration) "unless the parties have agreed otherwise, the nomination of an arbitrator, if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator"; SCAI Rules 2012, *supra* note 17, art. 6(1) ("If the parties have not agreed upon the number of arbitrators, the Court shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances"); SIAC Rules, *supra* note 9, arts. 1, 3.1(h) and 9 ("'Tribunal' includes a sole arbitrator or all the arbitrators where more than one arbitrator is appointed" and (re: the specifics to be mentioned in the Notice of Arbitration) "unless otherwise agreed by the parties, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator" and "A sole arbitrator shall be appointed in any arbitration under these Rules unless the parties have otherwise agreed; or it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators."); UNCITRAL Arbitration Rules, G.A. Res. 65/22, art. 7, Aug. 15, 2010 [*hereinafter* "UNCITRAL Arbitration Rules"] ("If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.").

These rules, thus, signal permission, or at least tolerance, for even-numbered tribunals. Nevertheless, the same rules explicitly require the award to be rendered by a majority or the presiding arbitrator,[32] which necessarily excludes two-member tribunals. There is no reported practice under these rules, of one of the two arbitrators having the casting vote in case of deadlock between the two same arbitrators, and such a practice or contractual provision would create serious problems relating to equality between the parties and due process.

None of the previously mentioned institutional rules, including the LCIA Arbitration Rules, refer to the umpire.[33] The same is true for most national arbitration laws as well. In both cases, reference to a two-member

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32 LCIA Rules 2014, *supra* note 16, art. 26.5 ("Where there is more than one arbitrator and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the presiding arbitrator shall decide that issue."); MCIA Rules 2017, *supra* note 31, art. 30.6 ("Where there is more than one arbitrator, the Tribunal shall decide by a majority"); SCAI Rules 2012, *supra* note 17, art. 31(1) ("If the arbitral tribunal is composed of more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, the award shall be made by the presiding arbitrator alone"); SIAC Rules, *supra* note 9, art. 30.7 ("Where there is more than one arbitrator, the Tribunal shall decide by a majority. Failing a majority decision, the presiding arbitrator alone shall make the Award for the Tribunal"); UNCITRAL Arbitration Rules, *supra* note 31, art. 33(1), ("When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.").

33 Interestingly, the appointment of an umpire was expressly envisaged in the ICC Rules prior to 1955. *See, e.g.,* Rules of Arbitration of the International Chamber of Commerce (1932), art. 12(2) (as amended in 1933): "When the parties each select one arbitrator, the Court shall appoint either an umpire or a third arbitrator in accordance with the terms of paragraph I of this article", and Rules of Arbitration of the International Chamber of Commerce (1947), arts. 12(1) & 21(1): "The parties may agree to the settlement of the difference by a sole arbitrator or, if necessary, by three arbitrators. If the reference is to three arbitrators, each of the parties shall, except when otherwise stipulated appoint an arbitrator and the and the Court of Arbitration shall appoint the third arbitrator (or umpire, as the case may be) […]" and "When two arbitrators and an umpire are appointed and the arbitrators fail to agree, the decision of the umpire shall be final and binding. The Umpire is not bound to adopt the opinion of either of the arbitrators".

tribunal is unlikely because the umpire, in general, is closely linked to the practice of two-member tribunals. The umpire gives psychological and legal comfort to parties that a practical solution will be possible in case of a deadlock.

It is also unclear if, and to what extent, the umpire would be given effect to in the context of an institutional rule or national arbitration law that does not know the institution as such.[34] There exists a lack of practical experience and intellectual familiarity with the concept of an umpire in the present times amongst both practitioners and judges alike. This is especially true outside common law jurisdictions, where the notion is often unknown or translated by different-sounding terms that are even less known, for example "*tiers arbitre*" in French. This is an important factor that explains the negative reaction typically displayed by many practitioners towards even-numbered tribunals.

Maritime arbitration is often said to be a different species. One reported difference is that even-numbered tribunals are more prevalent here than elsewhere.[35] The LMAA Terms clearly confirm this by their extensive references to the umpire, and an unusual definition of a tribunal. Article 2(c) of the LMAA Terms defines the term "tribunal" to include "*a sole arbitrator, a tribunal of two or more arbitrators, and an umpire.*" In passing, Article 8(a) of the LMAA Terms further differentiates the terms from the

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34 There is precedent that such arbitration would not be able to proceed under the ICC Rules; *see* Sumitomo Heavy Industries Ltd v. Oil Gas Commission of India, Award (June 27, 1995), ¶ 1.12, *available at* https://www.trans-lex.org/290024/_/sumitomo-heavy-industries-ltd-v-oil-gas-commission-of-india-/: "[…] the Secretariat of the ICC wrote to the parties' lawyers to the effect that, since the ICC Rules do not provide for Umpires, and since the parties were unable to agree upon the status of the Umpire in the context of the ICC Rules, the arbitration would not be able to proceed under the auspices of the ICC."

35 *See, e.g.*, Arbitration Rules of the Society of Maritime Arbitrators, Mar. 14, 2018 [*hereinafter* "SMA Rules"] which provide for the appointment of even-numbered arbitral tribunal, i.e., two arbitrators under § 5(b).

(English) Arbitration Act, 1996 and the LCIA Arbitration Rules[36] by deeming that an arbitration agreement provides for a tribunal of three arbitrators when it contains no provision as to the number of arbitrators.

The arbitration practitioners who are inexperienced in maritime arbitration might find the rules providing for even-numbered arbitral tribunals surprising, because such rules stand in marked contrast to the vast majority of the present-day arbitration laws and institutional rules, which make no mention of the umpire. It includes even those rules which are expected – by reason of historico-legal continuity or affiliation with the common law family – to include references to the umpire, but do not in reality, for example the (Indian) Arbitration and Conciliation Act, 1996, as revised in 2015, and the LCIA Rules, 2014.

It is difficult to know whether – outside the LMAA context – maritime arbitrations often provide for even-numbered tribunals. The personal experience of the author in maritime cases, and also exchanges with maritime arbitration practitioners suggest that even-numbered tribunals are rare in maritime arbitrations as well. The wording of other maritime institutional arbitration rules strengthens this tentative view, for example,

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36 Arbitration Act 1996, c. 23, § 15(3) (Eng.) provides that "[i]f there is no agreement as to number of arbitrators, the tribunal shall consist of a sole arbitrator."; LCIA Rules, *supra* note 16, arts. 5.7 and 5.8 provide that "[n]o party or third person may appoint any arbitrator under the Arbitration Agreement: the LCIA Court alone is empowered to appoint arbitrators (albeit taking into account any written agreement or joint nomination by the parties)" and that "[a] sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)".

UNUM Arbitration Rules, 2018,[37] Maritime Arbitration Chamber, and the Paris (CAMP) Arbitration Rules, 2019.[38]

It is important to note that even-numbered tribunals are also said to be more frequent in commodities and insurance disputes.[39] It is difficult to reliably repeat this assertion with any degree of certainty, as this assertion may well be less true at present than it was several decades ago.

In conclusion, there is no one particular "institutional" approach, but many institutions that allow a certain ambiguity in their arbitration rules regarding whether an even-numbered tribunal is possible. This should rarely present a concrete problem for parties who will simply opt for a sole arbitrator or three arbitrators or, if they indeed wish, for an even number of arbitrators and choose either *ad hoc* arbitration or institutional

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37 UNUM Arbitration Rules, *supra* note 27, r. 3.1 provides that "[the d]isputes shall be settled by three arbitrators, unless the parties agree that the dispute shall be settled by a sole arbitrator".

38 Arbitration Rules of the Chambre Arbitrale Maritime de Paris, art. VII(1), June 12, 2019 provides that "[the d]isputes under the jurisdiction of the Chambre Arbitrale Maritime shall be settled by a sole arbitrator or by a three-members Tribunal."; *See also* the Model Clause of the Emirates Maritime Arbitration Centre, 2016 (EMAC) saying that "[t]he number of arbitrators shall be [one or three]"; Arbitration Rules of the Cour Internationale d'Arbitrage Maritime et Aérien, art. 7.1 [*hereinafter* "CIAMA Rules"]: "[the d]isputes under the jurisdiction of "the Court" shall be settled by a sole arbitrator or by a three-members Tribunal"; Arbitration Rules of the Australian Maritime and Transport Arbitration Commission, r. 8, July 01, 2016 [*hereinafter* "AMTAC Rules"] : "[t]here shall be one arbitrator"; Rules of Arbitration & Conciliation of the Indian Council of Arbitration, r. 10(1), May 08, 2012 [*hereinafter* "ICA Rules"] : "[t]he number of arbitrators to hear dispute under these rules shall be either one or three to be appointed from and amongst ICA Maritime Panel of Arbitrators"; and Rules of the China Maritime Arbitration Commission, art. 29(1), Jan. 01, 2015: "[t]he arbitral tribunal shall be composed of one or three arbitrators".

39 *See* Julian D. M. Lew et al., Comparative International Commercial Arbitration ¶¶ 10-28 (2003); Nigel Blackaby et al., Redfern and Hunter on International Arbitration ¶ 4.22 (6th ed., 2015); Al-Hawamdeh & A. Ababneh, *supra* note 10, at 414.

rules which clearly, unmistakably allow even-numbered tribunals, for example, the LMAA Terms in the context of maritime arbitration.

The institutional approach could be understood to have been born out of pragmatic considerations and the desire to avoid potentially serious difficulties, and not simply the fear of deadlock, which can be easily remedied by an umpire or third arbitrator. In particular, there is uncertainty at the enforcement stage which is much more difficult to remedy, especially in a situation where there is a conflict between the law of the seat and the law of the jurisdiction where enforcement is sought.[40] Simply stated, even if two arbitrators render a unanimous decision, and

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[40] *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1645-1646 (2d ed., 2014) [*hereinafter* "BORN"]: "Preliminarily, conflicts between the parties' agreed procedures for constituting an arbitral tribunal and the law of the arbitral seat can take a variety of forms. Parties may agree upon an even number of arbitrators, while the mandatory law of the seat may require an odd number […] Although there is substantial room for debate, the better interpretation of the Convention is that Articles II(3) and V(1)(d) generally require giving effect to the parties' agreed arbitral procedures in recognition actions, including where those procedures violate the mandatory law of the arbitral seat […] Only where the parties' agreed procedures for constituting the tribunal violated mandatory due process guarantees (under Article V(1)(b)) or the procedural public policies of the judicial enforcement forum (under Article V(2)(b), would the Convention permit non-recognition of the resulting award (under provisions other than Article V(1)(d)) [1668]. Although there is room for debate, the better view is that Contracting States are free under the Convention to apply such mandatory prohibitions (against even numbers of arbitrators) to annulment of awards in locally-seated arbitrations, but that Articles II and V(1)(d) require other Contracting States to give effect to the parties' agreement on an even number of arbitrators in recognition proceedings, notwithstanding contrary mandatory law in the arbitral seat. This would permit states to invoke mandatory local public policy with regard to arbitrations seated locally, as an exceptional escape mechanism, while allowing (and requiring) other Contracting States to give effect to the parties' agreement"; FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 804 (Emmanuel Gaillard & John Savage eds., 1999): "One of the most innovative provisions of the 1958 New York Convention stipulates that the agreement of the parties as to the constitution of the tribunal takes precedence, and that the national law of the country where the arbitration takes place applies only where the agreement of the parties does not allow the tribunal to be properly constituted."

even if both parties had willingly participated in the procedure, the even composition of the tribunal may erupt or resurface at a post-award stage. The question of whether a national enforcement court would recognize an award rendered by an even-numbered tribunal or umpire needs to be considered. A prediction based on an exegesis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"] and national arbitration laws, is unlikely to offer the level of assurance that a well-advised party may wish for before agreeing to an even number of arbitrators. Aside from the common difficulty of predicting which national courts will be relevant at the enforcement stage, the rarity of even-numbered tribunals is matched by the rarity of clear and well-developed case laws by national courts.

For the future of international arbitration, especially at a time when it is heavily institutionalized, and despite efforts elsewhere to promote other methods of dispute resolution, the result could be a further separation of arbitration and conciliation. This is not entirely unlinked with the unfortunate large separation between the arbitration world and the contemporary legal comparatists.

III. The Links with Conciliation and Amiable Composition

Prohibiting or discouraging even-numbered tribunals does not always lead to positive results. The underlying negative assumption, that a tribunal composed of only two arbitrators will often result in a deadlock, may not even be grounded in fact. The inputs from arbitration practitioners who have actually participated in, or observed, an operational even-numbered tribunal, could prove to be very useful in the development of arbitration, by bringing new ideas to a topic that is often treated summarily, and in black and white terms.

Two main comparisons that support even-numbered tribunals are the truncated arbitral tribunals and two-member courts, especially divisional courts in common law jurisdictions such as England and Wales and India.

Both display present-day realities for which the fear and actuality of deadlock does not appear to be substantial.

The comparisons are admittedly not perfect, as, unlike the arbitral tribunals, the two judges are not nominated by the parties and an appeal would be possible. As for the truncated tribunals, the legal regime is often heavily fact-specific, dependent on timing, and very different from consciously choosing an even number of arbitrators from the very commencement of the arbitration as it allows an even number of arbitrators in an unlikely and undesired situation; where one of the arbitrators can no longer participate in the proceeding. Nevertheless, the risk of deadlock is still very much real with truncated tribunals and two-member courts, but has not been deemed sufficiently serious to prohibit their operational existence. The truncated tribunals and even-numbered national courts could, therefore, provide direction for even-numbered arbitral tribunals.

The question of why parties would agree to even-numbered tribunals in the first place also requires consideration. Many arguments can be raised against such tribunals, and these were concisely summed up by the Supreme Court of India in its decision dated February 20, 2002, in *Narayan Prasad Lohia* v. *Nikunj Kumar Lohia*, a case involving a family and property dispute where the parties had agreed at some point to a two-member arbitral panel:

"[The Respondent] submits that if there are an even number of Arbitrators there is a high possibility that, at the end of the arbitration, they may differ. [The Respondent] submits that in such a case parties would then be left remediless and would have to start litigation or a fresh arbitration all over again. [The Respondent] submits that this would result in a colossal waste of time, money and energy. [The Respondent] submits that to avoid such waste of time, money and energy the Legislature has, in public policy,

provided in a non-derogatory manner, that the number of arbitrators shall not be even.'[41]

At the same time, there are practical and perfectly valid reasons why parties may wish to choose an even-numbered tribunal. First, the parties, especially if improperly advised, may not be aware of the legal issues and potential complications arising out of even number of arbitrators. This, however, is unlikely to be frequent and does not call for further developments. Second, the parties may wish to have a more conciliatory dispute resolution procedure and outcome. This situation is not a marginal reality. Both of the previously mentioned factors may be especially relevant in family disputes and arbitrations of a more domestic nature, with which the international arbitration practitioners would be less familiar. Third, parties may expect a properly selected even-numbered tribunal to render a cost-efficient, fair and valid award, without undue concerns about the risk of deadlock.

Gary Born mentioned the possibility – without expressly endorsing the view – that an even number of arbitrators may more likely reach a pure

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41 Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572 ¶ 10 (India). In that case, however, the apex court – as the Supreme Court is often referred to in India – ultimately held that the losing respondent had waived its right to object to the composition of the tribunal. In pertinent part, the Supreme Court stated that "[…] we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage, i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two Arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed. Thus, we do not see how there would be waste of time, money and expense if a party, with open eyes, agrees to go to Arbitration of two persons and then participates in the proceedings. On the contrary there would be waste of time, money and energy if such a party is allowed to resile because the Award is not of his liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable."

'compromise decision'.[42] Despite the speculative, or at least debatable nature of this exercise, two main factors explain the reasons behind the possibility that an even number of arbitrators may have a specific impact on the arbitral procedure and outcome.

The first factor relates to the internal dynamics of an arbitral tribunal. With an even number of arbitrators, in particular, a two-member tribunal, the fear of deadlock has an advantage that it should incentivise the two arbitrators to make mutual concessions for arriving at a mutually satisfactory outcome, rather than seeing their decision being made by another person, like an umpire.

It is important to remember that parties are unlikely to blindly accept a pure two-member tribunal without a remedial solution, like an umpire, in case of a deadlock. This means that an arbitrator may be able to delay, but not entirely wreck the procedure. The mutual concessions may facilitate a more greyish and nuanced decision reflecting the complexity of the situation, rather than a black or white legalistic solution that may not necessarily do justice to the parties.

The second factor relates to the relationship between the parties and the community in which they operate. If the parties make an informed decision to choose an even number of arbitrators, the likelihood is that they will expect a certain level of fair play in the selection of the tribunal and the arbitration of their future dispute. Some of the reasons why parties could have such an expectation are the past dealings between the parties, desire to maintain long-term relations, and fairly closed community in which they operate, where the expectation of award compliance is high, and the reputational and other sanctions are relatively easy to apply in case of non-compliance.

42 BORN, *supra* note 40, at 1352.

The even number of arbitrators presents many similarities with amiable composition, one of the functions of which is also to allow fairer and more conciliatory approaches. Besides the fact that both, the number of the arbitrators and the special powers and obligations of *amiable compositeurs*, relate to the composition of the tribunal, their relative rarity, the suspicion that each creates amongst the practitioners, the institutional and national efforts aimed at preventing or discouraging their use, and the very reason why the parties may wish to have recourse to either of them in the first place, are all elements that bring them closer together at a theoretical level. These may constitute different techniques in different jurisdictions to reach a similar result.

The typical situation in which an *amiable compositeur* may be called upon, namely, long term contracts, the importance of good faith before and during the dispute, and the need to precisely draft the amiable composition clause for knowing the limits of the additional powers and obligations of the decision-makers, are all helpful elements to keep in mind, if and when the parties agree to an even number of arbitrators and umpire.

While the long-term nature of the underlying contract or relationship may be a less frequent element in the situation of even-numbered tribunals, good faith and precision in the arbitration clause and nomination process will always be paramount.

If the parties agree on an even number of arbitrators, but one of the parties nominates a specific arbitrator in bad faith, with the precise objective of preventing a common decision, then a sole arbitrator or three-member panel would certainly be preferable.

The rarity of even-numbered tribunals and *amiable compositeurs* at present should be contrasted with their past practice. When reviewing the institution of amiable composition, the author was surprised to learn that amiable composition was significantly more prevalent in the past, for

example in France.[43] In the jurisdictions where amiable composition was mistrusted and avoided, for example England, similar results could be achieved by arbitrators, who at the time were not obliged to, and often did not, provide reason in their awards.[44]

A review of the former national laws of England and India, i.e., the (Indian) Arbitration Act, 1940[45] and the (English) Arbitration Act, 1950, leaves one with the clear impression that the umpire and even-numbered tribunals were much more common before. It is not only the extensive references to the umpire, which are striking, especially in comparison to the (Indian) Arbitration and Conciliation Act, 1996, which does not make any such reference (in contrast, however, to the (English) Arbitration Act, 1996); it is also that the (English) Arbitration Act, 1950 presumes that: (i) unless indicated otherwise, a reference to two arbitrators shall be deemed to include a provision for the appointment of an umpire by the two arbitrators (the presumption now in the (English) Arbitration Act, 1996 is for the deemed appointment of a third arbitrator[46]) and (ii) the parties'

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43 See Régis Bonnan, Different Conceptions of Amiable Composition in International Commercial Arbitration: A Comparison in Space and Time, 6 J. INT'L DISP. SETTLEMENT 522, 530 n. 23 (2015).

44 *Id.* at 525.

45 The Arbitration Act, No. 10 of 1940, §§ 8, 9 (India) read as follows:
"8. Power of Court to appoint arbitrator or umpire -
(1)(c) Where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.
9. Power to appoint a new arbitrator or in certain cases, a sole arbitrator - Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party […]."

46 *See* Arbitration Act 1950, 14 Geo. 6 c. 27, § 8(1) (Eng.) ("Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators shall appoint an umpire immediately after they are themselves appointed"). *Cf.* Arbitration Act, 1996, c. 23, § 15(2) (Eng.) ("Unless otherwise agreed by the parties, an agreement that the number of arbitrators

reference to three arbitrators will be interpreted as a reference to two arbitrators with an umpire.[47] The above is further confirmed by the apparently uncontroverted assertion made by a leading Indian jurist, who stated that even-numbered tribunals were not only possible but were "usual" prior to the deemed entry into force of the (Indian) Arbitration and Conciliation Act, 1996.[48]

It must assuredly have been easier to agree on an even-numbered tribunal at a time when the use of an umpire was much more frequent and the awards did not have to be motivated. No reference is made to any such obligation in the (Indian) Arbitration Act, 1940 or the (English) Arbitration Act, 1950, thereby facilitating unanimity and rendering irrelevant the question of who drafts what. Arbitration was also much less institutionalised and not overwhelmingly dominated by lawyers.[49]

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shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator *as chairman* of the tribunal"); Note that § 3(2) of the First Schedule of the Arbitration Act, 1940 also provided that a reference to two arbitrators would require the appointment of an umpire ("If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments").

47 Arbitration Act 1950, 14 Geo. 6 c. 27, § 9(1) reads as follows: "Where an arbitration agreement provides that the Agreements reference shall be to three arbitrators, one to be appointed by for reference each party and the third to be appointed by the two appointed to three by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties."

48 Fali S. Nariman, *Even Number of Arbitrators: Article 10 of the UNCITRAL Model Law: India*, 15 ARB. INT'L 405 (1999) where the author summarized the litigant's position in stating, in pertinent part, that the "appointment of an even number of arbitrators was usual prior to 25 January 1996."

49 For the judicialization of international commercial arbitration, especially in the ICC Context, *see* Florian Grisel, *Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession*, 51 L. & SOC'Y REV. 790, 807-808 (2017). In particular, Mr. Grisel notes that "Professors were only a minority among all appointees, even though their relative weight steadily grew over time […] attorneys were the dominant group among ICC

The previously mentioned characteristics are clearly noticeable, and have left a deeper and lasting imprint on, the world of maritime arbitrations, especially in London. Along with this is the additional element that oral hearings were, and still are, less frequent,[50] even if party-appointed arbitrators appear to have often acted as advocate-arbitrators.

The following passage from Bruce Harris is informative:

"*[…] each of the parties would appoint an arbitrator, probably from the Baltic list. Those arbitrators would then seek to agree, but if they could not (and this was quite common) they would appoint a third person usually as 'umpire'. In English law, an umpire becomes the sole arbitrator once the party-appointed arbitrators have disagreed, and he alone makes the decision. This left the party-appointed arbitrators free to advocate their appointers' cases in front of the umpire, which they would often do. Nowadays, the concept of the arbitrator-advocate seems a strange one to us. That is partly because, due to some changes in shipping practices and in English arbitration law, the umpire is nowadays almost unknown, having been replaced by a third arbitrator who acts in conjunction with the other two arbitrators. It is also partly because the recent and present generations of arbitrators, unlike some of their predecessors, do not seek to take any position in relation to the disputes on which they*

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arbitrators after the Second World War, and […] their relative importance also increased. Conversely, the proportion of engineers/experts, businessmen/corporate executives and members of trade federations/unions dropped to insignificant levels. When considering the last sub-period (1963–1972), attorneys, judges, and professors accounted for more than 74 percent of all appointments. In other words, the influence of legal specialists grew over time to the point where business specialists held only a small share of all appointments."

[50] In the LMAA context, *see* Daniella Horton, *Adjusting the Sails…*, LONDON MAR. ARB. ASS'N 3 *available at* http://www.lmaa.london/uploads/documents/Daniella%20Horton%20Paper.pdf. ("In fact, for some time now, the majority of cases which proceed to an award on LMAA Terms, do so on documents alone").

have to adjudicate other than that which seems to them to be correct on their understanding of the evidence and the law."[51]

The search for conciliation may be a reason why parties today still wish to choose even-numbered tribunals, but it is not the sole reason. While even-numbered tribunals are more prevalent in maritime arbitration than elsewhere, conciliation is not reported to be the key objective in most maritime disputes. Perhaps, counter intuitively, parties acting in good faith could believe and expect that two party-appointed arbitrators will be able to reach a unanimous and objective decision, fairly, quickly, and in a cost-effective manner.

A dynamic of two arbitrators is different from one or three: the atmosphere will likely be less theatrical, more relaxed, and also more participative in the sense that one will not see the all too familiar situation in which the discussion is led essentially by two persons only, the third one being largely excluded or excluding himself. The idiom 'two is company, three is a crowd' may sometimes apply in the legal context as well.

The links between quantity and quality are complex, and depend on the context. In judicial and arbitral decision-making, having three or more decision-makers is not necessarily better than a lesser number, and there are ways to minimize the risk of deadlock and improve the process, including, by way of financial incentives to the arbitrators in the dispute resolution clause and, in case of deadlock, by placing more reliance on views of one of the two arbitrators, which would be similar to the 'referee' system or 'baseball arbitration' as referred to in the U.S. This would also promote reasonableness by the two arbitrators and efficiency if a deadlock still ensues.

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[51] Bruce Harris, *London Maritime Arbitration*, 77 ARB. INT'L 116, 117-118 (2011).

The visibility of the number of arbitrators makes it easy for institutions and legislators to prohibit the even-numbered arbitral tribunals and to enforce the rule of prohibition. This rule is not necessarily wise. Allowing an even number of arbitrators, in some situations and with certain safeguards, may well provide effective means of promoting more cooperation, good faith and impartiality in the decision-making process, which are crucial in arbitrations.

There may also be cost considerations at play. A well-functioning two-member tribunal will involve lower arbitral fees than a three-member tribunal, even though the easy and legitimate argument can be made that a sole arbitrator will be even cheaper. The anticipated cost reduction with even-numbered tribunals is not simply limited to the fact that there will be one less arbitrator working and charging for the performance of his duties. It is also explained by the expectation that the entire atmosphere of the arbitration will be less adversarial and confrontational, the practitioners will be less argumentative and repetitive in their briefs, and the awards will accordingly tend to be shorter and more concise.

On the other hand, some serious drawbacks exist with even-numbered tribunals, including potentially the personality conflicts and important disparities between the two arbitrators in ability, experience, and knowledge. These should be avoided to prevent deadlock or, in effect, a decision by a sole arbitrator. Two-member tribunals may also lead to less culturally diverse tribunals than is usually the case, because of the anticipated insistence by both parties – in law or in fact – to have party-appointed arbitrators with the precise legal background and practice corresponding to the law governing the dispute.

IV. Conclusion

The objective of this article is not to promote the generalization of even-numbered arbitral tribunals. This would be inadvisable for most commercial disputes; the uncertainty at the enforcement stage, today, remains unfortunately too high. And yet parties in dispute (and their in-

house counsel in particular) should not automatically reject such an option without further thought. Maritime arbitration, truncated tribunals and two-member national courts would provide useful sources of information. The appeal of even-numbered tribunals might also increase if the textual ambiguity of many institutional rules, and position by national enforcement courts, is clarified and publicized in a more liberal and permissive direction.

Even-numbered tribunals raise issues and ideas that are less clear-cut and more interesting than often thought. It has certain links with the reality of the advocate-arbitrator and the possible promotion of conciliation, and so the widespread negative treatment given to even-numbered tribunals – manifested by either rule prohibition or discouragement and often justified out of prudence and pragmatism – is a cause for concern.

CONFLICTS ON THE BELT & ROAD: CHINA'S NEW DISPUTE RESOLUTION MECHANISM

Patrick M. Norton[*]

Abstract

In its recent Belt and Road Initiative, China has proposed an ambitious program of infrastructure investments in dozens of countries throughout Asia and beyond. This program will inevitably generate a dramatic expansion of international commercial disputes and the need for procedures and institutions to resolve them. China has recently adopted a number of measures designed to prepare Chinese institutions to handle a significant share of these disputes. This article examines China's new measures and the suitability of Chinese institutions for such an expanded role.

I. Introduction

In 2013, Chinese President Xi Jinping announced a "*Belt and Road*"[1] project of remarkable scale under which the People's Republic of China ["**PRC**"] plans to use the enormous financial reserves generated by its recent manufacturing successes to invest trillions of dollars in infrastructure projects in dozens of countries around the globe. Chinese investments, to date, may already exceed a trillion dollars in countries throughout Central and Southeast Asia, parts of East Africa and the

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[1] The project is variously known as "*Belt and Road*," "*One Belt, One Road*" (*yidai, yilu* in Chinese) or by various acronyms for those names, e.g., "*B&R*," "*BAR*," "*BRI*", or "*OBOR*." The website of China's State Council (https://english.gov.cn/) provides a chronology of official developments in the "Belt & Road" initiative.

Middle East, and even Southern and Eastern Europe.[2] China has imaginatively modelled this project on the historic "*Silk Road*" – the complex of land and sea trade routes linking the economies of East Asia with Central and South-East Asia, the Middle East, and Eastern Europe since the days of the Han and the Roman Empires.[3] The "*belt*" of China's "*New Silk Road*" comprises of the overland routes from China through Central Asia to Europe; the various maritime routes from China around South and Southeast Asia to the Middle East and Africa make up the "*road*."

The scale of China's Belt and Road investments will inevitably have significant geopolitical and economic implications. Observers have expressed concerns that China's infrastructure investments may go hand-in-hand with the Chinese military and "*soft power*" ambitions. China's use of debt, not aid, to finance its projects has caused others to apprehend that China is establishing "debt traps" for unstable and developing economies. It is also feared that the injection of enormous amounts of capital into countries, where political corruption is already endemic, may aggravate political and corporate governance problems.[4]

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2 Reliable statistics for the Belt & Road are elusive. The World Bank provides on its website (https://www.worldbank.org/) various studies on Belt & Road economics that may be considered reliable.

3 *About the Silk Road*, UNESCO (Sept. 24, 2019), *available at* https://en.unesco.org/silkroad/about-silk-road.

4 A summary of the broader political and economic issues may be found in Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN REL. (May 21, 2019), *available at* https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative; *See also How will the Belt and Road Initiative advance China's interests*, CHINAPOWER (May 08, 2017), *available at* https://chinapower.csis.org/china-belt-and-road-initiative; Simeon Djankov et. al., *China's Belt and Road Initiative: Motives, Scope and Challenges*, PETERSON INST. INT'L ECON. (Mar. 2016), *available at* https://www.piie.com/publications/piie-briefings/chinas-belt-and-road-initiative-motives-scope-and-challenges.

China's new infrastructure investments portend, in any event, a dramatic expansion of the need for effective international dispute resolution, particularly in Asia. China's investment projects will inevitably create complex, multi-party contractual arrangements among both private and governmental actors in China, host countries, and, in some instances, third party countries. The projects' international financing requirements will likewise involve public and private international banks and financing institutions in China and third-party countries. These complex contractual structures will last for years, in some cases decades, and will inevitably generate complex commercial disputes. Some of these disputes will be submitted to the host country's courts,[5] or to arbitration before existing international arbitral institutions.[6] This paper focuses on a set of new dispute resolution procedures and institutions that China has recently established with the express intention of providing new and flexible mechanisms for resolving Belt and Road disputes.

II. Existing Dispute Resolution Institutions in China

China's development of a modern commercial legal system[7] has included the establishment of a nationwide network of courts and a web of commercial arbitration institutions. These judicial and arbitral institutions are currently available to serve as venues for Belt and Road disputes. The new Chinese Belt and Road institutions are also governed, in many respects, by existing Chinese laws, and have institutional relationships with the existing system. To understand the new measures, it is helpful to summarize briefly, China's existing dispute resolution framework.

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5 Some issues, for e.g., land use rights, may be subject to mandatory local laws or jurisdiction.

6 I have previously examined some of these alternatives, *see* Patrick M. Norton, *China's Belt and Road Initiative: Challenges for Arbitration in Asia*, 13 U. PA. ASIAN L. REV. 73 (2018).

7 In the People's Republic of China's (PRC) early years, a planned economy and very limited international trade and investment relations largely obviated the need for a commercial legal system. This changed dramatically with Deng Xiaoping's opening of the economy in 1979. Development of a modern commercial legal system followed in the wake of that opening.

A. Commercial Litigation in China

China has a civil law system[8] with a four-tier judiciary headed by the Supreme People's Court ["**SPC**"]. At the outset of China's redevelopment of its legal system, one of the judicial institutions' greatest challenges was a dearth of qualified judges and lawyers. Most experienced judges had been dismissed during the political campaigns of the 1950s and the Cultural Revolution, and the legal profession itself had effectively been abolished. Law schools and related legal education programs had been closed for more than a decade. These measures were reversed in the wake of Deng's 1979 opening, but re-establishing legal institutions and the legal profession was a challenge. Many of China's post-1979 judges had received no legal training; indeed, many had not even attended university.[9] China has addressed these judicial personnel shortages in the subsequent years with very intense legal education programs, including mandatory training classes for existing judges and encouraging students to study law abroad. As a result, judicial standards in China today are significantly higher than they were only 10 or 20 years ago.

A related challenge for China's judiciary has been a lack of specialist knowledge in fields related to foreign trade and investment. For many years, foreign parties found that their disputes in Chinese courts were being heard by judges with only limited familiarity with either rules of international trade and investment generally, or with more technically specialized fields of law such as intellectual property. China has addressed these problems aggressively too, establishing rules that vest jurisdiction for foreign-related disputes in designated intermediate or higher-level

[8] In the 19th century, China's legal reformers modelled a civil law system on Japan's, which itself had largely been modelled on Germany's. During the republic, China's legal system continued this tradition, and to a more limited extent, the PRC has followed that approach.

[9] Circa 2000, many of China's judges, particularly in the lower courts of first instance in the smaller cities and counties, were former officers of the People's Liberation Army (PLA) who were released during a downsizing of the PLA.

courts and, at least in the major cities, before panels of judges with training and experience in international or technically specialized areas.[10] The SPC itself has now established a Fourth Civil Division staffed with judges with the requisite training and experience. The SPC has also issued a number of directives providing guidance on how lower level courts are expected to handle cases of this nature.[11]

Several concerns nevertheless persist. First, communist dogma and the lingering effects of China's Confucian heritage are still felt. A recent study[12] has observed that Chinese judges are typically influenced in their decision-making by three, potentially inconsistent, factors: the legal, social, and political effects of their rulings. This importance accorded to social and political factors outside the scope of a given dispute is both Confucian and Marxist in origin, and results, as the Chinese say, in a "*rule of law with Chinese characteristics*."[13] Ideology still trumps legality, and the courts are repeatedly admonished to defer to the views of the Communist Party. It is probably fair to say that such factors play only a limited role in the majority of Chinese commercial cases these days, but the theoretical

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10 See, e.g., Jerome A. Cohen, Settling International Business Disputes with China: Then and Now, 47 CORNELL INT'L L. J. 555, 565 (2014); Xiao Yongzhen, Chinese Methods for Settling Economic Disputes Concerning Foreigners and their Legal Bases, 1(2) PAC. RIM L. & POL'Y J. 363, 379 (1993).

11 Provisions on the Jurisdiction of Beijing No. 4 Intermediate People's Court over Cases (2018) and Provisions on the Jurisdiction of Shanghai Financial Court over Cases (2018) provide for the assignment of foreign-related and financial cases to specialized courts in those municipalities, *see* Xuehua Wang et al., *Annual Review on Commercial Arbitration in China (2019)*, *in* COMMERCIAL DISPUTE RESOLUTION IN CHINA: AN ANNUAL REVIEW AND PREVIEW 1, 5 (Beijing Arbitration Commission and Beijing International Arbitration Center eds., 2019) [*hereinafter* "Wang et al."].

12 Meng Yu & Guodong Du, *How Chinese Judges Think?*, CHINA JUST. OBSERVER (Jan. 04, 2019), *available at* https://www.chinajusticeobserver.com/insights/how-chinese-judges-think.html.

13 In Western jurisprudence, this might be characterized as an emphasis on the principles of distributive justice within society, over those of commutative justice between the parties.

possibility still gives a degree of uncertainty to Chinese judicial proceedings.[14]

Chinese judicial procedures also sometimes present surprises to foreign parties. China's procedural rules generally follow a civil law model in which the pre-trial disclosure of evidence is largely in the hands of the judge, and Chinese judges cannot always be expected to ensure pre-trial disclosure.[15] As a result, a foreign party may find itself facing the other party's principal evidence for the first time at trial.

Enforcement of Chinese judgments is also typically problematic. China has been participating in the negotiation of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. In addition, China has reportedly entered into a number of bilateral agreements providing for mutual judgment enforcement.[16] On the whole, however, Chinese judgments remain unenforceable outside China.

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14 The interjection of policy into judicial contexts is not always a negative factor for foreign parties. The government and the Communist Party have a strong, ongoing interest in having foreign parties feel that they are receiving justice in Chinese courts.

15 Elizabeth Fahey & Zhirong Tao, The Pretrial Discovery Process in Civil Cases: A Comparison of Evidence Discovery between China and the United States, 37(2) B.C. INT'L & COMP. L. REV. 281, 287 (2014). See Li Huanzhi, China's International Commercial Court: A Strong Competitor to Arbitration?, KLUWER ARB. BLOG (Sept. 30, 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/09/30/chinas-international-commercial-court-a-strong-competitor-to-arbitration/ [hereinafter "Li Huanzhi"].

16 *See* Jianli Song, *Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments,* CHINA INT'L COM. CT. (Aug. 30, 2018), *available at* http://cicc.court.gov.cn/html/1/219/199/203/1048.html. Supreme People's Court (SPC) Justice Song stated that 36 out of 39 recent bilateral treaties with other countries provide for mutual recognition and enforcement of judgments. None, however, is with a major trading partner of China. There have been several cases in China and the United States recently in which a judgment in the other country was recognized on the basis of reciprocity. *See* Kent

For these and similar reasons, foreign parties generally do not select Chinese courts as their first choice for the resolution of their disputes with Chinese counter-parties. Foreign parties typically choose Chinese judicial proceedings only when they have no jurisdictional alternative or their counter-party's principal assets are located in China, and a Chinese court judgment is the most promising method of enforcing a favourable ruling against those assets.[17]

B. Arbitration in China[18]

The PRC began developing arbitration institutions to handle international disputes shortly after Deng's 1979 opening of the economy. During the 1980s and the early 1990s, the forerunners of the China International and Economic Trade Arbitration Commission[19] ["**CIETAC**"] and the China Maritime Arbitration Commission[20] ["**CMAC**"] were established and authorized to hear international cases. Domestic arbitration also became more widespread during that era, generally administered by local arbitration commissions. The Arbitration Law of the People's Republic of China ["**1994 Arbitration Law**"][21] then consolidated international and

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Woo, *Enforcement of Foreign Judgments in China*, ZHONG LUN (Jan. 08, 2018), *available at* http://www.zhonglun.com/Content/2018/01-08/1921190435.html.

17 For a generally positive view of Chinese courts in light of recent reforms, *see* Stephen O'Regan, *Understanding Legal Proceedings in China*, CHINA BUS. REV. (July 29, 2016), *available at* https://www.chinabusinessreview.com/understanding-legal-proceedings-in-china.

18 A summary of the current status of arbitration in China may be found in Wang et al., *supra* note 11.

19 The CIETAC's forerunner was the Foreign Trade Arbitration Commission which was established in April 1956. *See About us*, CHINA INT'L ECON. & TRADE ARB. COMM'N, *available at* http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en.

20 The CMAC was originally named the Maritime Arbitration Commission of the China Council for the Promotion of International Trade and was established in 1959. It was renamed CMAC on June 21, 1988; *See About us*, CHINA MAR. ARB. COMM'N, *available at* http://www.cmac.org.cn/?page_id=283&lang=en.

21 Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 01, 1995) (China) [*hereinafter* "1994

domestic arbitration and still provides the basic framework for all arbitration in China.[22] In subsequent years, additional Chinese arbitration commissions, most notably the Beijing Arbitration Commission ["**BAC**"], were authorized to hear international as well as domestic cases. In 2012, CIETAC's Shanghai and Shenzhen sub-commissions also broke off from the CIETAC's headquarters in Beijing to become independent.[23] The CIETAC continues to hear the majority of foreign-related cases in China, but the dockets of the BAC and the Shanghai International Arbitration Commission ["**SHIAC**"] and the Shenzhen International Court of Arbitration ["**SICA**"] are increasing.

Arbitration in China has been criticized for various shortcomings, including limitations in earlier years on the parties' ability to nominate non-Chinese arbitrators,[24] exceptionally low compensation for the arbitrators leading many candidates, particularly foreign arbitrators, to be unwilling to accept appointments and inducing those who do accept appointments to minimize their time spent on the cases; an unnecessary

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Arbitration Law"]. The Arbitration Law was enacted in 1994 but did not come into force until 1995. As a result, it is sometimes also referred to as the "1995 Arbitration Law".

22 On the history of Chinese arbitration, *see* Will W. Shen & Iris H.Y. Chiu, *Arbitration in China: History and Structure*, *in* ARBITRATION IN CHINA: A PRACTICAL GUIDE 3 (J. Cohen et al. eds., 1st ed. 2004) [*hereinafte*r "Cohen"]; JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 8 (3d ed. 2012).

23 The confusion initially created by the split between CIETAC and its Shanghai and Shenzhen sub-commissions was eventually clarified by directives from the SPC. The sub-commissions are now wholly independent entities. *See* Jie Zheng, *Competition between Arbitral Institutions in China – Fighting for a Better System?*, KLUWER ARB. BLOG (Oct. 16, 2015), *available at* http://arbitrationblog.kluwerarbitration.com/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system.

24 The CIETAC established a panel of approved international arbitrators and loosened its rules to permit the appointment of foreign arbitrators, and other Chinese arbitration commissions have followed suit. In many instances, however, the listed arbitrators are simply well-known in other jurisdictions and rarely or never appear in Chinese cases, if only because, historically, the pay has been so poor. Chinese counsels sometimes also recommend appointing only Chinese arbitrators.

level of interference in individual cases by the arbitration institutions' secretariats, rules that permit arbitrators, on their own initiative, to switch from arbitration to mediation and back,[25] and, on occasion, questions as to the transparency and impartiality of the arbitration proceedings. The institutions and many practitioners and academics have made significant efforts in recent years to ameliorate these problems, and the institutions themselves have repeatedly amended their rules to correct at least some of the problems. Nevertheless, most lawyers, foreign and Chinese, remain cautious about invoking the jurisdiction of the Chinese institutions.

Enforcement is the one area in which arbitration in China retains clear advantages over domestic litigation. China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, as a consequence, arbitral awards rendered in China are generally enforceable throughout the world[26] (China's own record in enforcing foreign arbitral awards has had a mixed history, but has improved considerably in recent years).[27]

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25 This "med-arb" or "two-hat" approach is controversial internationally. It is also common in the German-speaking countries of Europe, but many foreign parties feel that it compromises their positions in arbitration; if they are compelled to disclose their bottom-line positions in mediation and the case then reverts to arbitration. Chinese arbitrators say that they generally go to mediation only with the agreement of the parties, but few parties are likely to oppose a tribunal's proposal of this sort. Moreover, at this point in the arbitration, the parties are still uncertain of the outcome of the arbitration and may be willing to mediate in order to avoid the risks of an arbitral award from a tribunal that has shown a preference for a mediated result.

26 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I, June 10, 1958, 330 U.N.T.S. 38.

27 In the 1980's and early 1990's, a number of local Chinese courts, wishing to protect local economic interests, refused to enforce foreign arbitral awards on various spurious grounds. In 1995, the SPC adopted rules requiring that judicial rulings refusing to enforce foreign awards be referred to higher-level courts, and eventually to the SPC, for review, before they can be enforced. *See* Notice of the Supreme People's Court on the Handling by People's Courts of Issues Concerning Foreign-related Arbitration and Foreign Arbitration,

China's 1994 Arbitration Law has resisted a number of efforts at amendment,[28] and continues to present at least two general problems for international arbitration. First, Article 16 of the Arbitration Law requires that arbitration in China only be conducted under the auspices of a "*designated arbitration commission*."[29] This effectively bans *ad hoc* arbitration. Interpretations of this ambiguous statutory term by the SPC have also suggested that it may limit arbitrations in China to those conducted under the auspices of a *domestically* authorized "*arbitration commission*". The validity of arbitrations under the auspices of any non-Chinese arbitration institution may, therefore, be questioned.[30]

(promulgated by the Sup. People's Ct., effective Aug. 28, 1995, rev'd Dec. 16, 2008, effective Dec. 31, 2008) FAFA [1995] 18, *available at* http://cicc.court.gov.cn/html/1/219/199/201/701.html (China). This system of review has sometimes resulted in long periods of delay before negative lower court rulings can be reversed and the foreign awards actually enforced. Reliable statistics are difficult to obtain, but the record seems to be improving.

28 A current effort to amend the Arbitration Law focuses on adopting the UNCITRAL Model Law to Chinese circumstances. It remains uncertain whether and when such statutory changes might be adopted. *See* Wang et al., *supra* note 11, at 23-24.

29 1994 Arbitration Law, *supra* note 21, art. 16 (China).

30 The SPC vacated an ICC Award in 2003 that had been rendered in a case heard in Shanghai. *See* Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case concerning the Application of Züblin International GmbH and Wuxi Woco General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement, Sup. People's Ct., July 08, 2004 (China) [*hereinafter* "Züblin International"]. (The author was the sole arbitrator in that case and in two others that were effectively moot by the time of the *Züblin International* decision). The *Züblin International* decision was widely interpreted as construing Article 16 to bar arbitrations in China held under the auspices of foreign arbitration institutions. In 2013, however, the SPC validated an ICC award, also heard in Shanghai, leading some observers to conclude that *Züblin International* had been invalidated because the arbitration clause in that case, unlike the clause in the *Züblin International*, failed to name an arbitration institution, not because it named the rules of a foreign institution. *See* Tietie Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System*, 46 CORNELL INT'L L. J. 361, 377-78 (2013); Jessica Fei et al., *The Longlide Case and its Impact, or Non-Impact, on Sino-Foreign Arbitration Clause Drafting*, HERBERT SMITH FREEHILLS ARBITRATION NOTES (July 24, 2014), *available at*

Second, most foreign companies do business in China through a Foreign Invested Entity ["**FIE**"] – a Sino-foreign joint venture or a wholly-owned foreign enterprise ["**WFOE**"] organized under Chinese law that qualifies as a Chinese legal entity. The SPC has generally considered contracts between an FIE and a Chinese party that are performed in China as being between Chinese legal entities, and not "*foreign-related*" It has ruled on a number of occasions that disputes of this nature must be arbitrated within China.[31] Since Article 16 of the 1994 Arbitration Law permits arbitration in China only under the rules of a Chinese arbitration commission, this interpretation effectively requires that all cases between FIEs or between FIEs and local Chinese businesses, at least to the extent that they are performed in China, be arbitrated in China before a Chinese commission.[32]

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https://hsfnotes.com/arbitration/2014/07/24/the-longlide-case-and-its-impact-or-non-impact-on-sino-foreign-arbitration-clause-drafting. Subsequent decisions have not clarified the issue, and the most common view remains that only arbitrations before domestic arbitral institutions are clearly authorized; *See also* Michael J. Moser & John Choong, *China and Hong Kong*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 239, 248 (Frank-Bernd Weigand ed., 2009).

31 *See*, *e.g.*, Reply to Inquiry regarding Validity of an Arbitration Clause between Jiangsu Astronautics Wanyuan Wind Power Equipment Manufacturing Co., Ltd. and LM Wind Power (Tianjin) Co. Ltd., (2012) Min Si Ta Zi No. 2 (Aug. 31, 2012) (China), (a contract between a joint venture and a wholly-owned foreign enterprise performed in China and concerning products manufactured and installed in China was not "foreign-related" and dispute could not, therefore, be arbitrated outside China.

32 *See* Sabrina Lee, *Arbitrability of China Disputes Abroad: A Changing Tide?*, KLUWER ARB. BLOG (Apr. 07, 2016), *available at* http://arbitrationblog.kluwerarbitration.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changing-tide.

III. China's New Specialised Dispute Resolution Mechanism for the Belt and Road Initiative

On January 23, 2018, a joint committee of the Chinese Communist Party and the State Council[33] issued an Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions ["**Opinion**"].[34] The Opinion called for the establishment of a "*dispute resolution mechanism for the BRI*" ["**Mechanism**"][35] consisting of: (i) a newly established Chinese International Commercial Court ["**CICC**"]; (ii) an International Commercial Expert Committee ["**Expert Committee**"]; and (iii) a selected group of international commercial dispute resolution institutions.

A. "One-Stop Shop"

The Opinion envisions the Mechanism as a "*one-stop centre for dispute resolution*." In many ways, this is its most intriguing feature. Once having agreed to refer a dispute to this "*one-stop centre*," parties are able to choose among various linked institutions to resolve their disputes through mediation, litigation, arbitration, or a combination thereof.

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33 The Central Leading Group for Comprehensively Deepening Reform.

34 Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions, CHINA INT'L COM. CT. (June 27, 2018), *available at* http://cicc.court.gov.cn/html/1/219/208/210/819.html [*hereinafter* "Opinion"]; The online version of the Opinion is updated as of June 27, 2018, the same date as the implementing Provisions issued by the SPC. The original Opinion, however, was promulgated on January 23, 2018. *See* Wang et al., *supra* note 11, at 7.

35 "Mechanism" is an awkward English title for a set of institutions, but it is the one used by Chinese authorities in the Opinion and often in other translations. Hence, I will use it here. "Platform" might be a better translation of the concept and is used in the published English version of Article 11 of the Provisions, and by many Chinese lawyers, to describe the Belt & Road institutions collectively.

China's Mechanism and, in particular, the CICC is inspired by the success of similar international commercial courts in Singapore and Dubai,[36] and well-publicized plans to establish such courts in Abu Dhabi, Belgium, and elsewhere.[37] China's new institutions differ most strikingly from the Singapore and Dubai models in what might be called their Sino-centrism. The Singapore and Abu Dhabi courts are "*international*" in the sense that each maintains a panel of judges from various countries, their rules do not require a nexus with the host country as a jurisdictional prerequisite. The Singapore and Dubai courts also permit qualified international lawyers from other jurisdictions to argue cases. As discussed in sub-section B below, China's new CICC differs in all these respects: only Chinese judges hear cases; only Chinese lawyers may argue them; and a nexus with China is a jurisdictional requirement.

China has sought to mitigate this Sino-centrism by authorizing the use of English in documents that may be filed, without Chinese translations, in CICC proceedings and requiring judges of the CICC to be fluent in English.[38] The CICC procedures are also facilitated by electronic filings,

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36 Justice Zhang Yongjian, Chief Judge of the SPC's Fourth Civil Division, acknowledged in a speech in 2018 that the inspiration for the CICC was the international commercial courts in these jurisdictions. Zhang Yongjian, Member of Adjudication Committee of the Supreme People's Court, Chief Judge of the Fourth Civil Division of the Supreme People's Court, Towards a Fair, Efficient and Convenient Dispute Resolution Mechanism for B&R-Related International Commercial Disputes: China's Practice and Innovation, at the Forum on the Belt and Road Legal Cooperation (July 02, 2018).

37 *See* Nicholas Lingard et al., *China establishes international commercial courts to handle Belt and Road Initiative disputes*, OXFORD BUS. L. BLOG (Aug. 17, 2018), *available at* https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and.

38 Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court, (promulgated by the Sup. People's Ct. on June 25, 2018, effective July 01, 2018), FA SHI [2018] 11, art. 4 [*hereinafter* "SPC Provisions"]. This article requires the judges of the CICC to be "*capable of using Chinese and English proficiently as working languages*".

video-conferencing, and other forms of information technology,[39] and by maintaining a website in English as well as Chinese. It remains to be seen to what extent these measures will succeed in convincing non-Chinese parties to agree to proceedings that must be argued by Chinese lawyers before Chinese judges.

B. The Chinese International Commercial Court

In June 2018, the SPC implemented the Opinion by issuing Provisions of the Supreme People's Court on Several Issues regarding the Establishment of International Commercial Courts ["**SPC Provisions**"].[40] The SPC Provisions formally established the CICC as an organ of the SPC under the direction and administration of the SPC's Fourth Civil Division. The CICC functions through two subordinate courts or tribunals,[41] each drawing from the same panel of 15 SPC judges.[42] Each is also typically referred to, somewhat confusingly, as a "CICC". The first CICC was established in Shenzhen ["**Shenzhen CICC**"] to handle disputes concerning the "*Maritime Silk Road*." The second CICC was established in Xian, the Chinese terminus of the ancient Silk Road ["**Xian**

39 *Id.*

40 SPC Provisions, *supra* note 38.

41 The English translations of the Opinion and related documents generally refer to the CICC as a "court," but they also generally refer to the individual operational tribunals in Xian and Shenzhen, discussed below, as "courts." This can be confusing. Chinese texts do not always clearly distinguish between singular and plural, and the SPC, in any case, has clear authority only to establish "tribunals" (*fating*), rather than "courts" (*fayuan*). *See* Matthew S. Erie, *Update on the China International Commercial Court*, OPINIO JURIS (May 13, 2019), *available at* http://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%EF%BB%BF.

42 The first eight judges were appointed in July 2018, the remaining seven in December. *See* Wang et al., *supra* note 11, at 8, 9.

CICC"], to handle disputes concerning the "*Land Silk Road*".[43] It remains uncertain whether China intends to establish additional CICC courts.

In December 2018, the SPC issued procedural rules for the CICC ["**CICC Rules**"].[44] Article 1 of the CICC Rules provides that the CICCs are to "*[provide] an international commercial dispute resolution mechanism that integrates litigation, mediation and arbitration for the parties to resolve disputes fairly, efficiently, conveniently and economically*."[45] In addition to its litigation functions, the CICC, thus serves as the central administrative organ for the Mechanism generally. Further, Article 7 requires that each of the individual CICC courts maintain its own case management system to administer its own docket.[46]

i. Jurisdiction

The CICC's jurisdiction is set out in Article 2 of the SPC Provisions. The CICC may accept cases that are:

(i) International commercial cases with an amount in dispute of at least RMB 300 million (approximately US$ 45 million);

(ii) International commercial cases subject to the jurisdiction of a PRC higher people's court that determines that a case should be tried by the SPC, and that what the SPC decides is appropriate for the CICC;

(iii) International commercial cases that have a "nationwide significant impact";

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43 *See* Ben Bury, *China's International Commercial* Courts, LEXOLOGY (Sept. 13, 2018), *available at* https://www.lexology.com/library/detail.aspx?g=ee271656-1145-4ab5-b2dd-4d55967c77c1.

44 Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation) (promulgated by the Sup. People's Ct.), FA FA BAN [2018] 13 (China). [*hereinafter* "Procedural Rules"].

45 *Id.* art. 1.

46 *Id.* art. 7.

(iv) Cases involving applications for preservation measures in arbitration, or for setting aside or enforcement of international commercial arbitration awards according to Article 14 of the Regulations;

(v) Other international commercial cases that the SPC considers appropriate to be tried by a CICC.[47]

Article 3 of the SPC Provisions provides that a dispute may be considered an "*international commercial case*" if:

(i) One or both parties are foreign nationals, stateless persons, foreign enterprises, or other organisations;
(ii) One or both parties [reside outside China (even if they are both Chinese nationals)];
(iii) The object in dispute is outside the territory of China; and/or
(iv) "Legal facts" that create, change or terminate the commercial relationship have taken place outside China.[48]

Investor-state disputes are not included in the CICC's jurisdiction.

There are a number of questions about the terms of this jurisdiction. The requirement for the amount in dispute to be at least RMB 300 million narrows the range of potential cases. Moreover, it may be difficult for many commercial parties to predict the likely amount in dispute when they are drafting the dispute resolution clauses of their contracts, or even when an actual dispute arises.[49] Considerable discretion is also vested in the CICC to determine, for example, what cases have a significant

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47 SPC Provisions, *supra* note 38, art. 2.
48 *Id.* art. 3.
49 *See* Li Huanzhi, *supra* note 15.

nationwide impact,[50] or are otherwise "appropriate" for resolution by the CICC.[51] All of these issues remain to be worked out.

ii. Applicability of Chinese Judicial Laws and Procedures

The CICC is an integral part of China's court system and thereby subject to China's judicial laws and procedures. This is significant in several respects:

(i) Judges for the CICC must be current judges of the Chinese courts and must be Chinese nationals. Under Article 4 of the SPC Provisions, the judges of the CICC are appointed by the SPC and must be senior judges who are experienced "*with international treaties, international usages, and international trade and investment practices, and capable of using Chinese and English proficiently as working languages.*"[52]

(ii) The CICC courts are Chinese courts, and Article 263 of the Chinese Civil Procedural Law only permits Chinese-admitted lawyers to act as legal representatives in cases before Chinese courts.[53]

(iii) The CICC courts are to sit as courts of first instance, and the tribunal in each case is to be comprised of a "*panel of three or more judges.*"[54] Like the rulings of other organs of the SPC, the CICC's judgments are final and legally binding.[55] Parties may apply to the

50 SPC Provisions, *supra* note 38, art. 2(3).
51 *Id.* art. 2(5).
52 SPC Provisions, *supra* note 38, art. 4.
53 Civil Procedure Law of the People's Republic of China (promulgated by Nat'l People's Cong., Apr. 09, 1991, effective July 01, 2017), art. 263 (China).
54 SPC Provisions, *supra* note 38, art. 5.
55 *Id.* art. 15.

SPC, however, for a rehearing. If the SPC grants the rehearing, it will be heard before the SPC itself.[56]

C. The International Commercial Expert Committee

The SPC established the Expert Committee envisioned by the Opinion in December 2018.[57] It is to be comprised of 20 foreign experts and 12 Chinese experts.[58] Working rules for the Expert Committee were issued in November 2018.[59] Members of the Expert Committee may participate in Belt and Road dispute resolution procedures in three ways.

First, foreign experts may be appointed to mediate disputes.[60] The use of these experts in mediation is discussed in sub-section D below. Second, the Expert Committee is to advise "*the people's courts*" – apparently all Chinese courts, not just the CICC panels – on issues of international or foreign law. Article 3 of CICC Rules, more specifically, anticipates that a CICC panel may arrange to "*consult*" with an expert on certain "*specialised legal issues*" by making a request to the Office of the International Experts Committee.[61] Article 8 of the SPC Provisions requires that parties to a

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56 *Id.* art. 16.

57 Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation) (promulgated by Sup. People's Ct., Nov. 21, 2018) FABANFA [2018] 14 (China) [*hereinafter* "Working Rules"]; *See* Sun Hang, *The Supreme People's Court Established the International Commercial Expert Committee*, CHINA INT'L COM. CT. (Aug. 26, 2018), *available at* http://cicc.court.gov.cn/html/1/219/208/209/981.html. For a summary of the Expert Committee and its operations, *see* Ning Fei et al., *Annual Review on Commercial Mediation in China (2019)*, *in* COMMERCIAL DISPUTE RESOLUTION IN CHINA: AN ANNUAL REVIEW AND PREVIEW 33, 36-38 (2019) [*hereinafter* "Fei"].

58 The SPC published the initial list of experts in August 2018. See People's Court News Media Association, The Supreme People's Court Issued the Supporting Documents for the "Belt And Road" International Commercial Dispute Settlement Mechanism, CHINA INT'L COM. CT. (Dec. 05, 2018), available at http://cicc.court.gov.cn/html/1/218/149/156/1128.html. The foreign experts on the list are all well-known international arbitration experts.

59 Working Rules, *supra* note 57.

60 *Id.* art. 3(1).

61 Procedural Rules, *supra* note 44, art. 31.

CICC case be informed of this consultation and be given the opportunity to comment on or dispute the expert's views. Expert views, however, are only one of eight methods authorized for use when a CICC court must apply foreign law in a case.[62] No guidance has been issued as to how this kind of advice will be provided. It is also unclear what weight is to be accorded to an expert member's views.

It remains to be seen how these expert consultations will operate in practice. It will obviously not be possible to include experts from all of the numerous Belt and Road host countries, and one may doubt the expert qualifications of an Expert Committee member with respect to the laws of any country other than his or her own even if its country's legal system resembles the jurisdiction at issue – for e.g., an expert from one Islamic law country will not necessarily be qualified to opine on the laws of another country with an Islamic law-based system.

D. Mediation

Mediation under the Belt and Road Mechanism is administered by the International Commercial Mediation Centre for the Belt and Road.[63] Offices of this Centre have recently been established in various locations in China.[64] The documents implementing the Mechanism, to date, emphasize mediation in the broader platform of dispute resolution methods. Article 12 of the SPC Provisions directs that, with the consent of the parties, the CICC may, within seven days of accepting a case, submit the case to mediation either *with one or more Members of the Expert Committee or with a designated mediation institution*.[65] The SPC approved two

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62 *Id.* art. 8.

63 *Qianhai Court Mediation Office of International Commercial Mediation Center for the Belt and Road was Unveiled*, DEHENG L. OFF. (Sept. 05, 2018), *available at* http://www.dhl.com.cn/EN/socialcontent/0007/008653/5.aspx?MID=0900.

64 Fei, *supra* note 57, at 41-42.

65 Procedural Rules, *supra* note 44 , art. 12.

commercial mediation institutions for this purpose in the "Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the '*One-stop' Diversified International Commercial Dispute Resolution Mechanism*" ["**December 2018 Notice**"]:[66] first, the Mediation Centre of China Council for the Promotion of International Trade and, second, the Shanghai Commercial Mediation Centre.

Article 17 of the CICC Rules modifies and clarifies these procedures somewhat, providing that the case management office of the relevant CICC court "*will convene a case management conference (in person or via video conference) within seven days of the date of service of the litigation documents on the defendant*" to discuss mediation. The parties may then choose to mediate before either a panel of up to three members of the Expert Committee or before one of the approved commercial mediation institutions. The time limit for the mediation is generally not to exceed twenty days. These time limits may be optimistic for cases between parties located far from the CICCs, even with video-conferencing. If the parties do not consent to pre-trial mediation at the initial case management conference, the case management committee is directed to proceed directly to the preparation of a time schedule for a trial. According to Article 21 of the CICC Rules, the mediation is not open to the public.[67] If the mediation is successful, Article 24 states that the CICC may issue a judgment incorporating the parties' agreement.[68]

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66 Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-stop" Diversified International Commercial Dispute Resolution Mechanism (promulgated by the Sup. People's Ct.), FABAN [2018] 212 (China) [*hereinafter* "Notice"].

67 Procedural Rules, *supra* note 44, art. 2.

68 *Id.* art. 24.

These mediation proceedings may be an attractive feature of the CICC procedures for foreign parties in general. They provide the parties an opportunity, at the outset, to avoid costly adversarial proceedings before Chinese judicial or arbitral institutions. Moreover, if successful, the parties can turn their agreement into an enforceable SPC judgment.

E. Arbitration

Finally, the Mechanism also anticipates allowing the parties to refer their dispute to Chinese arbitration institutions. In its December 2018 Notice, the SPC named five domestic arbitration institutions for this purpose: CIETAC, SHIAC, SCIA, the BAC, and the CMAC.[69] The CICCs are authorized to assist the arbitration institutions by issuing judicial orders for the "*preservation of property, evidence or conduct*" before or after an arbitration proceeding.[70] The Civil Procedure Law, 1994 Arbitration Law and other relevant statutes of the People's Republic of China govern such applications.[71] It remains unclear why parties wishing to submit their dispute to arbitration before a Chinese arbitration institution would not submit it directly to one of the five institutions, rather than submitting it first to the CICC. A direct submission would appear to be procedurally simple. The principal attraction for some parties may be the ready availability of interim relief to preserve important assets or evidence.

IV. First Cases

In 2019, the CICC courts in both Shenzhen and Xian heard their first cases. Five related cases concerning shareholder disputes, involving the Thai manufacturer of the Red Bull energy drink were consolidated in

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69 Notice, *supra* note 66.

70 SPC Provisions, *supra* note 38, art. 14. It is uncertain what "conduct" means in this context. One does not ordinarily "preserve" conduct. Presumably the intention is to allow enforceable interim orders concerning the parties' conduct pending the outcome of the arbitration.

71 Procedural Rules, *supra* note 44, art. 34.

Xian.[72] A product liability dispute against Italian pharmaceutical company, Bruschettini S.R.L., brought by its Chinese distributor, Guangdong Bencao Medicine Group Co. Ltd.,[73] was referred to the Shenzhen CICC, where CICC procedural rules were followed. Both cases were initially submitted to mediation, which, in both cases, was apparently unsuccessful. The CICC hearings were then held in both cases in May. As of September 2019, no results have been announced.[74]

V. Prospects for China's One-Stop Shop Dispute Resolution Mechanism

China's attempts to site many of the Belt and Road disputes before Chinese institutions and legal procedures is not surprising. Chinese parties to Belt and Road transactions will feel more comfortable dealing with disputes on their home turf, particularly since many of the Chinese entities will have limited international experience, and the dispute resolution mechanisms and laws of the host countries may, thus, be unfamiliar.

In establishing Chinese institutions to manage and resolve Belt and Road disputes, however, China faces a significant challenge from the outset. The predominant consideration in choosing a venue for most international dispute resolution, is finding a neutral venue and neutral rules. Most parties to international disputes are reluctant to site their dispute in the home country of their counter-party, under the rules and procedures of the counter-party's institutions. This will surely be true of most host country and third-party countries to Belt and Road contracts,

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72 Helen Tang et al., *China's International Commercial Courts hear first cases*, HERBERT SMITH FREEHILLS ARBITRATION NOTES (June 06, 2019), *available at* https://hsfnotes.com/arbitration/2019/06/06/chinas-international-commercial-courts-hear-first-cases; *China's int'l commercial court tries first case,* XINHUA (May 30, 2019), *available at* http://www.xinhuanet.com/english/2019-05/30/c_138100724.htm.

73 *Id.*

74 *Id.*

particularly where at least the judicial option of the CICCs will require all the uncertainties of litigation before Chinese judges, using Chinese lawyers, resulting, at best, in a Chinese judgment, difficult to enforce outside China. Chinese parties will, of course, have significant negotiating leverage in infrastructure investments that China is financing. But one may question how effective that leverage will be in light of the ready availability in Hong Kong and Singapore of respected international arbitration and litigation venues that China itself has publicly endorsed.

One may ask then, what China's purpose is in establishing the Belt and Road Mechanism. To some extent, it may simply reflect China's general ambitions of establishing leading institutional frameworks that parallel and reflect China's undeniable economic and military accomplishments. More particularly, China may hope that by establishing a flexible institution, it may be able to induce host country parties to Belt and Road projects to accept a broader, more diffused Chinese jurisdiction over any potential disputes. By accepting a choice-of-forum clause that stipulates the Belt and Road Mechanism, a host country corporation is not just accepting in advance the jurisdiction of a Chinese court or a Chinese arbitration institution. It is, rather, accepting a more flexible, more general process that emphasizes mediation at the outset and provides a range of litigation or arbitration options at some point in the indeterminate future. If host country and third country parties are willing to accept dispute resolution clauses for these designedly flexible institutions, it may prove a foot in the door for China's Belt and Road Mechanism to establish a significant docket of cases.

Another possibility may be to furnish predominantly Chinese entities with more flexible options for resolving their intra-Chinese disputes. Chinese companies engaged in Belt and Road projects in other countries may do so through locally incorporated subsidiaries or joint ventures that contract with other Chinese-owned entities to perform or finance a project. Article 3 of the SPC Provisions expressly provides for jurisdiction over disputes

when either or both of the parties, even if Chinese, are resident outside China. This clause may be aimed at disputes between Chinese-owned entities incorporated in the host countries and their Chinese partners or financial institutions. An institution that regularly handles such disputes may be a welcome option for many of these Chinese businesses operating well outside familiar territory.

China's Belt and Road dispute resolution institutions are, in any event, nascent, and their goals largely aspirational. Progress will be incremental, hindered by foreign parties' reservations, but enthusiastically supported by many Chinese parties and the Chinese Government.

ASSIGNEE'S RIGHT AND OBLIGATION TO ARBITRATE UNDER CIVIL LAW AND THE PERUVIAN LONG ARM RULE

James O. Rodner[*]

Abstract

In civil law countries,[1] *the assignment of a contract changes the parties to the contract without resulting in novation. The assignee takes the position of the assignor but the original contract continues to exist, along with provisions relating to choice of law and jurisdiction. Therefore, in many civil law jurisdictions, an agreement to arbitrate contained in the assigned contract is binding on the assignee. This conclusion is supported by the rules on assignment of contract, which are now followed in most civil law jurisdictions and recently adopted in the new French Civil Code of 2016. Further, the Colombian Arbitration Statute of 2012 has an express rule regarding transfer of the arbitration clause in the event of assignment. Furthermore, Article 14 of the Peruvian Arbitration Law incorporates the principle whereby the arbitration clause applies to all the parties which have participated in any way in the performance of the*

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This article was prepared with the assistance of Angélica Marcano Peña, practicing attorney in Venezuela and member of the Federal District Bar, Venezuela.

1 The reference to civil law is basically to countries that follow the French civil law tradition which include, in Europe, France, Italy, Portugal, Belgium and Spain and, to some extent, Switzerland. The French civil law is followed in West Africa, parts of Southeast Asia, most of Latin America, Quebec in Canada, and Louisiana in the United States. For this note, we are using the civil law of Venezuela, Argentina, Panama and Peru, for Latin America. *See* JAMES OTIS RODNER, LA TRANSFERENCIA DEL CONTRATO (THE TRANSFER OF CONTRACT) (UNIDROIT ART. 9) (2014) [*hereinafter* "Rodner"].

obligations arising out of the contract in good faith. This is a "long-arm" provision covering the difficult cases of assignment.

I. Assignment of Contract in Common Law

A recent comment in this journal[2] regarding a decision of the Singapore Court of Appeals in *Rals International Pte Ltd* v. *Cassa di Risparmio di Parma e Piacenza SpA*[3] dealt with the common law approach regarding the effects of an assignment on the arbitration clause contained in the original assigned agreement. Although the High Court in Singapore held that the assignee was not a party to the arbitration agreement for the purpose of Article 6 of the International Arbitration Act (Singapore), the assignee could nonetheless be considered a person claiming "through or under" the contract and therefore has a right to the arbitration clause.

A different approach was adopted in a recent decision of the Irish High Court[4] wherein it was held that in case of assignment of the benefits of the insurance policy, which included an arbitration clause, the assignees could choose whether to participate in the pending arbitration or not.[5] Essentially, the Irish High Court seems to hold that the right to arbitrate can be transferred to the assignee, but not the obligation to submit to arbitration.

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2 Oomen Mathew & Alvin Yap, Assignee's Right and Obligation to Arbitrate under Singapore Law: A Missed Opportunity by the Court of Appeal of Appeal?, 5(2) INDIAN J. ARB. L. 177 (2017).

3 Rals International Pte Ltd v. Cassa di Risparmio di Parma e Piacenza SpA [2016] SGCA 53 (Sing.).

4 Stewart v. McKenna [2014] IEHC 301 (Ir.).

5 A&L Goodbody, *Irish High Court Rules on Effect of an Assignment on Agreement to Arbitrate* (July 29, 2014), LEXOLOGY, *available at* https://www.lexology.com/library/detail.aspx?g=b4105180-347d-4eda-8770-fd9b87e600af.

In common law, the assignment of a contract results in novation, that is, "the replacement of the contract entirely with a new contract".[6] In fact, "novation is now usually employed to denote a change of parties".[7] The result of the assignment is that there is a new contract;[8] the effect is to "extinguish the original contract and replace it by another". If the original contract is extinguished, you need the consent of both contracting parties,[9] which implies that you need the consent of the assignee to the arbitration agreement.

In the United States, "*unless the language or circumstances indicate the contrary, such as in case of an assignment for security, an assignment of 'the contract' or of 'all of my rights under the contract' or an assignment in similar general terms, is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract*".[10] When there is an assignment of a duty, which occurs in the assignment of a contract, the intention of the assignor "is not completely effective unless the obligor of the assigned right joins in a novation".[11] Therefore, in the United States, in order to have a full assignment, the parties must agree to a novation of the original agreement. Nonetheless, it appears that the American cases favour the survival of the agreement to arbitrate after the assignment of the contract is complete.

Under Article 9 of the Uniform Commercial Code of the United States ["**UCC**"], the assignee of a right takes the right subject to agreement between the account debtor and the assignor.[12] The Federal Courts have

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6 Ewan McKendrick, Goode on Commercial Law 114, § 3.89 (5th ed. 2016).
7 Id.
8 JOSEPH CHITTY, CHITTY ON CONTRACTS 990, § 19-050 (Anthony Gordon Guest ed., 27th ed. 1996) (1826).
9 Id.
10 Restatement (Second) of Contracts § 328 (Am. Law Ins. 1979).
11 *Id.* at cmt. (a).
12 U.C.C. § 9-404 (a)(i) (Am. Law Inst. & Unif. Law Comm'n 1977).

held that "*a finance assignee suing on an assigned contract is bound by that contract's arbitration clause unless it secured a waiver*".[13] An important caveat is that Article 9 of the UCC, where we find that the rule of Section 9-404 only applies to secured transactions, that is, to assignments as security.[14]

In the United States, though the assignment of the contract produces novation, it appears that the arbitration agreement in the assigned contract passes to the assignee with the assignment.[15] In *Bank of America, N.A. & Platinum Indemnity Limited* v. *Diamond State Insurance Company*,[16] the defendant argued that a "*novation agreement extinguished any agreement between the parties to arbitrate*".[17] The Court, however, granted the motion to compel arbitration. When determining whether a matter is to be arbitrated, the Court must first determine whether the arbitration agreement is broad or narrow. The Court, in *Bank of America* v. *Diamond State Insurance Company*, concluded that "*the parties clearly manifested an intent to arbitrate issues under the contract, even after its termination*".[18] Therefore, one concludes that even if the assignment had produced a novation, thus terminating the agreement, the issues were still subject to arbitration.

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13 GMAC Commercial Credit LLC v. Springs Industries, 171 F.Supp.2d 209, 215 (S.D.N.Y. 2001), *cited in* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.55 (6th ed. 2015) [*hereinafter* "REDFERN & HUNTER"]; *See also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1188 n. 244 (2d ed. 2009) [*hereinafter* "BORN"].

14 U.C.C. § 9-101 (Am. Law Inst. & Unif. Law Comm'n 1977).

15 BORN, *supra* note 13, at 1518. Gary Born cites several cases decided in Federal Courts. *See, e.g.*, Asset Allocation & Mgt. Co. v. Western Employers Ins. Co., 892 F.2d 566 (7th Cir. 1989).

16 Bank of America, N.A. v. Diamond State Ins. Co. Ltd., 2002 U.S. Dist. LEXIS 23225, 2002 WL 31720328 (S.D.N.Y. 2002).

17 *Id.* at 9.

18 Id.

II. Assignment of Contract in Civil Law

In civil law, the right of the assignee to rely on the arbitration clause in case of assignment of a contract is based on the effect that the assignment produces on the parties to the contract. In civil law, the assignment of a contract is not the transfer of all the rights and delegation of all the duties of the assignor. An assignment of a contract entails one of the parties transferring his condition as a party to the contract to a third party. The assignment, in effect, puts the assignee in the position of the assignor, prior to the assignment. However, the original contract remains. There is no novation, only a change in one of the parties to the contract. Therefore, the assignee, as the new party to the contract, is bound by the arbitration clause in the contract and has the right, as well as the obligation, to submit to arbitration.

Assignment of contract resulting in the substitution of a party to a contract is recognized in most civil law jurisdictions. The rule on assignment of contract appears in the French Civil Code of 2016, which provides that the assignor can assign his condition as a party to the contract to a third party, the assignee, with the consent of the assigned other party to the contract, i.e., the co-contractant.[19] The first civil code to adopt an express rule regarding assignment of contract, as a substitution of a party, was the Italian Civil Code of 1942[20] followed by the Portuguese Civil Code of 1966.[21] In Latin America, the rules regarding assignment of contract are covered in the Peruvian Civil Code,[22] the Civil Code of

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19 CODE CIVIL [C. Civ.] [CIVIL CODE] art. 1216 (Fr.). The term 'the other party' to translate co-contractant is contractant is taken from the International Institute for Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts 2016, art. 9.3.1, *available at* https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 [*hereinafter* "UPICC"].

20 CODICE CIVILE [C.C.] art. 1406 (It.).

21 Código Civil [C.c.] [Civil Code] art. 424 (Port.).

22 Código Civil [C.c.] [Civil Code] art. 1435 (Peru).

Bolivia,[23] the Colombian Commercial Code,[24] and in the new Civil Code of Argentina.[25] In jurisdictions where there is no express rule regarding assignment of contract, doctrine (legal literature)[26] and some court decisions have held that assignment of contract produces the substitution of a party.[27]

Assignment of contract has also been adopted in the UNIDROIT Principles of International Commercial Contracts ["**UPICC**"],[28] which define "assignment of a contract" as "*the transfer by agreement from one person ("the assignor") to another person ("the assignee") of the assignor's rights and obligations arising out of a contract with another person ("the other party").*"[29] The UPICC, unlike civil law, do not refer to the substitution of a party to the

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23 Código Civil [C.c.] [Civil Code] art. 539 (Bol.).

24 Código Civil [C.c.] [Civil Code] art. 887 (Colom.).

25 Código Civil [Cód. Civ.][Civil Code] art. 1637 (Arg.).

26 Legal literature, or better known by its French term "doctrine", is a reference to the opinion by scholars in a particular country. Referred to in Spanish as "doctrina", in Italian "dottrina", as such, the term does not exist in the common law. Doctrine in common law is more a reference to a rule taken from court decisions. *See, e.g.*, FRANCESCO DE FRANCHIS, DIZIONARIO GIURIDICO ITALIANO-INGLESE (LEGAL DICTIONARY ITALIAN-ENGLISH) 716 (1996). In international arbitration, however, the use of opinions by scholars is frequently used on both opinion articles as well as in awards. This is probably the result that the legal principles are still developing and further because of its international scope, there is a strong influence from civil law.

27 Doctrine in Spain recognizes that an assignment of a contract is valid, based on the principle of freedom of contract. *See* CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1255 (Spain); 2 LUIS DIEZ-PICAZO, FUNDAMENTOS DE DERECHO CIVIL PATRIMONIAL (BASIC PRINCIPLES OF CIVIL LAW) 1044-1045 (8th ed. 2008). This recognition has been confirmed by the Spanish Supreme Court (S.T.S., June 2011, R.J. 2011, 45229), *quoted in* FRANCISCO HERNÁNDEZ URZAINQUI, CÓDIGO CIVIL (CIVIL CODE) 1613 (11th ed. 2015). For Venezuela and Spain, *see* ÁNGEL CRISTÓBAL MONTES, ESTUDIOS DE DERECHO CIVIL (STUDIES OF CIVIL LAW) 100-101 (1970).

28 UPICC, *supra* note 19.

29 *Id.*

contract with the assignee. However, the official comment to Article 9.3.1 refers to the replacement of one of the parties.[30]

To complete the assignment of a contract in civil law, the consent of the assignor, the assignee and of the assignor's counterpart is required.[31] The consent of the counterpart can be given prior to the assignment, at the time of the assignment, or later.

According to legal literature, in Portugal, the principal effect of the assignment is to "substitute the assignor for the assignee as a party to the assigned contract."[32] Further, as has been held in Peru, the assignor is no longer the holder of the relation under the assigned contract.[33] The assignee, as the new party to the contract, is bound by all the terms and conditions of the contract, except for those which were expressly excluded in the assignment agreement. This also includes the agreement to submit to arbitration. A transfer of the arbitration clause to the assignee, when there is an assignment of the contract, is recognized in most civil law countries without major discussion.[34] The arbitration clause applies to the assignee not because the assignee may be "claiming through or under" the contract, but rather, because it is a party to the contract. The assignee is not considered a third party to the arbitration. According

30 *Id.* at cmt. to art. 9.3.1.

31 Código Procesal Civil [C.c.] [Civil Code] art. 1435 (Peru).

32 2 João de Matos Antunes Varela, Das Obrigações em Geral (The General Obligations) 404, § 430 (7th ed. 2004).

33 Affirmation taken from doctrine in Peru, which follows the same doctrine as that of Portugal. *See* 2 MANUEL DE LA PUENTE Y LAVALLE, EL CONTRATO EN GENERAL (THE GENERAL CONTRACT) 539 (2011).

34 REDFERN & HUNTER, *supra* note 13, at 89, ¶ 18, § 2.55. According to Redfern & Hunter, there is a presumption that the clause was assigned with the contract. *See also* BORN, *supra* note 13, at 1467.

to the Italian Court of Cassation,[35] the arbitration clause that was binding upon the original party now automatically binds the assignee without the requirement of an agreement between the assignor and the assignee. The assignment "automatically transfers the arbitration agreement."[36]

A. Colombian Arbitration Law

Most arbitration laws in Latin America, which are heavily influenced by the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"],[37] do not have a rule on the assignment of contracts. The one notable exception is the Colombian Arbitration Law of 2012 ["**CAL**"],[38] which provides that "the assignment of a contract that has an arbitration agreement entails the transfer of the arbitration clause".[39] This provision was added to the 2012 law, following discussions on the effect of assignments on the arbitration clause, which was considered by some as separate from the contract and, thus, not part of the assignment agreement. In fact, this article was not necessary in Colombia since the Colombian Commercial Code (Article 887),[40] which regulates the assignment of contracts, provides for the substitution of a party to the contract. In Colombia, an assignment of a contract puts the assignee in the same position as that of the assignor prior to the assignment.[41]

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35 Cass., sez. un., 17 settembre 1970, n. 1525, Foro it. I (It.); Cass., sez. un., 21 giugno 1996, n. 5761, Foro it. I (It.), *quoted in* G. PESCATORE & C. RUPERTO, CODICE CIVILE ANNOTATO CON LA GIURISPRUDENZA CORTE COSTITUZIONALE, DELLA CORTE DI CASSAZIONE E DELLE GIURISDIZIONI AMMINISTRATIVE SUPERIORI (ANNOTATED CIVIL CODE) (2010).

36 BORN, *supra* note 13, at 1518.

37 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), [*hereinafter* "Model Law"].

38 L. 1563/2012, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.), *translation available at* https://www.wipo.int/edocs/lexdocs/laws/es/co/co100es.pdf.

39 *Id.* at art. 5.

40 Código de Commercio [C. Com.] [Commercial Code] art. 887 (Colom.).

41 1 Fernando Hinestrosa, Tratado de las Obligaciones (Treaty of Obligations) 530 (3d ed. 2007).

Therefore, the assignee is bound by the agreement to arbitrate. Nonetheless, by regulating the effects of assignment in the CAL, the arbitration agreement will survive an assignment independently of the law of the contract.

Article 5 of the CAL is considered applicable to national arbitration[42] but also extends by analogy to international arbitrations in Colombia. The rule included in Article 5 of the CAL could be considered in the future for any amendment of the Model Law.[43]

B. Separability

The principle of separability of the arbitration clause, otherwise known as the independence of the agreement to arbitrate from the main contract,[44] is found in most Latin American arbitration laws. The principle is adopted from the Model Law, which provides that "*an arbitration clause which forms part of a contract shall be treated as an agreement, independent of the other terms of the contract*".[45]

The separability of the arbitration agreement, however, does not mean that the agreements are not related, and does not in any way limit or prevent the transfer of the arbitration agreement at the time of assignment

42 The Colombian Arbitration Law covers national and international arbitrations under two different chapters. None of the rules for international arbitration, refer to the assignment of contract, or to the effects of the assignment on the agreement to arbitrate. An arbitration in Colombia is considered international if the parties are of different nationalities or if the contract has to be performed in two or more different countries.

43 Model Law, *supra* note 37.

44 JEAN ROBERT, L'ARBITRAGE-Droit Interne, DROIT INTERNATIONAL PRIVÉ (ARBITRATION IN MUNICIPAL LAW AND IN PRIVATE INTERNATIONAL LAW) ¶ 282 (1983).

45 A similar rule is found *inter alia* in the Venezuelan Commercial Arbitration Law, art. 7 (Ven.); Peruvian Arbitration Law, art. 41(2) (Peru); Panama Arbitration Law, art. 30; CÓDIGO CIVIL [COD. CIV.] [CIVIL CODE] art. 1653 (Arg.).

of the contract. In fact, separability does not mean that the arbitration clause has to be assigned in a separate agreement.[46]

According to Venezuelan doctrine, separability is a legal fiction used to allow the jurisdiction of the arbitral tribunal to survive a request to declare the contract void.[47] It does not mean that the agreement to submit to arbitration is not related to the underlying contract. An agreement to submit to arbitration must always refer to a particular contract or claim as it does not live on its own. Therefore, the arbitration agreement is not, at least in civil law, transferred separately from the underlying contract.

The simple method for transfer of the arbitration clause is for the assignment agreement to expressly state that along with the assignment of the contract, the agreement to arbitrate is also being assigned. Therefore, when the assignee gives its consent to the transfer of the contract, it is also giving consent to the arbitration clause. However, even if the assignment agreement does not state that the arbitration clause is being assigned, as long as the arbitration clause is included in the same agreement together with the basic contract (underlying contract), the arbitration clause passes to the assignee upon assignment.

At times, the arbitration clause is not in the body of the main contract. If the arbitration clause is contained in a separate agreement, but the

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46 In France, the decisions of the courts since 1950 have held that the arbitration clause passes with the assignment of the contract. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., July 12, 1950, Bull. civ. II No. 77 (Fr.), *cited in* P. FOUCHARD ET AL., TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL (INTERNATIONAL COMMERCIAL ARBITRATION) 427, ¶ 712 (1999); *See also* JEAN BILLEMENT, LA LIBERTÉ CONTRACTUELLE À L'ÉPREUVE DE L'ARBITRAGE (FREEDOM OF CONTRACT UNDER THE TEST OF ARBITRATION) 231, ¶ 323 (2013).

47 Ramón Escovar Alvarado, La facultad de lostribunalesarbitraleslos tribunales arbitrales para determinarsupropiajurisdicción, determinar su propia jurisdicción, 18 ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL 435 (2005).

assignment agreement makes a reference to this separate agreement or wherever the assignee had knowledge of its existence, the arbitration clause will be binding on the assignee.

Most civil law countries provide that contracts must be performed in good faith.[48] If the assignee knows of the existence of an arbitration clause and does not make a reference in the assignment to the effect that he is not accepting the arbitration clause, it would violate the principle of performance of contracts in good faith, if he were to later claim that the arbitration clause is not applicable to him. Similarly, the Peruvian doctrine has held that it would be contrary to good faith if the assignee who has accepted the assignment, tried to refuse the application of the arbitration clause, except in those cases where the assignee had no knowledge, and could not have known of the existence of the separate arbitration agreement.[49]

III. Assignment of a Right[50]

In civil law, assignment of a contract is different from assignment of a right under the contract, but in both cases, if the contract contains an arbitration clause, the assignee will normally be bound by the agreement to arbitrate.

The assignment of a right is defined in the UPICC as "*the transfer by agreement from one person ("the assignor") to another person ("the assignee"), including*

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48 CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1160 (Venez.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1109 (Pan.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1362 (Peru).

49 1 Carlos Soto Coaguila & Alfredo Bullard González, Comentarios a la Ley Peruana de Arbitraje (Comments to the Peruvian Arbitration Law) 173 (2011).

50 Referred to in some civil law countries as the assignment of a credit. *See* CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1550 (Venez.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1278 (Pan.). Common law uses the term assignment of rights; *See also* UPICC, *supra* note 19, art. 9.1.1; CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1206 (Peru); CÓDIGO CIVIL [COD. CIV.] [CIVIL CODE] art. 1614 (Arg.).

transfer by way of security, of the assignor's rights to payment of a monetary sum or other performance from a third person ("the obligor")."[51] Similar definitions are found in most civil law countries.[52] An assignment of a credit in civil law does not require the consent of the assigned debtor and is completed prior to the giving of notice to the assigned debtor. To complete the assignment of a right in civil law, it is necessary to give notice to the assigned debtor of the assignment.[53] However, the assignment does not require the consent of the assigned debtor.[54]

If the assigned right was contained in a contract which had an arbitration clause, the question then is, whether the arbitration clause binds the assignee. If the assignee were to enforce his right, would he be obliged to submit to arbitration according to the arbitration clause in the contract? The answer to this, though it has not been extensively discussed, is that in fact, the assignment of a right transfers to the assignee both the duty and the right to submit any dispute to arbitration. The reason is that the assignee of a right is claiming through the contract.

A. The Peruvian Long Arm Rule

The extension of the arbitration clause to the assignee of a contract as well as the assignee of a right is supported in Peru by the Arbitration Act of 2008. Article 14 of the Peruvian Arbitration Law ["**PAL**"] expressly provides: "*The arbitration agreement extends to those whose consent to submit to arbitration, according to good faith, as is determined from their active and decisive participation in the negotiation, performance or termination of the contract that includes the arbitration agreement or to which the arbitration agreement relates. It also extends*

51 UPICC, *supra* note 19, art. 9.1.1.

52 CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1549 (Venez.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1278 (Pan.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1215 (Peru).

53 CÓDIGO CIVIL [C. C.] [CIVIL CODE] art. 1550 (Venez.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] arts. 1278, 1279 (Pan.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1215, 1216 (Peru).

54 In Panama, *see* 1 Dulio Arroyo Camacho, Contratos Civiles (Civil Contracts) § 179 (1974).

to those who aspire to derive rights or benefits from the contract, according to its conditions."[55] This provision applies to arbitrations that take place in Peru or to arbitrations outside of Peru but which have some connection with Peruvian law.[56]

The Peruvian doctrine stresses that this provision of the PAL[57] refers to an extension of the agreement to arbitrate to non-signatory parties. The PAL does not permit the inclusion of third parties to the arbitration. However, the arbitration clause extends to those that are parties (referring to those that have expressed their consent to be bound by the arbitration clause) to the arbitration agreement but have not signed it.[58] When express consent does not exist through the execution of the arbitration agreement or the contract where it is included, and *implied* consent exists through the performance of the contract, the party is bound to the arbitration agreement. However, consent (implied or express) is always necessary.[59] Thus, consent to submit to arbitration continues to be the cornerstone of this institution.

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55 Translation for informational purposes. *See* Peruvian Arbitration Law, art. 14, *quoted in* COAGUILA & GONZÁLEZ, *supra* note 49, at 200, 201.

56 Peruvian Arbitration Law, arts. 1.1-1.2. Article 1.2 of Peruvian Arbitration Law states that Article 14 (long arm rule) applies even in those cases where the arbitration takes place outside of Peru. If the arbitration takes place outside of Peru, the connection with Peru exists if the contract is subject to Peruvian substantive law. This assumes that in Peru the law of the contract is the law that governs that agreement to arbitrate. Also, in those cases of the enforcement of an award rendered outside of Peru, in Peru, the law assumes that the tribunal had jurisdiction over a party that participated in the performance of the contract though not a party to the original agreement, i.e. an assignee of the contract.

57 *See* COAGUILA & GONZÁLEZ, *supra* note 49 at 202.

58 Id.

59 See Pablo Mori Bregante & Giuseppe Galluccio Tonder, Aplicación del Artículo 14 de la Ley Peruana de Arbitraje al Caso de los Grupos de Sociedades (Application of Article 14 of the Peruvian Arbitration Law to Company Groups), in ANUARIO LATINOAMERICANO DE ARBITRAJE, ACUERDO DE ARBITRAJE A PARTES NO SIGNATARIAS E INTERVENCIÓN DE TERCEROS EN EL ARBITRAJE 234-235 (2012).

There is no question that the assignee of a contract has an active participation in the performance of the assigned contract. Further, the assignee of rights under a contract derives benefits from the assigned contract. Thus, it can be concluded that under the long arm rule in Article 14 of the PAL, the assignee of the contract is bound by an arbitration clause in the original contract.

The principle contained in Article 14 of the PAL appears to be taken from the award in the case of Dow Chemical France against Isover Saint Gobain ["**ISG**"], in 1983.[60] The arbitration was commenced by four claimants, of which two were parties to contracts with ISG that is, Dow Chemical AG and Dow Chemical Europe. The others, including Dow Chemical France, were not. These agreements contained International Chamber of Commerce arbitration clauses. The defendant alleged that the arbitral tribunal did not have jurisdiction to issue an award in the proceeding between Dow Chemical France and Dow Chemical Company against ISG on the grounds that it had not signed any agreement with these parties that included an arbitration clause. In an interim award, the arbitral tribunal held that it had jurisdiction to decide the dispute, including the claim from Dow Chemical France, although it was not a party to the contracts. The arbitral tribunal *inter alia* reasoned that Dow Chemical France had participated "*effectively and individually*" in the "*conclusion, performance and termination*" of the contracts.

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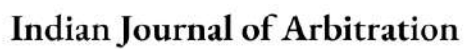
[60] Case No. 4131 of 1982, Dow Chemical France et. al. v. Isover Saint Gobain, Interim Award on Jurisdiction, 9 Y.B. Comm. Arb. 131 (ICC Int'l Ct. Arb. 1984). Against this award, an action for setting aside was filed and was rejected by the Court of Appeals of Paris in a decision dated October 21, 1983. Dow Chemical Venezuela entered into a contract initially with the Company Boussois-Isolation. Later, Boussois-Isolation assigned the contract to a company called Isover Saint Gobain (ISG). Dow Chemical Venezuela subsequently assigned its condition as party to the contract to Dow Chemical AG (Switzerland), Claimant No. 3. Because of the chain of assignments, the parties to the arbitration were not the same as the parties to the contract.

IV. Conclusion

In civil law, the agreement to arbitrate will always bind the assignee of a contract as long as the arbitration clause is contained in the text of the contract or in a separate agreement that is known by the assignee. In addition, in countries like Peru, the PAL picks up the concept of decisive participation in the performance of the contract as a form of implied consent to be bound by the arbitration clause. When a contract is assigned, the assignee participates in the performance of the contract and, thus, gives its implied consent to be bound by the arbitration clause. The rule in Article 14 of the PAL is not necessary to bind an assignee in the case of an assignment under civil law since the arbitration clause passes automatically with the assignment of the contract. However, it helps to explain the assignment of the arbitration clause in the case of an assignment of a right under the contract.

International arbitration frequently involves several legal systems. It is typical for an arbitration, under a contract subject to civil law, to take place in a common law jurisdiction or where the assignment was made in a common law country. Regardless, the survival of the agreement to arbitrate should be a clear principle. One approach is to adopt in the corresponding arbitration law a rule similar to Article 5 of the CAL, which makes it explicit that transfer of the agreement containing the arbitration clause would include transfer of the arbitration clause. Further, it would be useful that the Model Law adopts a rule similar to Article 5 of the CAL so as to eliminate doubts of the effects of an assignment on the agreement to arbitrate. The CAL only refers to assignment of contracts.[61] It should be extended to the assignment of rights.

61 L. 1563/2012 art. 5, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.).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