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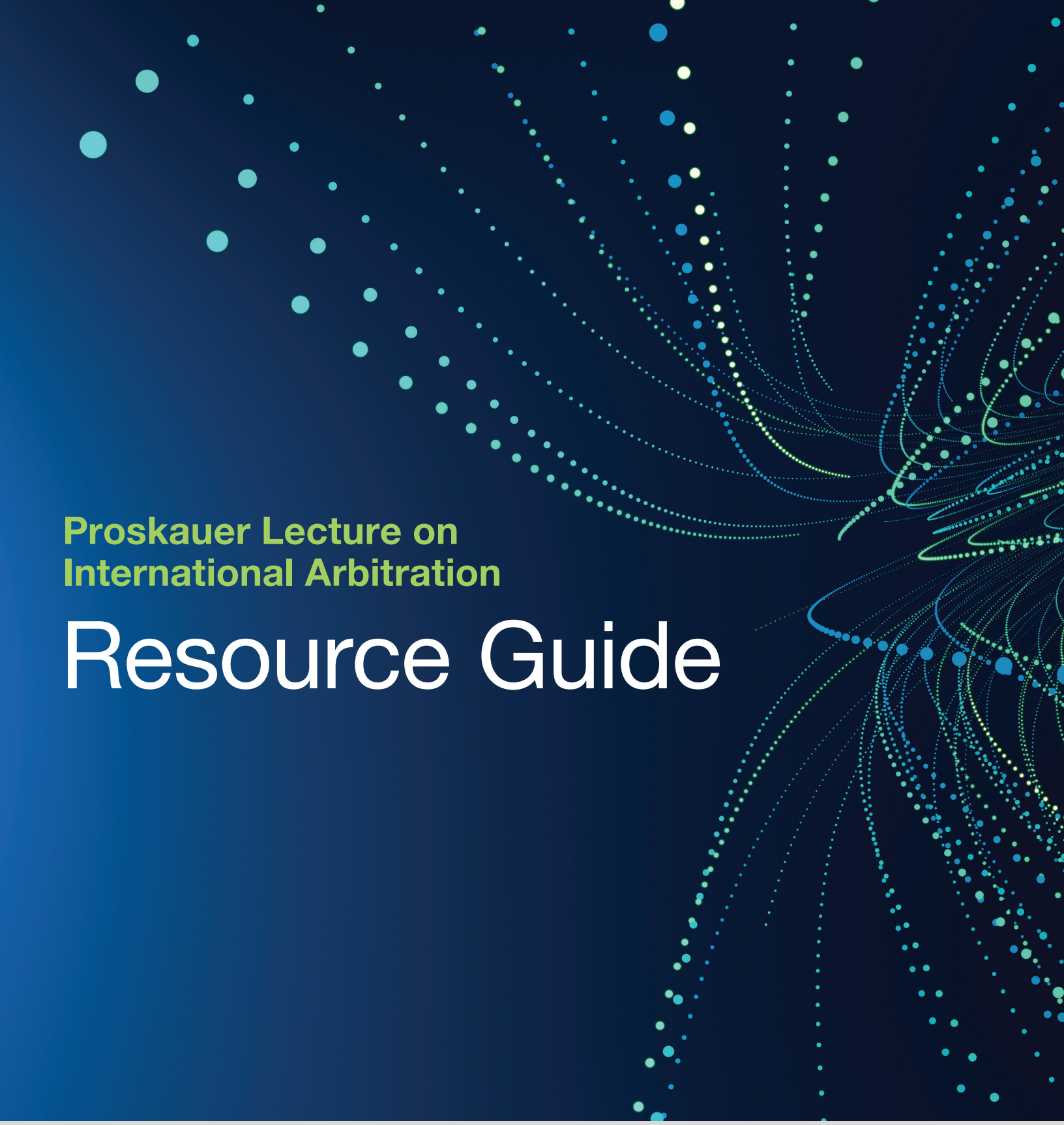

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ASCERTAINING THE CONTENT OF THE APPLICABLE LAW AND *IURA NOVIT TRIBUNUS*: APPROACHES IN COMMERCIAL AND INVESTMENT ARBITRATION†

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While there is good guidance, scholarly and otherwise, on how arbitral tribunals determine the content of the law applicable to the dispute, uncertainty still exists on the use of what we will call *iura novit tribunus* in the process. The traditional sources are of little or no assistance for tribunals in finding an answer to the question as to how the content of the applicable law is to be determined in the absence of party pleading on a particular legal issue. In fact, party agreements rarely, if ever, address this topic.[1] Institutional arbitration rules do not provide for guidance save one outlier,[2] although some institutional

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[1] At an ASA Conference in 2006 in Zurich, Prof. Gabrielle Kaufmann-Kohler proposed the following transnational rule in line with Rule 44.1 of the U.S. Federal Rules of Civil Procedure, which could easily be made part of an arbitration agreement: "The parties shall establish the content of the law applicable to the merits. The…tribunal shall have the power, but not the obligation, to conduct its own research to establish such content. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the results of the tribunal's research. If the content of the applicable law is not established with respect to a specific issue, the…tribunal is empowered to apply to such issue any rule of law it deems appropriate," Kaufmann-Kohler, Gabrielle: "The Governing Law: Fact or Law? – A Transnational Rule on Establishing its Contents", Best Practices in International Arbitration, in *ASA Special Series No. 26*, July 2006, p. 6.

[2] Article 22.1(iii) of the LCIA Arbitration Rules (2014) states in relevant part that "[t]he Arbitral Tribunal shall have the power…to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the

rules, while not expressly addressing the issue, provide tribunals with wide discretion.[3] Finally, national arbitration laws are mostly silent on the issue, again, with a few exceptions.[4] In any event, these exceptions would only apply if the dispute were to be subject to those particular jurisdictions.

However, this does not mean that the *iura novit tribunus* doctrine is not being utilized by international tribunals in the context of commercial and investment arbitration. Quite the contrary—arbitral tribunals routinely determine the content of the law beyond the parties' pleadings, and reviewing courts routinely sanction this practice. The following will address the question as to whether the *iura novit tribunus* doctrine should be viewed as a power of the tribunal or as a duty required of the tribunal, and will then focus on its limitations suggested in recent case law. First, however, we will address the impropriety of drawing on *iura novit curia* to determine the scope of *iura novit tribunus*.

I. The Limited Utility of Relying on Domestic Court Practices

Most scholarly analyses of an arbitrator's power to determine the content of the applicable law outside of the parties' pleadings start with a review of *iura novit curia* in civil and common law domestic courts. Indeed, national courts in the civil and common law regimes deal with the question as to who shall ascertain and/or prove the content of foreign law in international disputes differently, and the background of the arbitrator and/or the reviewing court may affect how the issue is addressed in arbitration.

Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute."

[3] Article 20(1) ICDR Rules (2014); Article 22 ICC Rules (2012); Article 14.5 LCIA Arbitration Rules (2014); Article 13.1 HKIAC Administered Arbitration Rules (2013); Rule 16.1 SIAC Rules (2013); Article 19(1) SCC Arbitration Rules (2010); *see* also Article 17(1) UNCITRAL Arbitration Rules (2010).

[4] Section 34(1) of the English Arbitration Act (1996) establishes that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter." Section 34(2)(g) goes on and clarifies that "[p]rocedural and evidential matters include whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law." While not explicitly addressed, wide discretion can be found in Article 19(2) UNCITRAL Model Law, Article 1460 of the French Code of Civil Procedure, Article 182 of the Swiss Federal Statute on Private International Law, Articles 21 and 22 of the Brazilian Arbitration Act, among others.

But viewing *iura novit tribunus* through the lens of domestic court practice is inapt. In court, the topic generally arises in the context of how a court is supposed to determine the content of domestic and foreign law, respectively. In the case of domestic law, the court is presumed to have *iura novit curia* powers in almost all jurisdictions, because the court is appointed by the state to interpret and apply the state's laws. That responsibility carries with it the requirement that the court go beyond the parties' pleadings and determine the content of the law (and apply that law) to its own satisfaction. It is insufficient, as a state court, to rely solely on the parties' arguments. Arbitrators, on the other hand, derive their jurisdiction not from the state but from the parties' agreement, and are not empowered by any state in particular to interpret or safeguard the application of its laws.[5] Although the disputing parties usually expect that the law will be applied correctly to the best of the arbitrator's ability, there generally is no significant threat to the state if the law is applied incorrectly, and of course—unlike in domestic courts—an error of law is rarely a basis for overturning an arbitral award.

Similarly, scholars writing on this subject in the context of arbitration often focus on a court's treatment of foreign law, correctly pointing out that, in some jurisdictions, foreign law is treated as a matter of law subject to *iura novit curia*, whereas in other jurisdictions, it is treated as a matter of fact that must be proven by the party asserting the content of the foreign law.[6] Again, this

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[5] For an extensive discussion on the juridical nature of arbitration and the source of arbitrator powers *see*: Lew, Julian D. M./Mistelis, Loukas A./Kröll, Stefan M.: *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2003, pp. 73-78.

[6] Some very well-respected authors have advanced the theory that tribunals should not reach beyond of what the parties have pled and proven, that applicable law should be treated as a fact, and, as such, the *iura novit tribunus* doctrine finds no application in arbitration. *See*, for example, Derains, Yves: "Observations - Cour d'appel de Paris (1re Ch. C) 13 novembre 1997 - *Lemeur v. SARL Les Cités invisibles*", in *Revue de l'arbitrage*, Volume 1998 Issue 4, Sirey, Paris, 1998, p. 710 ("L'adage *Jura novit curia* n'a pas sa place en matière d'arbitrage, et surtout pas en matière d'arbitrage international" or "The adage *iura novit curia* has no place in arbitration, especially not with regard to international arbitration."); *see* also Gaillard, Emmanuel/Savage, John: *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague, 1999, para. 1263 ("[The law] should be established as though it were an element of fact. The idea that foreign laws should be treated as issues of fact is well established in both common law and civil law systems and should apply in international arbitral practice"). This view is too rigid and is, in any event, contrary to the weight of authority. Even jurisdictions like the United Kingdom, where foreign law is treated as fact in court proceedings, have done away with this concept for examining applicable law

framework does not fit arbitration, where the question is not one of *foreign* law, but rather one of *applicable* law. The very concept of foreign law is misplaced in the context of international arbitration as tribunals have no nationality, forum or *lex fori*.[7] They operate under the applicable law, which may not always be known to the tribunal, but should not be treated as a "fact" to be proven by the parties.

Thus, we will dispense with an analysis of *iura novit curia* in domestic courts. In order to make the separation clear, we will refer to the relevant practice in arbitration as *iura novit tribunus.* That said, the most significant set of sources on the application of *iura novit tribunus* are (1) domestic court cases for enforcement or vacatur of arbitral awards, and (2) in the investment treaty context, ICSID annulment committee decisions. Thus, although we dispense with the usual analogies to *iura novit curia* in courtroom practice, domestic court decisions remain relevant to the below analysis.

II. May Tribunals Assume *Iura Novit Tribunus* Powers?

Absent the parties' agreement to the contrary, there is no known proscription against the arbitrator going beyond the parties' pleadings. The vast majority of courts and annulment committees examining the topic have affirmed that arbitral tribunals can, within the limitations discussed below, determine the content of the applicable law on their own, whether or not the specific legal issue was pled by the parties. In each of the cases discussed below, the notion that tribunals had this power was not questioned; the only question was whether it was applied correctly and fairly.

Reviewing courts have consistently held, for example, that a commercial arbitral tribunal can, in some circumstances, re-classify a claim,[8] vary the legal characterization of facts if reasonably connected

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in arbitration. *See* Section 34(1) and (2)(g) of the English Arbitration Act (1996) and Article 22.1(iii) of the LCIA Arbitration Rules (2014).

[7] *See* Kaufmann-Kohler, Gabrielle: "The Arbitrator and the Law: Does He/She Know it? Apply It? How? And a Few More Questions", in *Arbitration International*, Volume 21 Issue 4, Kluwer Law International, The Hague, 2005, p. 632; Lew, Julian D.M.: "Iura Novit Curia and Due Process", in *Queen Mary, University of London, School of Law Legal Studies Research Paper No. 72/2010*, 2010, para. 8; also agreeing on this point, Fouchard/Gaillard/Goldman, *supra* note 8, p. 1263.

[8] *Urbaser v. Babcock*, Madrid Court of Appeal (27 October 2008), Case No. 542/2008-2/2008, commentated in *UNCIRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, United Nations Publication, Vienna, 2012, para. 90, http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf; *see* also *Bank*

to the arguments raised,[9] or engage in legal reasoning unrelated to the parties' legal arguments.[10] That is, a tribunal can exercise *iura novit tribunus* to replace the parties' legal reasoning with its own.[11] As the U.S. Court of Appeals for the Ninth Circuit pithily explained, a reviewing court is tasked to examine whether the award "exceeds the scope of the [arbitration agreement]", not whether the award "exceeds the scope of the parties' pleadings".[12] Thus, the exercise of *iura novit tribunus* powers by an arbitral tribunal by itself will not generally result in a successful challenge to the award. Similarly, as Christoph Schreuer has explained, ICSID annulment committees have "uniformly rejected the idea that the tribunals in drafting their awards are restricted to arguments presented by the parties."[13]

III. Must Tribunals Apply *Iura Novit Tribunus*?

Some learned colleagues follow a strict civil law inquisitorial approach and advocate that tribunals are not just empowered but rather *must* establish the content of the applicable law in order to fulfill their mandate.[14] Courts in a few civil law jurisdictions have

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Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd., Swiss Federal Supreme Court (2 March 2001), Case No. 4P.260/2000, in *ASA Bulletin*, Volume 19 Issue 3, Kluwer Law International, The Hague, 2001, p. 535, para. 5(c).

[9] *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd,* Supreme Court of Singapore, High Court (23 September 2013), SGHC 186, p. 41, para. 65 ("If an unargued premise flows reasonably from an argued premise, I do not think that it is necessarily incumbent on the arbitral tribunal to invite the parties to submit new arguments. The arbitral tribunal would be doing nothing more than inferring a related premise from one that has been placed before it").

[10] *Not indicated v. Not indicated*, Ière Cour de droit civil (21 September 2007), Case No. 4A_220/2007, in *ASA Bulletin*, Volume 26 Issue 4, Kluwer Law International, The Hague, 2008, p. 753, para. 7.2.

[11] On this general topic, *see* Williams, David A.R.: "Defining the Role of the Court in Modern International Commercial Arbitration", in *Global Arbitration Review*, Law Business Research, London, 2012, p. 38 with more case references. To what extent this may impact a party's right to be heard will be addressed below.

[12] *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc. et al.*, United States Court of Appeals for the Ninth Circuit (30 June 1992), 969 F.2D 764, p. 771.

[13] Schreuer, Christoph: "Three Generations of ICSID Annulment Proceedings", in *Annulment of ICSID Awards,* IAI Series in International Arbitration No. 1 (Emmanuel Gaillard/Yas Banifatemi, eds.), Juris Publishing, Huntington, 2004, p. 30.

[14] *See* discussion in von Wobeser, Dr. Claus: "The Effective use of Legal Sources: How Much is too Much and What is the Role for Iura Novit Curia", Paper submitted for *2010 ICCA Congress* in Rio de Janeiro, p. 7; *see* also Giovannini, Teresa: "International Arbitration and Jura Novit Curia – Towards Harmonization", in *Transnational Dispute Management*, Volume 9 Issue 3, OGEMID listserv, Maris BV, Voorburg, 2012, p. 6, http://www.transnational-dispute-management.com/article.asp?key=1819.

supported the idea that commercial arbitral tribunals are required to apply *iura novit tribunus* and determine the law themselves.[15] The Cour d'appel de Paris, for example, unmistakably stated in 1997 in *Société VRV v. Pharmachim* that arbitrators have an obligation to pursue the adequate rule of law *ex officio*.[16]

In contrast, most jurisdictions favor the notion that tribunals do not, at least not exclusively, have the burden to educate themselves on the content of the applicable law. Section 34(2)(g) of the English Arbitration Act, for example, empowers tribunals to decide to what extent they should ascertain the law, but this power does not advance to the degree of an obligation. Justice Thomas explained in *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co.* that, under Section 46(1)(a),[17] the tribunal is "free to decide the matter on the basis of the presumption that the applicable…law is the same as the law of England and Wales", unless the parties or the tribunal itself raise an issue that is treated differently under the law chosen by the parties.[18]

Interestingly, the Swiss Federal Supreme Court has evolved on this issue. In a series of earlier cases, the court held that a *iura novit tribunus* obligation existed, in line with the strict *iura novit curia* doctrine that is applied in Swiss courts.[19] But in 2005, the Swiss Federal Supreme Court changed its earlier position and agreed in *D. d.o.o. v. Bank C.* that the application of the *iura novit tribunus*

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[15] As discussed in more detail in: Giovannini, *supra* note 16, pp. 5-6 with more case references.

[16] *Société VRV v. Pharmachim*, Cour d'appel de Paris (25 November 1997), in *Revue de l'arbitrage*, Volume 1998 Issue 4, Sirey, Paris, 1998, p. 687.

[17] Article 46(1)(a) provides that "[t]he arbitral tribunal shall decide the dispute (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute..."

[18] *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co.*, English Commercial Court (19 April 2000), in *2 Lloyd's Law Report*, Informa Subscriptions, London, pp. 83 et seq., para. 42.

[19] In 1994, the Swiss Federal Supreme Court had found in *Westland v. Arab British Helicopter Co.* that an adjudicator is *obligated* to apply the law on its own motion without being limited to the grounds advanced by the parties. *Westland Helicopters Ltd v. The Arab British Helicopter Company*, Swiss Federal Supreme Court (19 April 1994), Case No. ATF 120 II 172, p. 175, para. 3(a). The Swiss Federal Supreme Court also made an explicit reference to the *iura novit curia* doctrine in its decision, which marked the starting point for numerous decisions as to the scope of this doctrine in arbitration. It confirmed this general notion in 2001 in *N.V. Belgische Scheepvaartmaatschappij-Compagnie Maritime Belge v. N.V. Distrigas*, Swiss Federal Supreme Court (19 December 2001), Case No. ATF 4P.114/2001, paras. 3(a) and 5(a); *see* also *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.*, *supra* note 10, para. 5(c).

doctrine should not be mandatory. It found that not applying this doctrine does not of itself put the award at risk for being set aside. It further clarified that a tribunal does not have to conduct its own research and may entirely rely on the parties' arguments if believed to be sufficient to ascertain the content of the applicable law.[20] It reaffirmed this notion in *X. A.S. v. Z. S.A.* in 2014.[21]

Nor is the application of *iura novit tribunus* viewed as mandatory in investment treaty arbitration. The ad hoc annulment committee in *Patrick H. Mitchell v. Democratic Republic of Congo provided the clearest statement on this issue,*[22] writing that a tribunal "is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option…."[23] A similar delineation was recognized by the tribunal in *CME Czech Republic B.V. v. Czech Republic*, which was heard under the UNCITRAL rules. In *CME*, the tribunal made clear that it was not "bound to research, find and apply national law which has not been argued or referred to by the parties and has not been identified by the parties and the Tribunal to be essential to the Tribunal's decision."[24]

The 2010 annulment decision in *Enron Creditors Recovery Corporation and Ponderosa Assets L.P. v. Republic of Argentina*[25] suggests a possible alternative approach in investment arbitration. The *Enron* annulment committee paid lip service to the *iura novit tribunus* rule announced in *Mitchell*, but nonetheless annulled the underlying arbitral decision on the ground that the tribunal failed to apply the applicable law, faulting the tribunal for overlooking arguments on the customary international law of necessity *that were not raised by the parties*.[26] Thus, by the *Enron* ad hoc committee's logic, the award

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[20] *See D. d.o.o. v. Bank C.*, Swiss Federal Supreme Court (27 April 2005), Case No. 4P.242/2004, in *ASA Bulletin*, Volume 23 Issue 4, Kluwer Arbitration Law, The Hague, 2005, p. 724, para. 7(3).

[21] *X. A.S. (Turkey) v. Z. S.A. (Belgium)*, Swiss Federal Supreme Court (5 February 2014), Case No. 4A_446/2013, Reasons, para. 3.

[22] *Patrick H. Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (November 1, 2006).

[23] *Id.,* para. 57.

[24] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award (March 14, 2003), para. 411.

[25] *Enron Creditors Recovery Corp. and Ponderosa Assets L.P. v. Republic of Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment (July 30, 2010).

[26] *Id.,* paras. 376-377.

was annullable because the underlying tribunal failed to utilize *iura novit tribunus*, suggesting that—despite the reference to *Mitchell*—*iura novit tribunus* is mandatory.

The *Enron* decision has been frequently criticized, but it was not the first case to find a *iura novit tribunus* obligation in the investor-state context. In *BP Exploration Co (Libya) Ltd. v. The Government of the Libyan Arab Republic*,[27] Judge Lagergren found that an arbitrator is "both entitled *and compelled* to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by the Claimant," at least in the context of a respondent's default. There is also the interesting case of the ICSID ad hoc annulment committee decision in *RSM Production Corporation v. Grenada*.[28] In determining that an ICSID annulment committee has *iura novit tribunus* powers (not addressing whether those powers rise to the level of duty), the *RSM* committee relied on the ICJ decisions in *Fisheries Jurisdiction* and *Military and Paramilitary Activities in and against Nicaragua*.[29] These ICJ decisions stand for the proposition that *iura novit curia* is not only a power held by the ICJ, but an obligation on the court. In *Fisheries Jurisdiction*, the ICJ wrote that "[t]he Court…, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required…to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute."[30] In the *Nicaragua* case, the ICJ held that it was "bound" to apply *iura novit curia* in order to determine whether it had jurisdiction in the absence of an appearance by the respondent state.[31]

Along these lines, Jan Paulsson, in his article on the generation of legal norms in investment treaty arbitration, expressly advocates for a

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[27] *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic*, 53 ILR 297 (1979).

[28] *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Decision on Application for Preliminary Ruling (October 29, 2009), para. 23.

[29] *Fisheries Jurisdiction (Federation of Germany v. Iceland)*, Merits, Judgment (25 July 1974), in *I.C.J. Report 1974*, pp. 175 et seq.; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment on the Merits (27 June 1986), in *I.C.J. Report 1986*, pp. 14 et seq.

[30] *Fisheries Jurisdiction (Federation of Germany v. Iceland)*, *supra* note 31, p. 181, para. 18.

[31] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, *supra* note 31, pp. 24-25, para. 29.

iura novit tribunus obligation for investment-treaty arbitrators. As Paulsson explains, "a tribunal in an investment dispute cannot content itself with inept pleadings, and simply uphold the least implausible of the two."[32] He cites to Article 38 of the ICJ Statute and *Fisheries Jurisdiction* to support that argument.[33]

As a policy matter, should it be mandatory for tribunals to conduct their own research and confirm the content of the law outside of the parties' pleadings? The answer, in international commercial arbitration at least, is no. Most of the time, the applicable domestic law is unfamiliar even to the most experienced of arbitrators.[34] Placing such burden of education solely on tribunals would be a disservice to international parties in highly technical commercial disputes in need of industry-specific experts rather than lawyers to serve as arbitrators. To then expect acquaintance with specific legal notions, possibly based on unfamiliar law, is ill conceived. Such an expectation could also add significantly to the costs of arbitration, a concern raised by Justice Thomas in *Hussman*.[35]

The considerations may be different in investment treaty arbitration, but the conclusion is the same. While investment arbitration tribunals are more likely to feature international legal scholars and experienced practitioners capable of researching the applicable law, which is often international law, there is no rule requiring the appointment of such arbitrators. Indeed, it is not unheard of for parties to appoint investment treaty arbitrators not because of their acumen in international law, but because of their industry experience or familiarity with domestic law relevant to the case. In addition, international arbitrators are not themselves responsible for the protection or advancement of any particular system of law, international or domestic.

Finally, and perhaps most importantly, a mandatory *iura novit tribunus* obligation would be contrary to well-established law on the challenge of arbitral awards. It is almost universally accepted that errors of law, absent other factors, cannot sustain a motion to vacate

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[32] Paulsson, Jan: "International Arbitration and the General of Legal Norms: Treaty Arbitration and International Law", in *ICCA Congress Series*, No. 13, Kluwer Law International, The Hague, 2007, p. 879.

[33] *Id.*

[34] *See* Kaufmann-Kohler, *supra* note 9, p. 1.

[35] *Hussman (Europe) Ltd. v. Al Ameen Dev. & Trade Co., supra* note 20, para. 42.

or annul an arbitral award (commercial or investment), and cannot be a basis to avoid enforcement. If that is the case, it would be inconsistent to *require* arbitrators to assure themselves of the legal correctness of their award outside the parties' pleadings.

IV. Limitations to the *Iura Novit Tribunus* Doctrine

The tribunal's core responsibility is to render a fair and enforceable award while ensuring that due process is preserved. As such, a tribunal applying the *iura novit tribunus* doctrine is well advised to do so against the backdrop of national arbitration laws[36] (see also Article 34 of the UNCITRAL Model Law) and/or the New York Convention,[37] which set the stage for questions of enforceability of foreign awards. The Washington Convention similarly provides the bases for annulment of an investment treaty arbitration award rendered under the ISCID Rules.[38] Typically, these laws and conventions provide that enforcement may be refused if the award contains decisions on matters beyond the scope of what has been submitted to arbitration,[39] if the tribunal manifestly exceeded its powers,[40] or if the negatively affected party was unable to present its case.[41] The following sections will address these limitations.

A. Scope of the tribunal's mandate and the ne ultra petita *principle*

The arbitration agreement empowers the tribunal but, at the same time, can also remove certain remedies from the tribunal's sphere of adjudication. In addition, the claimant fixes and delimits the subject matter of the arbitration with its prayer for relief from which the

[36] Local courts that review challenges will in all likelihood be influenced by the application of the principle of *iura novit curia* in court litigation at the seat of the arbitration. For example, Sections 33 and 34 of the Swedish Arbitration Act (1999), Article 1059 of the German Code of Civil Procedure, Sections 67 and 68 of the English Arbitration Act (1996), Art. 190(2) of the Swiss Federal Code on Private International Law, Section 41 of the Finnish Arbitration Act, Articles 1502 and 1504 of the French Code of Civil Procedure, and Article 1065 of the Dutch Code of Civil Procedure.

[37] United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[38] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement of Investment Disputes of 1965, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[39] *See, e.g.,* Article V(1)(c) of the New York Convention.

[40] *See, e.g.,* Article 52(1)(b) of the Washington Convention.

[41] *See, e.g.,* Article V(1)(b) of the New York Convention.

tribunal cannot deviate. At the outset, it must be clarified that the *iura novit tribunus* doctrine and the *ne ultra petita* (not beyond the request) principle are two maxims that co-exist and complement each other. Put differently, the *ne ultra petita* principle confines the matter in dispute and, as such, the outer limits of relief a tribunal may grant. If the tribunal exceeds these limits by awarding a different or higher relief than requested, it puts the award at risk.[42]

The Cour d'appel de Paris, for example, found in *Société GFI informatique SA v. Société Engineering Ingegneria Informatica SPA et al.* that the tribunal cannot go beyond the mission entrusted to it and that its mission is limited to the subject matter of the dispute as set out in the parties' claims.[43] Similarly, Spanish courts have stated that the parties' prayer for relief binds the tribunal and that its decision must echo the prayer for relief, though there does not have to be literal identity between the prayer for relief and the award.[44] The Italian Corte di Cassazione Civile in *Soc. Profilglass v. Nerozzi et al.* clarified that a judge violates the *ne ultra petita* principle when he interferes with the dispositive powers of the parties by altering the elements of identification of the claim or exception which may result in a decision not requested or exceeds the limits of the request or exception.[45] A U.S. court applying the "excess of powers" doctrine similarly found that "the Arbitrator exceeded his power by declaring the contract void as against public policy—an issue not raised by the parties or *subject to arbitration*."[46]

Variations on the *ne ultra petita* principle can be found in investment arbitration jurisprudence as well. The annulment committee in *Klöckner v. Republic of Cameroon* recognized that an ICSID tribunal cannot, "by formulating its own theory and argument,…[go] beyond

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[42] For example, the tribunal finds that the parties' agreement is void whereas Claimant merely asked for it to be amended.

[43] *Société GFI Informatique SA v. Société Engineering Ingegneria Informatica SPA et al.,* Cour d'appel de Paris (27 November 2008), Case No. 07/11672, in: *Revue de l'arbitrage*, Volume 2009 Issue 1, Sirey, Paris, p. 231.

[44] *See* Giovannini, *supra* note 16, p. 4, citing Audiencia Provincial de Madrid (29 June 2004), Case No. 524/2004; Audiencia Provincial de Madrid (17 November 2004), Case No. 632/2004.

[45] *Soc. Profilglass v. Nerozzi et al.*, Cass. Civ. Sez. II (12 July 2005), Giust. Civ. Mass. 2005, p. 6.

[46] *Depascuale Building & Realty Co. v. Rhode Island Board of Governors for Higher Education*, Superior Court of Rhode Island (June 29, 2009), Case No. PC07-6393, 2009 R.I. Super. LEXIS 79 (R.I. Sup. 2009) (unpublished opinion) (emphasis added).

the 'legal framework' established by the Claimant and Respondent," for example by deciding the case "on the basis of tort while the pleas of the parties were based on contract."[47] The *Caratube* annulment committee reiterated this concept in 2014: "a tribunal (and also a committee) is only free to adopt its own solution and reasoning without obligation to submit it to the parties beforehand, if it remains within the legal framework established by the parties."[48]

On the other hand, some courts have found that as long as the *iura novit tribunus* doctrine operates within the limits of *ne ultra petita*, it allows the tribunal to fully investigate the law applicable to the parties' requests for relief.[49] The interaction between *iura novit tribunus* and *ne ultra petita* is best explained by examining the much debated *Werfen Austria GmbH v. Polar Electro Europe B.V.*[50] case. The claimant in the underlying arbitration requested the tribunal to find that it should be indemnified for the violation of the parties' distribution agreement. In order to be able to claim a payment, it asked the tribunal to declare void (under Section 28 of the Finnish Act on Commercial Representatives and Salesman) a clause that would have otherwise nullified that payment due to termination. The tribunal denied that request, but nonetheless awarded the claimant corresponding compensation by *sua sponte* interpreting and amending the agreement based on a different provision (Section 36 of the Finnish Contracts Act), which the claimant had never addressed. The Finnish Supreme Court found that the tribunal did not grant anything more or different than what the claimant had requested, and that this outcome therefore did not violate the *ne ultra petita* principle, even though the legal basis of the award was different than what was pled.[51] What the tribunal arguably did here was to apply the *iura novit tribunus* doctrine within the limitations set by the *ne ultra petita*

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[47] *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee (October 21, 1983), para. 91.

[48] *Caratube International Oil Co. LLP v. Republic of Kazakhstan,* ICSID Case No. ARB/08/12, Decision on Annulment (18 February 2014), para. 93.

[49] *See* Alberti, Christian P., "Iura Novit Curia in International Commercial Arbitration – How much justice do you want?", in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, (Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas, Vikki Rogers, eds.), Kluwer Law International, The Hague, 2011, pp. 4-6, 18-19.

[50] *Werfen Austria GmbH v. Polar Electro Europe B.V.*, Supreme Court of Finland – majority decision (2 July 2008), Case No. S2006/716, no. 1, 517.

[51] *Id.*, paras. 12-13.

principle. The tribunal *de facto* granted what had been requested but, in doing so, did not limit itself to the claimant's pleading, searched the law on its own accord, and found a fitting legal concept under the same applicable law.[52]

The Swiss Federal Supreme Court came to a similar conclusion in *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.* In that case, the tribunal awarded corresponding damages based on a contractual breach theory while the claimant requested indemnification for non-compliance with the parties' guarantee agreement. The Court found that the tribunal did not violate *ne ultra petita* principle so long as the re-characterization of the claim is covered by the claimant's original request.[53] In a previous decision the same Court distinguished between court and arbitral practice on this issue. The Court found that a judge does not violate the *ne ultra petita* principle if he legally qualifies a claim differently from what the claimant had advanced and that, under the *iura novit curia* doctrine, he is not limited to the pleadings advanced by the parties.[54] An arbitral tribunal, on the other hand, is limited to the subject matter and the amount requested; particularly, when the claimant qualifies or limits its claims in the conclusions themselves.[55]

In conclusion, there is a very fine distinction to be made between pleadings and prayers of relief and attention must be given on how the parties have expressed themselves in their legal conclusions and prayers. If the claimant has legally characterized its prayers for relief

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[52] Wiegand also provides for two examples which illustrate the interaction between these two maxims: If the claimant had requested for an amendment of the parties' contract and the tribunal instead declares it void, it has violated the *ne ultra petita* principle. It should have simply denied the claimant's request if it did not agree with the grounds for amendment. If, in turn, the claimant had asked for the contract to be annulled and the tribunal disagreed but declared it void, then the *ne ultra petita* principle has not been violated as the tribunal has not granted anything more than what the claimant had requested. But it came to such conclusion by applying the *iura novit curia* doctrine. *See* Wiegand, Wolfgang: "Iura novit curia vs. ne ultra petita – Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts", Rechtsetzung und Rechtsdurchsetzung – Zivil- und schiedsverfahrensrechtliche Aspekte – Festschrift für Franz Kellerhals zum 65. Geburtstag (Monique Jametti Greiner, Bernhard Berger, Andreas Güngerich, eds.), Stämpfli Verlag AG, Bern, 2005, pp. 133-134.

[53] *Bank Saint Petersburg PLC v. ATA Insaat Sanayi ve Ticaret Ltd.*, *supra* note 10, p. 535, para. 5(c).

[54] *P. GmbH (Germany) v. S. (Syria),* Swiss Federal Supreme Court (1 November 1996), in *ASA Bulletin* Volume 20 Issue 2, Kluwer International Law, The Hague, 2002, p. 262.

[55] *Id.*, p. 263.

it has excluded all other bases for the award and the tribunal cannot go beyond these limitations. If, on the other hand, the prayer for relief is fashioned as a particular remedy or outcome, but is not anchored to a particular legal theory, it may be possible to look beyond the parties' pleadings for law supporting the requested remedy.

B. The right to be heard: surprise v. foreseeability

The application of the *iura novit tribunus* doctrine may lead to a violation of the right to be heard, a fundamental rule of due process. Thus, in application, tribunals should be careful to provide the disputing parties with notice of the possible application of legal principles that were not presented in the pleadings, at least if the application of those principles would come as a surprise to the parties.

In *Systembolaget v. V&S Vin & Spirit*, for example, the Swedish Court of Appeal set aside an award based on Section 34, first paragraph, sub-section 2 of the Swedish Arbitration Act (1999). The underlying Stockholm Chamber of Commerce tribunal had based its award on an argument that was not advanced by either side. The Court found that the decisive argument could not have been inferred by the parties' submissions.[56] Systembolaget's expert, Professor Lars Heuman, explained that the right to be heard was violated, as one must be able to understand the claim being made against him in order to be able to defend himself (rather than fighting in the fog).[57]

The right to be heard was also the basis of the decision of the Swiss Federal Supreme Court in *José Ignacio Urquijo Goitia v. Liedson da Silva Muñiz*. The underlying arbitration before a Court of Arbitration for Sport ("CAS") tribunal involved a Brazilian football player and his Spanish agent. The contract was governed by the FIFA rules and, secondarily and only as a gap-filling measure, by Swiss law. It provided the agent with the exclusive right to represent the player in the European market. The player later signed with a Portuguese football club without the agent's involvement. The agent brought arbitration to collect his fees, but the FIFA Players' Status Committee and, upon appeal, the CAS tribunal rejected the agent's claim. The

[56] *Systembolaget v. V&S Vin & Spirit*, Svea Court of Appeal (1 December 2009), Case No. T4548- 08, p. 19.

[57] *See* James Hope, "Sweden: Fighting in fog - when a party does not know the case against it", in *Global Arbitration Review*, Volume 5 No. 1, Law Business Research, London, http://globalarbitrationreview.com/journal/article/27636/sweden-fighting-fog-when-party-does-not-know-case-against-it.

latter relied in its decision on Article 8(2)(a) Swiss Federal Law on the Employment Exchange and the Hiring-out of Personnel, a mandatory Swiss law provision under which exclusivity clauses in agency agreements leading to employment contracts are null and void. Neither side had invoked this provision in the arbitration. The agent argued in court that the CAS decision constituted a violation of his right to be heard. The Court agreed, finding that the agent could not have anticipated that this law would apply (arguably, it was not even applicable); even less that it would be decisive for its case. The Court set the award aside finding that the agent was taken by surprise, as the CAS tribunal should have at least provided the parties with an opportunity to submit comments on this law.[58]

The Quebec Superior Court addressed *iura novit tribunus* and the right to be heard in *Louis Dreyfus S.A.S. v. Holding Tusculum B. V. et al.* The respondent in the court case had pursued arbitration before an ICC tribunal for breach of the shareholders' agreement, after a failed reorganization attempt of a joint venture. The agreement included a remedy clause the parties sought to apply. Instead, the ICC tribunal fashioned a valuation and buyout remedy of its own making "on the ad hoc application of broad principles of justice and fairness"[59] and terminated the joint venture. The claimant then asked the Quebec Superior Court for partial annulment of the award arguing that the ICC tribunal decided the dispute based on a remedy neither party had pled. The Court agreed that the ICC tribunal violated the parties' right to be heard, as it dealt with a dispute not contemplated by the parties, and set the award aside in part.[60] Note that this decision, although not addressing the *ne ultra petita* principle, could just as easily have been decided on that basis.

In *Société Engel Austria GmbH v. société Don Trade et al.* the Cour d'appel de Paris partially set aside an award, again, on the grounds that an ICC tribunal violated the right to be heard. While the ICC tribunal rejected part of the claimant's claims, it upheld one claim resulting in a partial annulment of the parties' contract. It based its decision *sua sponte* on the principle of frustration of the contractual

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[58] *José Ignacio Urquijo Goitia v. Lidson da Silva Muñiz*, Swiss Federal Supreme Court (9 February 2009), Case No. 4A_400/2008, in *ASA Bulletin*, Volume 27 Issue 3, Kluwer Law International, The Hague, 2009, pp. 498-499.

[59] *Louis Dreyfus S.A.S. v. Holding Tusculum B. V. et al.*, Quebec Superior Court (8 December 2008), Case No. 2008 QCCS 5903, para. 36.

[60] *Id.*, paras. 76-88.

basis (*Wegfall der Geschäftsgrundlage*) under Austrian law, a doctrine that neither side had pled. The respondent consequently requested the Court to set aside this decision, arguing *inter alia* that it had never been given the opportunity to be heard on this legal principle. The Court agreed that the parties were not given such opportunity and that the ICC tribunal violated the right to be heard after having introduced a new legal basis for its decision *ex officio*.[61]

U.S. courts have likewise grappled with the concept of *iura novit tribunus* and the right to be heard in arbitration. In *Township of Montclair v. Montclair PBA Local No. 53*, the appellate division of the Superior Court of New Jersey wrote:

> By predicating his ruling upon an issue that neither party raised nor had notice of, the arbitrator effectively denied the parties the right to marshal evidence and be heard on the pivotal issue identified by the arbitrator. Fundamental fairness requires, at the very least, notice of claim and the right to be heard. No matter how innocently conceived, the arbitrator's election to decide the case before him without reference to the issues of law raised by the parties, and upon an issue of law that neither side relied upon nor had the opportunity to address, deprived the Township of notice and an opportunity to be heard.[62]

Some courts, on the other hand, have refused to vacate (or have granted enforcement) even where *iura novit tribunus* was applied without prior notice, finding that there was no violation of the right to be heard. The previously-addressed *Werfen* decision is on point. In that case, the Finnish Supreme Court addressed the question of whether the respondent had sufficient opportunity to present its case. It found that the tribunal was not bound by the parties' legal arguments and that the tribunal had not awarded anything beyond of what the claimant had asked for. It also stated that the respondent had the opportunity to state its position on the factors that eventually led to the tribunal's decision. In particular, it noted that the legal nature of

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[61] *Société Engel Austria GmbH v. société Don Trade et al.*, Cour d'appel de Paris (3 December 2009), Case No. 08/13618, p. 114; *see* also Kirby, Jennifer/Bensaude, Denise: "A View from Paris – March 2010", in *Mealey's International Arbitration Report*, Volume 25 No. 3, LexisNexis Mealey's Publications, King of Prussia, 2010, p. 9.

[62] *Township of Montclair v. Montclair PBA Local No. 53*, Superior Court of New Jersey – Appellate Division (May 22, 2012), Case No. A-0657-1154, 2012 N.J. Super. Unpub. LEXIS 1122 (Sup. Ct. N.J. 2012) (unpublished opinion).

the parties' agreement itself was in dispute so that the outcome could not have come as a surprise.[63]

The Swiss Federal Supreme Court denied a similar vacatur request in *X (Switzerland) v. Y (Hungary)* in 2009. The respondent argued that the tribunal had based its findings on contractual terms and legal provisions that neither party had advanced. More importantly, it argued that neither party could have anticipated what would become the basis for the tribunal's decision. The Court found that the claimant had in fact indirectly referred to the relevant contractual terms by arguing the consequences of their application. The Court concluded that the respondent had sufficient opportunities to respond. Notably, it also found that the respondent had an experienced counsel who should have anticipated the application of the contractual terms addressing the contract termination.[64]

In 2010, the Swiss Federal Supreme Court upheld another award in *X SA. (Belgium) v. Y SA. (Spain)*. The respondent contended that its right to be heard had been violated because the tribunal's decision was based on legal reasoning and notions neither party had advanced. The Court found that a party must be granted the opportunity to present its arguments on legal issues only under exceptional circumstances and that otherwise the *iura novit tribunus* doctrine applies. It clarified that the right to be heard is only violated where neither party has invoked the relevant legal concept and an award based on it would come as an unforeseen event. The respondent failed this test, having been represented by Swiss counsel who had referred in its submissions to notions similar to the one on which the tribunal had based its decision.[65]

The "right to be heard" argument also failed in a federal case in the Northern District of California. The arbitration underlying the decision in *Weiner v. Original Talk Radio Network, Inc.,* involved a contract dispute between a prominent radio personality and his employer.[66] The arbitrator in that case issued an award that included

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[63] *Werfen Austria GmbH v. Polar Electro Europe B.V.*, *supra* note 52, para. 16.

[64] *X (Switzerland) v. Y (Hungary)*, Swiss Federal Supreme Court (9 June 2009), Case No. 4A_108/2009, in *ASA Bulletin*, Volume 28 Issue 3, Kluwer Law International, The Hague, 2010, pp. 557-559.

[65] *X SA. (Belgium) v. Y SA. (Spain)*, Federal Supreme Court (3 August 2010), Case No. 4A_254/2010, pp. 809-811.

[66] *Weiner v. Original Talk Radio Network, Inc.*, U.S. Federal Court for the Northern District of California (May 2, 2013), Case No. 10-cv-05785, 2013 U.S. Dist. LEXIS 63083 (N.D. Ca. 2013) (unpublished opinion).

back pay, even though back pay was not addressed by the parties. The Court held that the arbitration agreement was broad enough to include the back pay issue, and that the respondent was "on notice" that it may have to address that issue.

At least one reviewing court has held that, in order to vacate an award, the complaining disputant must show not only that the new legal authorities in the award came as a surprise, but that "with adequate notice it might have been possible to persuade the arbitrator to a different result."[67]

Finally, it should be noted that ICSID annulment committees have not annulled any awards based on the right to be heard in the context of the application of *iura novit tribunus*,[68] even though violations of fundamental rights of procedure are bases for annulment.[69] For example, the 2002 annulment committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* explained that while the reasoning adopted by the underlying tribunal "came as a surprise to the parties, or at least to some of them…this would by no means be unprecedented in judicial decision-making" and was not a basis for annulment.[70] That language was later quoted and applied by the ad hoc annulment committee in *Helnan International Hotels A/S v. Arab Republic of Egypt*.[71] This line of precedent was affirmed in February 2014 by the annulment committee in *Caratube International Oil Company LLP v. Kazakhstan*.[72] As another example, in *Wena Hotels Ltd. v. Arab Republic of Egypt,*[73] the tribunal exercised its assumed *iura novit*

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[67] *Trustees of Rotoaira Forest Trust v. Attorney-General*, New Zealand High Court (30 November 1998), [1999] 2 NZLR 452, para. 463.

[68] The right to be heard was at issue, for example, in *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment (Dec. 23, 2010), but the underlying concern was the submission and consideration of new evidence, not *iura novit tribunus*.

[69] Article 52(1)(d) of the Washington Convention.

[70] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002), para. 84.

[71] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee (June 14, 2010), para. 23.

[72] *Caratube International Oil Co. LLP v. Republic of Kazakhstan, supra* note 50, paras. 90-96.

[73] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision – Annulment Proceeding (February 5, 2002).

tribunus power in utilizing compound interest to calculate damages, despite the fact that neither party argued for compound interest.

A few observations can be made from the decisions where the right to be heard was examined as a basis for vacatur of the award. All courts seem to agree that the right to be heard is fundamental and that it is violated if a surprising decision has been rendered. But unforeseeability is a matter of appreciation. Indeed, some authors see no possible violations of the right to be heard in the application of *iura novit tribunus*, as "in principle, there is no violation…of due process as the parties should know that the…arbitrators know the law and will apply it."[74] Certainly, whether the decisive legal issue could have been inferred by the parties' submissions and whether the parties could not have otherwise anticipated or contemplated its application is a case-by-case determination. Factors such as the nature of the newly introduced notion and the qualifications of the representatives may certainly play a role here. This becomes all the more conspicuous if the parties had explicitly agreed on that law and the newly introduced legal notion or provision is fundamental or mandatory in nature.

Indirect references made by counsel or discussions of similar legal notions during the course of the proceeding may also have weight in the evaluation of what is foreseeable. As the High Court in *TMM Division Maritima SA de CV* stated:

> There is…a nuanced difference between deciding the dispute on a ground that has never been expressly raised or contemplated, and deciding the dispute on a premise which, though not directly raised, is reasonably connected to an argument which was in fact raised.[75]

Nonetheless, all arbitral tribunals would be wise to heed the advice provided in a 2008 report on the ascertainment of the content of applicable law published by the International Law Association ("ILA"). The ILA specifically recommended, as a best practice, that where a tribunal intends to invoke *iura novit tribunus*, it should bring

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[74] Lévy, Laurent: "Jura Novit Curia? The Arbitrator's Discretion in the Application of the Governing Law", in *Kluwer Arbitration Blog*, Kluwer Law International, The Hague, 2009, http://kluwerarbitrationblog.com/blog/2009/03/20/jura-novit-curia-the-arbitrator%e2%80%99s-discretion-in-the-application-of-the-governing-law.

[75] *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd, supra* note 11, pp. 39-40, para. 63.

the new legal authorities to the attention of the parties and invite their comments, "at least if those sources go meaningfully beyond the sources the parties have already invoked and might significantly affect the outcome of the case."[76]

V. Conclusion

In conclusion, it is indisputable that arbitral tribunals have the power to invoke the *iura novit tribunus* doctrine. That is, arbitrators may look beyond the parties' pleadings to determine the content of the applicable law. The weight of authority and public policy considerations suggest that, while arbitrators *may* invoke this power, there is no obligation to do so. The power has limits, however, largely related to whether the exercise of *iura novit tribunus* offends the *ne ultra petita* principle, and whether the right to be heard has been preserved. In particular, all tribunals are advised to alert the disputing parties if they are considering new legal authorities in order to preserve the enforceability of their awards. Finally, the parties themselves should address this issue with their tribunals as early as possible, and even work it into a procedural order, so that both the parties and the tribunal have the same expectations with respect to *iura novit tribunus*.

[76] International Law Association: "Final Report – Ascertaining the Contents of the Applicable Law in International Commercial Arbitration", Rio de Janeiro Conference (2008), p. 23.

procedure (see Article 1 above). The arbitrators should summarise the parties' submissions as to costs and then set out any factors which they took into account when dealing with costs and give reasons for their decision, unless the parties have agreed that reasons are not required.

b) Arbitrators should specify the items of recoverable costs and the amount referable to each item of recoverable cost.[17] They should also state the date by which such sums should be paid and the consequences in terms of interest, if applicable, of late payment.[18] The decision as to costs, including the amounts, should be repeated in the dispositive part of the final award.[19]

Conclusion

One of the most important tasks which arbitrators have to perform relates to the making of awards on costs. There are a great variety of ways in which costs are allocated and numerous factors that are likely to influence the arbitrators' decision. This Guideline aims at assisting arbitrators in formulating their decisions as to costs in a more consistent manner.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

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Endnotes

1. These costs are also referred to as 'central costs', see Colin Ong and Michael O'Reilly, *Costs in International Arbitration* (LexisNexis 2013), p. 5 and Michael O'Reilly, 'The Harmonization of Costs Practices in International Arbitration: The Search for the Holy Grail' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), chapter 25. These costs are also sometimes referred to as 'tribunal costs', Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015), paras 9.87-9.88.
2. See generally CIArb Guideline on Drafting Arbitral Awards Part I — General (2016) and CIArb Guideline on Awarding Part II — Interest (2016).
3. Even though this is not common, there may be cases where the parties stipulate that the arbitrators have no power to award party costs. See Ong and O'Reilly, n 1, p. 25.
4. See ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs in Arbitration* (2012), para 82; ICC Arbitration and ADR Commission Report, *Decisions on Costs in International Arbitration* (2015), paras 30-35.
5. Ong and O'Reilly, n 1, pp. 13-14.
6. Michael Bühler, 'Awarding Costs in International Commercial Arbitration: an Overview' (2004) 22 ASA Bulletin, p. 250.
7. Ong and O'Reilly, n 1, pp. 69-70. See Queen Mary and White & Case Survey, *Current and Preferred Practices in the Arbitral Process* (2012), p. 40; David Williams and John Walton, 'Costs and access to International Arbitration' (2014) 80(4) Arbitration, p. 432. See also, Annette Magnusson and Celeste E. Salinas Quero, 'Recent Developments in International Arbitration Allocation of Costs: a

Case Study' paper presented at the International Conference on Arbitration and Mediation (Taipei, 30-31 August 2014).

8. Ong and O'Reilly, n 1, p. 20 (suggesting that there is a trend towards a moderated cost follow the event policy.) ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 20.
9. See ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, which lists a number of techniques available to arbitrators to reduce costs.
10. Difficulties may arise when counsel from different legal traditions claim costs that are in other jurisdictions considered as legally problematic, such as contingency or success fees.
11. Article 37(5) ICC Rules (2012), for example, specifically states that arbitral tribunal may take into account whether 'each party has conducted the arbitration in an expeditious and cost-effective manner'. See also, ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, para 82.
12. ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 8.
13. See e.g., Article 37(3) ICC Rules (2012) which provides that arbitrators may make decisions on party's costs and order payment during the course of the proceedings; Article 17G UNCITRAL Model Law on International Commercial Arbitration.
14. See e.g., Article 37(5) ICC Rules (2012) and Article 28(4) LCIA Rules (2014) which include express references as to parties' conduct. See also, ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, para 82 which includes a non-exhaustive list of examples of behaviour which is considered to be unreasonable and the ICC Arbitration and ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 19 and pp. 23-24.
15. Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's*

Guide to ICC Arbitration (ICC Publication No. 729E, 2012), p. 409. See also, Marie Berard, '"Other Costs" in International Arbitration: A Review of the Recoverability of Internal and Third-Party Funding Costs' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), chapter 27.

16. Ong and O'Reilly, n 1, p. 98-99; Fry, n 15, p. 410.
17. In institutional arbitrations, the arbitrators' and administrative fees are fixed by the institution pursuant to a pre-established fee schedule or scale which forms part of the cost provisions in the applicable arbitration rules and therefore arbitrators can only determine the allocation of such costs. See e.g., Article 37(1) ICC Rules (2012) which reserves the power to the ICC Court and Article 28(1) LCIA Rules (2014) which reserve the power to the LCIA Court.
18. See CIArb Guideline on Drafting Arbitral Awards Part II — Interest (2016).
19. See CIArb Guideline on Drafting Arbitral Awards Part I — General.

INSIDE THE ARBITRATOR'S MIND

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Arbitrators are lead actors in global dispute resolution. They are to global dispute resolution what judges are to domestic dispute resolution. Despite this, arbitral decisionmaking is a black box. This Article is the first to use original experimental research to explore how international arbitrators decide cases. We find that arbitrators often make intuitive and impressionistic decisions rather than fully deliberative ones. We also find evidence that casts doubt on the conventional wisdom that arbitrators render "split the baby" decisions. Although direct comparisons are difficult, we find that arbitrators generally perform at least as well as, but never demonstrably worse than, national judges analyzed in earlier research. There may be reasons to prefer judges to international arbitrators, but the quality of judgment and decisionmaking, at least as measured in these experimental studies, is not one of them. Thus, normative debates about global dispute resolution should focus not on

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decisionmaker identity or title but rather on structural safeguards and legal protections to enhance quality rule of law based decisionmaking.

INTRODUCTION

Arbitration is an important alternative to litigation in the United States, particularly in consumer, employment, and securities disputes.[1] But arbitration's role in domestic dispute resolution pales in comparison to the role it plays globally. In most international disputes, arbitration is the default dispute resolution method.[2]

This means that arbitrators are the central actors in international dispute resolution. They play a vital role in the global economy, oversee disputes involving billions of dollars, and make decisions implicating the transnational rule of law.

Despite the outsized role that arbitrators play in international dispute resolution, we know relatively little about how they make decisions. Some commentators sing arbitrators' praises,[3] observing that they possess both subject-matter expertise and incentives to resolve disputes according to governing law. Other commentators decry their skill and demand instead that judges resolve disputes.[4] They question the quality of arbitrator

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[1] *See infra* note 22 and accompanying text.

[2] George A. Bermann, *International Commercial Arbitration: Past, Present, Future*, 33 ALTERNATIVES TO HIGH COST LITIG. (Int'l Inst. for Conflict Prevention & Resolution), May 2015, at 65, 65; *see also* Gilles Cuniberti, *Beyond Contract The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417, 417–18 (2009); Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233 (2006) ("Between 1993 and 2003, the number of international arbitration proceedings administered by leading institutions almost doubled."); Stephen R. Halpin III, *Stayin' Alive?:* BG Group, PLC v. Republic of Argentina *and the Vitality of Host-Country Litigation Requirements in Investment Treaty Arbitration*, 71 WASH. & LEE L. REV. 1979, 2021–22 (2014) ("[I]nternational arbitration between foreign investors and host countries will remain the dominant method of conclusively resolving investment disputes . . . .").

[3] *See, e.g.*, Andreas F. Lowenfeld, *The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 654 (1997); *see also* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 958–59 (2005); Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States*, 52 VA. J. INT'L L. 723, 744 n.105 (2012).

[4] Letter from Alliance for Justice to U.S. Congressional Officials and U.S. Trade Representative (Mar. 11, 2015), http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf; *see also supra* note 76 and accompanying text (identifying that German judges publicly rejected arbitration of international investment disputes and demanded disputes be returned to national courts). Other critiques of international arbitration address transparency, review by national courts, consistency in outcome, and diversity of adjudicators. Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2015); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration:*

decisionmaking,[5] arguing that arbitrators often ignore applicable law[6] and generally "split the baby" by making awards that fall halfway between the positions the parties advance.[7] Whatever perspective they espouse, commentators debate the relative merits of international arbitration in an information vacuum.

In an effort to shed some light on arbitration, this Article reports the results of a first-ever set of experiments involving international arbitrator decisionmaking.[8] In it, we describe how international arbitrators decide hypothetical cases. When possible, we compare arbitrators' performance to domestic judges. We also explore how the experimental insights we glean might inform adjudicative design.

To do so, we draw on decades of experimental research on the psychology of judgment and decisionmaking. That research shows—contrary to the assumptions of classical economics but consistent with common sense—that

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Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1521 (2005). These concerns are beyond this Article, as they do not address decision-making psychology.

[5] *See* Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 361 (2014); *see also* Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration*, 77 U. CHI. L. REV. 1013, 1014 (2010) ("[A]rbitrators might deliver poor-quality decisions that undermine the attractiveness of arbitration as a whole."); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 458 (1988) ("[T]he less favorable a person's view of the quality of decisionmakers in arbitration, the more likely that person was to support broader judicial review of arbitration awards.").

[6] *See* David S. Baffa, John L. Collins & Gerald L. Maatman, Jr., *Guidance for Employers Considering Mandatory Arbitration Agreements with Class and Collective Action Waivers*, 39 EMP. REL. L.J. 34, 41 (2013); *see also* Henry Wade Rogers, *The Essentials of a Law Establishing an International Court*, 22 YALE L.J. 277, 287 (1913) ("[O]ne who carefully examines the decisions rendered by the Arbitral Tribunals will come to the conclusion that they are inferior to those rendered in the Supreme Court of the United States."); Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 175 (2004) (observing that immunity "allows arbitrators to render poor or unenforceable decisions and then . . . escape responsibility").

[7] William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 689–93 (2009); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 93 (2013); *see also* WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 560 (2d ed. 2012) (describing bankers' herd mentality and suggesting arbitration in an unnecessary invitation to render split the difference awards); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FL. ST. L. REV. 1259, 1261 (2005) ("We can expect, therefore, a tendency for arbitrators to 'split the difference' in their awards . . . ."); Joshua B. Simmons, *Valuation in Investor-State Arbitration: Toward a More Exact Science*, 30 BERKELEY J. INT'L L. 196, 200, 208–14 (2012) (identifying "perceptions that arbitrators merely 'split the baby' between the parties' proposed valuations, particularly when awards are poorly explained").

[8] *But see infra* note 83 and accompanying text (describing how, until recently, most exploration about cognitive illusions in international arbitration was largely theoretical).

human beings often make decisions in irrational, but predictable, ways.[9] Likewise, we draw on more recent research showing that judges, like other human beings, are also prone to predictably irrational decisionmaking.[10] But what about arbitrators?

We might hypothesize that arbitrators make decisions much like judges. Arbitrators, like judges, are human beings; both arbitrators and judges are elite professionals engaged in the task of applying legal principals to facts and have a legal mandate to exercise their judgment in a neutral and objective way. On the other hand, we might hypothesize that arbitrators and judges make decisions differently, as each have different incentives, mandates from different principals,[11] different cultures and legal traditions,[12] and different subject matter

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[9] *See generally* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (rev. & expanded 2008); DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING (1993).

[10] Initial research on cognition and judicial decisionmaking used the term "cognitive illusions" to describe intuitive, simple, quick assessments. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782 (2001); *see also infra* note 77. Psychologists and behavioral economists call these "biases and heuristics." In international arbitration, "bias" has a loaded, often undefined, meaning, whereas "independence" and "impartiality" have precise legal meanings. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 135–36 (2d ed. 2012); Dominque Hascher, *Independence and Impartiality of Arbitrators: 3 Issues*, 27 AM. U. INT'L L. REV. 789, 791–92 (2012); *infra* note 70 and accompanying text. We use "cognitive illusion" to avoid confusion and to focus on intuitive cognition.

[11] States sometimes appoint judges to long-term appointments with a broad mandate; other times, national judges are elected or have finite jurisdiction. *See, e.g.*, APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Kate Malleson & Peter H. Russell eds., 2006). By contrast, parties appoint arbitrators, although courts or institutions can also appoint arbitrators. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 629 (2d ed. 2001); *infra* notes 69–70. States pay judges; but parties pay arbitrators, and tribunals allocate costs. Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769 (2011); *see also* Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 722 (2013) (arguing judges have a fiduciary duty to the legislature and public in some cases but "arbitrators do not hold the judicial office in a democracy and therefore do not have a responsibility to the people in the way judges do"). Arbitrators may have financial interests in re-appointment given prospects of further income, but arbitrators have other incentives like reputation or lost opportunity of pursuing work that is more fiscally lucrative or less likely to create conflicts of interest. *See* Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEGAL STUD. 307, 309 (2002) ("[I]t is important not to equate rationality with materialistic self-interest . . . .").

[12] *See* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS, at xix–xx (2014) (observing domestic adjudicators may have different approaches than international courts and tribunals); Posner, *supra* note 7, at 1259 ("[J]udicial behavior is likely to differ across national legal systems and indeed within a nation's legal systems . . . ."); Leon E. Trakman, *"Legal Traditions" and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 1, 2–3 (2006) (discussing different cultures within international arbitration); Vitalius Tumonis, *Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement*, 31 WISC. INT'L L.J. 35, 36 (2013) (noting the "fallacy" that "international courts are essentially analogous to their domestic counterparts, when in fact there are many more differences between them than similarities").

expertise. Judges, as generalists, may be relatively unfamiliar with the facts, law, and context of a case in front of them; arbitrators, by contrast, often have highly relevant domain expertise.[13]

Understanding how arbitrators decide is important because it can inform hotly contested debates over the proper forms of dispute resolution to deploy both international and national disputes. Senator Elizabeth Warren has taken issue with the use of arbitration and objected to the lack of "independent judges"[14] in the Trans-Pacific Partnership.[15] Likewise, the European Parliament expressed a desire to strip arbitrators of jurisdiction in trade agreements[16] with the United States, namely the Trans-Atlantic Trade and Investment Partnership (TTIP), and with Canada, namely, the Comprehensive Economic and Trade Agreement (CETA);[17] instead, the EU demands that judges must resolve

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[13] *See, e.g.*, Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV 1031, 1046 (2009); *see also* BG Group PLC v. Republic of Argentina, 134 S. Ct. 1198, 1210 (2014) ("International arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations . . . ."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633–34 (1985) (noting the specialist, elite international arbitrators appointed in that case).

[14] *TPP Opponents, Warren, Academics Highlight ISDS As Key Reason to Resist Deal*, INSIDE U.S. TRADE (Sept. 8, 2016), https://insidetrade.com/daily-news/tpp-opponents-warren-academics-highlight-isds-key-reason-resist-deal; Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

[15] At the time of writing this article, TPP was signed and was moving forward towards enactment into law but its future was somewhat uncertain. *Compare* Tim Worstall, *With Trump's Election the TPP Probably Is Dead, Yes As Is the TTIP*, FORBES (Nov. 11, 2016, 4:35 AM), http://www.forbes.com/sites/timworstall/2016/11/11/with-trumps-election-the-tpp-probably-is-dead-yes-as-is-the-ttip/#5104e7185b80 (postulating after President Trump's election that the TPP would not survive), *and* Mike DeBonis, Ed O'Keefe & Ana Swanson, *The Trans-Pacific Partnership Is Dead, Schumer Tells Labor Leaders*, WASH. POST (Nov. 10, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/11/10/the-trans-pacific-partnership-is-dead-schumer-tells-labor-leaders/?utm_term=.9fc6c62d1d98 (discussing senators' beliefs that the TPP will not pass in Congress), *with* Cyrus Sanati, *Trans-Pacific Partnership May Not Be Dead Yet*, USA TODAY (Nov. 21, 2016, 8:07 AM), http://www.usatoday.com/story/tech/columnist/2016/11/20/trans-pacific-partnership-may-not-dead-yet/93986892/ (discussing the benefits of the TPP and expressing belief that it may survive). During the midst of editing, an Executive Order withdrew the United States from the TPP. *Trump Signs EO Removing US from TPP*, C-SPAN (Jan. 23, 2017), https://www.c-span.org/video/?c4651802/trump-eo-tpp&start=24.

[16] *See EU Finalizes Proposal for Investment Protection and Court System for TTIP*, EUROPEAN COMM'N (Nov. 12, 2015), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396; *see also* EU TTIP Team (@EU_TTIP_Team), TWITTER (Sept. 16, 2015, 4:30 AM), https://twitter.com/EU_TTIP_team/status/644110990242639873.

[17] The original, signed version of CETA included arbitration; but in an unprecedented "scrubbing" process, arbitration was replaced wholesale with a standing court. Wolfgang Alschner, *Legal Scrubbing or Renegotiation? A Text-as-Data Analysis of How the EU Smuggled an Investment Court into Its Trade Agreement with Canada*, MAPPING BITS BLOG (Mar. 24, 2016), http://mappinginvestmenttreaties.com/blog/2016/03/legal%20scrubbing-ceta/. While drafting this Article, there were ongoing concerns as to whether CETA will have any force and effect. Kathleen Harris, *Justin Trudeau Says CETA Will Test European Union's 'Usefulness'*,

disputes.[18] There are similar concerns about arbitrators' suitability to decide wholly domestic disputes.[19]

This Article—in which we peer inside the arbitral mind—aspires to offer an objective, empirical, and evidence-based approach to these important normative choices about transnational dispute system design. Ultimate design choices are part of a larger puzzle that will inevitably be affected by multiple variables,[20] including practical politics, political economy, and norm preferences.[21] But by focusing on arbitrator cognition and competence, we hope to contribute to these design choices.

In Part I of the Article, we introduce international arbitration and behavioral psychology. In Part II, we identify our hypotheses and experimental

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CBC NEWS (Oct. 13, 2016, 2:55 PM), http://www.cbc.ca/news/politics/manuel-valls-parliament-hill-trudeau-1.3802584. Likewise, with the Brexit vote, TTIP negotiations are stalled. Jim Zarroli, *German Official Says U.S.-Europe Trade Talks Have Collapsed, Blames Washington*, NPR (Aug. 26, 2016, 4:31 PM), http://www.npr.org/sections/thetwo-way/2016/08/28/491721332/german-official-says-u-s-europe-trade-talks-have-collapsed-blames-washington.

[18] Recently, the EU appears to have moved towards creating a multilateral, rather than a series of bilateral, investment courts. *See, e.g.*, *Inception Impact Assessment*, EUROPEAN COMM'N (Aug. 1, 2016), http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf (outlining the process for moving forward with a multilateral investment court); EUROPEAN COMM'N, CONSULTATION STRATEGY, IMPACT ASSESSMENT ON THE ESTABLISHMENT OF A MULTILATERAL INVESTMENT COURT FOR INVESTMENT DISPUTE RESOLUTION, (2016), http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_154997.09.30%20Consultation%20strategy%20IIA_for%20publication.pdf (outlining the process for moving forward with a multilateral investment court).

[19] *See, e.g.*, Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015) https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?ref=topics; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=1; The Editorial Board, *Arbitrating Disputes, Denying Justice*, N.Y. TIMES (Nov. 7, 2015), https://www.nytimes.com/2015/11/08/opinion/sunday/arbitrating-disputes-denying-justice.html?ref=topics.

[20] *See generally* Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009); Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007). While aspects of this Article compare arbitration and litigation, other processes—including negotiation and mediation—are core options in system design and promote norms like distributive and procedural justice. Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195 (2009); Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289 (2009).

[21] Other factors, beyond those in our experiment, invariably influence system design. These might include concerns related to certainty, predictability, transparency, conflicts of interest, impartiality, legal correctness, efficiency, enforceability, and diversity. *See supra* note 4 and note 11 (identifying arbitration-related concerns); *see also infra* note 70 and note 244 (identifying arbitration-related concerns). We do not address conflicts of interest or impartiality in real disputes, as those subjects are better analyzed through arbitration doctrine or content analysis of existing cases.

methodology. In Part III, we report experimental results showing that arbitrators, like judges, are prone to intuitive decisionmaking and the influence of well-known cognitive illusions like anchoring, framing, representativeness, and egocentrism. In Part IV, we interpret the results, acknowledge the limitations of our study, and offer normative assessments. Recognizing that intuition influences adjudicative determinations irrespective of an adjudicator's title or mandate, we argue that dispute system designers should not focus on whether judges or arbitrators should decide disputes. Rather, system designers should focus on structural and procedural reforms to decrease the risk of error and to promote quality decisionmaking in international economic dispute settlement.

I. INTERNATIONAL ARBITRATION

Arbitration is a ubiquitous method of dispute settlement used in both domestic[22] and international disputes.[23] This section explores the prevalence and vitality of international arbitration. It introduces international commercial arbitration (ICA) and international treaty arbitration (ITA), explains arbitral procedures, and discusses arbitral decisionmaking.

A. A Doctrinal Primer

Parties involved in global economic activity require reliable dispute resolution. Although parties can use informal processes—like negotiation or mediation—these methods operate in the "shadow of the law."[24] International

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[22] U.S. domestic arbitration involves consumer, employment, franchise, and securities law disputes. Stephen J. Ware, *Teaching Arbitration Law*, 14 AM. REV. INT'L ARB. 231, 239 (2003); *see also* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY, § 5, 30 (2015); Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 272–75; Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 74–75 (2008); Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1176–77 (2010); Constantine Katsoris, *Securities Arbitrators Do Not Grow on Trees*, 14 FORDHAM J. CORP. & FIN. L. 49, 50 (2008); Erin O'Hara O'Connor, Kenneth J. Martin & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133 (2012). Employment arbitration is distinguishable from labor arbitration with a distinct doctrinal regime. Arthur T. Carter, Edward F. Berbarie & Sean M. McCrory, *The Principal Differences Between Labor and Employment Arbitration*, 69 THE ADVOCATE 85 (2014); William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006).

[23] Internationally, arbitration offers a proxy for diplomatic negotiation or state-to-state dispute settlement. Susan D. Franck, *Foreword: A Symposium Exploring the Modern Legacy of William Jennings Bryan*, 86 NEB. L. REV. 142, 144–45 (2007); Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L.J. 1 (2014).

[24] Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982). *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

arbitration offers formal adjudication to provide a final and binding assessment of legal rights and "has achieved a level of legitimacy to which other [types of international] disciplines can only aspire."[25]

There are multiple reasons international arbitration enjoys this stature, including historic pedigree,[26] adaptability to new contexts and the flexibility of the process,[27] the capacity to provide neutrality while avoiding fears that locals will be favored over foreigners,[28] expertise, and a strong enforcement record.[29] Moreover, in low-capacity environments where court systems may be weak, international arbitration fills a crucial developmental gap.[30]

Two core areas of modern international arbitration are ICA and ITA.[31] ICA is a traditional form of arbitration where parties resolve transnational disputes under national law.[32] ICA covers a broad range of disputes, including contract breach, business torts, and antitrust violations.[33] It typically involves commercial disputes between two businesses, but it can also encompass contract disputes between investors and states under national law related to commercial

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[25] S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 572–73 (2013).

[26] Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 242–43 (1928); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934); *see also infra* notes 40–42.

[27] *See infra* notes 31, 62–70 (describing international arbitration's substantive and procedural flexibility).

[28] *See* George A. Bermann et al., *Restating the U.S. Law of International Commercial Arbitration*, 113 PENN. ST. L. REV. 1333, 1342 (2009) ("Parties choose international arbitration primarily because they fear being subject to the potentially biased decisions of the national courts of their business-partner-turned-adversary."); Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT'L ARB. 319, 320 (2008) ("[G]rowth of arbitration has been driven by flaws in the national legal systems and the distrust and suspicion associated with litigation in a foreign country . . . .").

[29] HERBERT KRONKE, INTRODUCTION TO RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 1, 3 (Herbert Kronke et al. eds., 2010); *see also infra* note 73 (describing enforcement).

[30] Mistelis & Baltag, *supra* note 28, at 320–21.

[31] Ban-Ki Moon, UN Secretary-General Ban-ki Moon's Address to ICCA 2016 Congress, May 9, 2016, https://www.un.org/sg/en/content/sg/statement/2016-05-09/secretary-generals-address-international-council-commercial («l'arbitrage peut jouer un rôle clef pour ce qui est de restaurer l'état de droit après un conflit, puisqu'établir un système judiciaire pleinement indépendant peut prendre du temps»). Arbitration extends to other areas. *See, e.g.*, *supra* note 22.

[32] Depending upon the applicable law, ICA may require application of transnational, including the Convention on the International Sale of Goods (CISG) UNIDROIT, law principles. George Bermann, *Restating the U.S. Law of International Commercial Arbitration*, 42 N.Y.U. J. INT'L L. & POL. 175, 190–91 (2009).

[33] *See, e.g.*, JULIAN D. M. LEW, LOUKAS MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 187–219 (2003); JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 265–73 (2007).

ventures or infrastructure projects.[34] Arbitrators use existing commercial law—whether codified in national statutes, case law, or otherwise—to adjudicate claims and finally resolve disputes.[35]

ICA is common and growing.[36] International arbitration centers report that hundreds of cases are filed annually.[37] Commentators identified over 2700 disputes involved in institutional arbitration in one year and "major claims" involving billions of dollars.[38] In its 2015 analysis, the *American Lawyer* identified over 125 cases with billion-dollar claims.[39]

ITA, or arbitration devolving from international law-based treaty rights states grant to investors, also has deep roots. It arose from international law mixed-claims commissions where states created sui generis opportunities for private individuals or entities to bring claims against states for economic harm.

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[34] HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION 158, 163 (Vaughan Lowe, Dan Sarooshi & Stefan Talmon eds., 2013); Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, 24 AM. REV. INT'L ARB. 361, 382–83 (2013).

[35] W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 243, 260 (2010); *see* Susan D. Franck, The *Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 504 (2006). It is possible to apply more nebulous conceptions of fairness, namely principles of *amiable compositeur* or ex *aequo et bono*; but this is uncommon and requires parties to opt-in to the discretion. *Id.*; Leon Trakman, Ex Aequo Et Bono*: Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621, 623, 632 n.64 (2008).

[36] TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 341 app. 1 (Christopher R. Drahozal & Richard W. Naimark eds., 2005); Bermann, *supra* note 2, at 73.

[37] *See* Gilles Cuniberti, *Beyond Contract The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417, 418 (2009) ("Some of the major international arbitral institutions report that their caseload has increased dramatically."); *The AAA/ICDR and Fidal's "Dispute-Wise" Business Management France Survey Results Released*, 4 ICDR INT'L ARB. REP. 3, 3 (2013) (identifying administration of 996 cases during 2012); International Chamber of Commerce, *ICC Reveals Record Number of New Arbitration Cases Filed in 2016*, https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/ (last visited Mar. 28, 2017) (identifying 966 arbitration requests filed at the ICC in 2016); LCIA, REGISTRAR'S REPORT 1 (2013), http://www.lcia.org/LCIA/reports.aspx (identifying 290 arbitrations filed in 2013); *SCC Statistics 2014*, ARBITRATION INST. STOCKHOLM CHAMBER OF COMMERCE, http://www.sccinstitute.com/media/93526/statistics-2014.pdf (identifying 117 new arbitrations in 2013).

[38] *See* Mark Bezant, James Nicholson & Howard Rosen, *Trends in International Arbitration: A New World Order*, FTI JOURNAL 3–4 (Feb. 2015), http://www.ftijournal.com/uploads/images/GAR_020415.pdf (reporting that in 2012, there were over 2700 international arbitration cases filed in various institutions and, in 2013, the value of pending "major claims" was over US$1.6 billion); Richard W. Naimark & Stephanie E. Keer, *Analysis of UNCITRAL Questionnaires on Interim Relief*, *in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 129, 129 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (observing that, in 2000, the AAA administered over 500 disputes, and over the years, the ICC has administered cases "with claims in the billions of dollars").

[39] Michael D. Goldhaber, *Arbitration Scorecard 2015*, AM. LAWYER: FOCUS EUROPE (2015). Goldhaber's article does not indicate, however, whether the cases he analyzed were filed, pending, or just randomly sampled during the time of analysis (2013–2014).

Early arbitrations addressed disputes under the 1794 Jay Treaty,[40] involving claims about wartime debts owed to British merchants and which owes its origin to the advocacy of Alexander Hamilton,[41] and the *Alabama Claims Commission*, where arbitrators adjudicated disputes involving destroyed U.S. commercial vessels.[42]

ITA is the method of dispute resolution embedded in more than 3000 bilateral and multilateral investment treaties. These treaties grant foreign investors substantive rights and provide *ex ante* consent to arbitration.[43] Parties resolve disputes arising under the treaties, including claims of improper discrimination, failure to provide proper compensation for expropriation, and breaches of promises to provide "fair and equitable" treatment.[44] Only qualifying investors can sue, and they can only sue for state conduct breaching a treaty causing compensable damage.[45] ITA disputes receiving public attention include: investors suing Argentina for damages after Argentina devalued the peso and other emergency measures to stabilize its economy;[46] the Chevron–Ecuador dispute over activities in the Amazonian rain forest[47] where the U.S. Supreme Court recently left in place a D.C. Circuit opinion confirming a US$96

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[40] Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116; Richard B. Lillich, *The Jay Treaty Commissions*, 37 ST. JOHN'S L. REV. 260, 261–62 (1963).

[41] *See* RON CHERNOW, ALEXANDER HAMILTON 485–503 (2004) (discussing historical aspects of Jay Treaty); TODD ESTES, THE JAY TREATY DEBATE, PUBLIC OPINION, AND THE EVOLUTION OF EARLY AMERICAN POLITICAL CULTURE 82–83 (Sidney M. Milkis & Jerome M. Mileur eds., 2006) (describing initial reluctance by Hamilton and but noting his vigorous defense and support of the treaty).

[42] Charles H. Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT'L L. 259, 272–74 (2008); Barton Legum, *The Innovation of Investor-State Arbitration under NAFTA*, 43 HARV. INT'L L.J. 531, 536 (2002).

[43] Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 523–24 (2013).

[44] Some rights are analogous to a constitutional "bill of rights" for investors. Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 48 (2005); David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 767 (2000). States can limit court access with sovereign immunity, fail to permit domestic review of government conduct, or have strong rule of law. Stephen E. Blythe, *The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties*, 47 INT'L LAW. 273, 274–75, 281–82 (2013).

[45] Susan D. Franck & Lindsey Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 473–74 (2015).

[46] JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 248 (2011).

[47] Chevron Corp. v. Ecuador, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures (Perm. Ct. Arb. 2013), http://www.italaw.com/sites/default/files/case-documents/italaw1274.pdf; Jesse Greenspan, *2nd Circ. Greenlights Chevron, Ecuador Arbitration*, LAW360 (Mar. 17, 2011, 2:42 PM), https://www.law360.com/articles/232959/2nd-circ-greenlights-chevron-ecuador-arbitration (explaining that the dispute is about "pollution in the Amazon rain forest").

million award;[48] and Phillip Morris suing Australia and Uruguay (and losing both cases) for plain-packaging cigarette regulations that arguably resulted in expropriation of intellectual property.[49] Other ITA disputes are less sensational and more business-oriented, including suits involving revocation of a banking license or failure to pay dividends.[50] ITA requires using applicable law, which is usually derived from the treaty, to make decisions.

Since the first award in 1990,[51] ITA has expanded. While the global ITA caseload is smaller than ICA,[52] the value at stake is nonetheless noteworthy. The average ITA claim exceeds US$650 million, the average combined legal fees are roughly US$10 million, and arbitrators and institutional expenses cost roughly US$1 million per case.[53] Experts have estimated that ITA will cover roughly 40%–60% of global investment.[54]

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[48] Chevron Corp. v. Ecuador, 795 F.3d 200, 203, 209 (D.C. Cir. 2015), *cert denied*, 136 S. Ct. 2410 (2016); Caroline Simson, *A Cheat Sheet to Chevron's Epic Feud with Ecuador*, LAW360 (June 14, 2016), https:/www.law360.com/articles/805987/a-cheat-sheet-to-chevron-s-epic-feud-with-ecuador.

[49] Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, (Perm. Ct. Arb. 2015), http://www.pcacases.com/web/sendAttach/1711; Philip Morris Brand Sàrl v. Oriental Republic of Uruguay, ICSID ARB/10/7, Award (July 8, 2016), http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf.

[50] *See* Ross P. Buckley & Paul Blyschak, *Guarding the Open Door: Non-party Participation Before the International Centre for Settlement of Investment Disputes*, 22 BANKING & FIN. L. REV. 353, 366 (2007); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 748 (2007).

[51] Asian Agric. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), http://www.italaw.com/sites/default/files/case-%20documents/ita1034.pdf.

[52] The United Nations Conference on Trade and Development estimates there have been roughly 500 ITA disputes. Susan D. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, 55 VA. J. INT'L L. 13, 15 (2014); *see also* Bezant, Nicholson & Rosen, *supra* note 38, at 3 (estimating roughly 40–50 ICSID cases are filed every year).

[53] Franck & Wylie, *supra* note 45.

[54] *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/tpp/Summary-of-US-objectives (last visited Feb. 1, 2017); Jana Kasperkevic, *You Down with TPP? An Explainer on Obama's 'Secret' Trade Pact*, THE GUARDIAN (May 12, 2015, 10:10 PM), https://www.theguardian.com/us-news/2015/may/12/trans-pacific-partnership-explainer; Rem Korteweg, *It's the Geopolitics, Stupid: Why TTIP Matters*, CTR. FOR EUROPEAN REFORM (Apr. 2, 2015), http://www.cer.org.uk/insights/it%E2%80%99s-geopolitics-stupid-why-ttip-matters. Should TPP not go into effect, the estimate would require reconsideration. In any event, the U.S. withdrawal from TPP may require recalculation. *See supra* note 15 (indicating that the future and scope of TPP is uncertain).

Beyond sheer caseload and fiscal risks, international arbitration regulates global economic activity[55] and contributes to transnational lawmaking.[56] In ICA, tribunals render a final, binding, and enforceable decision for disputes arising under national law. These decisions create law for courts supervising arbitration or evaluating award enforceability. In ITA, tribunals evaluate treaty obligations to ascertain whether state conduct violates an investor's treaty-protected rights. This requires assessment of state liability for international law wrongs and can involve public policy considerations.[57] Although neither ICA nor ITA necessarily creates *de jure* precedent,[58] arbitration awards have a *de facto* effect[59] and have the capacity to influence doctrinal development.[60] ICA and ITA lack a unified traditional court structure, but the arbitral mandate requires arbitrators to apply law to facts and to render binding decisions that can be reviewed by national courts.[61]

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[55] *See* Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189, 190 (2007); W. Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, 24 ICSID REV.—FOREIGN INV. L.J. 185, 186, 189 (2009); Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138, 138–39 (2007).

[56] Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN. ST. L. REV. 1343, 1344 (2009); Stephan W. Schill, *International Arbitrators as System-Builders*, 106 AM. SOC'Y INT'L L. PROC. 295, 295 (2012).

[57] Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367, 370–78 (2014).

[58] Franck, *supra* note 4, at 1611–12; *see also* Rogers, *supra* note 3, at 999–1000 ("[I]n the absence of a formal system of stare decisis, and despite the confidential and 'private' nature of international arbitration, arbitration proceedings generate procedural rules and practices, and to a lesser extent substantive rules, that serve as precedent for future arbitrations and beyond."); *Id.* at 999 n.145 ("[P]ublished awards fail to 'command stare decisis respect' like a court decision[.]").

[59] Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 413 (2012); Strong, *supra* note 25, at 504.

[60] W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1929 (2010).

[61] International arbitration falls squarely within the ambit of international courts and tribunals. Gary B. Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 780–81 (2012); Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241, 245 (2007); Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 96 AM. SOC'Y INT'L L. PROC. 219 (2002). In ICA, the New York Convention permits limited review of arbitration awards by national courts. In ITA, disputes rendered pursuant to the New York Convention are similarly reviewable by national courts, whereas disputes rendered under the ICSID Convention benefit from internal annulment proceedings but are only subject to review by national courts as if the award was a national court judgment. Franck, *Legitimacy Crisis*, *supra* note 4, at 1546–55.

B. Arbitration Procedures

International arbitration is a creature of consent. Parties—whether individuals, commercial entities, or governments—must agree to arbitrate conflicts involving commercial disputes or other transnational relationships.[62] In ICA, parties typically agree to arbitrate in contracts *ex ante*,[63] and in ITA, two or more states make an *ex ante* offer in a treaty that their respective investors' can arbitrate, which investors later accept by initiating arbitration.[64] Under both ICA and ITA, parties agree arbitrators will be neutral adjudicators finally resolving disputes using applicable law. Arbitration allows parties to create tailor-made procedural rules, but practically speaking, particularly with its "judicialization"[65] or "Americanization,"[66] international arbitration procedures resemble more rigid and rule-oriented national court litigation.[67] International arbitration frequently involves submission of formal pleadings (e.g., a Request for Arbitration and Answer), requests to dismiss cases early on jurisdictional grounds, petitions for interim relief, requests for documents; competing expert reports, hearings for the evidence presentation and oral testimony, witness cross-examination, post-hearing submissions, and formal awards.[68]

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[62] *See, e.g.*, BORN, *supra* note 11, at 187, 197, 217; LEW, MISTELIS & KROLL, *supra* note 33, at 4–5, 99–186.

[63] *See* Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 90 (1995).

[64] *See* Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 314 (2014); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INV. L.J. 232, 233 (1995).

[65] INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?, at ix (Richard B. Lillich & Charles N. Brower eds., 1994); Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1342 n.22 (2007).

[66] *See, e.g.*, Roger P. Alford, *The American Influence on International Arbitration,* 19 OHIO ST. J. DISP. RESOL. 69, 69 (2003); Bernard Audit, *L'Américanisation du droit* [*The Americanization of Law*], 45 ARCHIVES DE PHILOSOPHIE DU DROIT 7 (2001); Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE INT'L L. REV. 289 (2006); Kenneth F. Dunham, *International Arbitration Is Not Your Father's Oldsmobile*, 2005 J. DISP. RESOL. 323, 326–27; Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. DISP. RESOL. 5, 5–7 (2003); George M. von Mehren & Alana C. Jochum, *Is International Arbitration Becoming Too American?*, 2 GLOBAL BUS. L. REV. 47, 47–57 (2011).

[67] BORN, *supra* note 11, at 1–2; *see also* William W. Park, *Arbitrators and Accuracy*, 1 J. INT'L DISP. SETTLEMENT 25, 26–27 (2010) ("In examining the competing views of reality proposed by each side, arbitrators aim to get as near as reasonably possible to a correct picture of those disputed events, words, and legal norms that bear consequences for the litigants' claims and defences.").

[68] *See, e.g.*, BORN, *supra* note 11, at 1–2; Franck, *supra* note 20, at 192–94.

While parties control (either directly or indirectly) arbitrator appointment,[69] arbitrators must abide by rules that require impartial and independent decisionmaking.[70] The applicable law imposes duties upon arbitrators,[71] like minimizing expense and delay in decisionmaking.[72] After arbitrators render an award, treaties facilitate streamlined enforcement of awards.[73]

C. Arbitration Decisionmaking

Given their mandate and discretion on issues of economic and doctrinal importance, international arbitrators play a vital role in global disputes. The integrity and quality of their decisionmaking is therefore central to arbitration's legitimacy as a form of dispute settlement.[74] Uncertainty about the quality of decisions has created apprehension and debate[75] about whether international arbitrators should be stripped of jurisdiction in favor of judges.[76]

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[69] There are various appointment methods. Depending on parties' agreement and applicable law, parties, co-arbitrators, arbitral institutions, or another neutral body may appoint arbitrators; national courts can also make appointments. *See, e.g.*, Born, *supra* note 11, at 614–52.

[70] *See* Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration*, 35 U. PA. J. INT'L L. 431, 438–54 (2013); Franck, *supra* note 35, at 502–12; *see also* Craig, *supra* note 35, at 253 ("It is widely recognized in the practice of international commercial arbitration and in the rules of international arbitration institutions that a party-appointed arbitrator must be impartial and independent." (footnote omitted)).

[71] LEW, MISTELIS & KRÖLL, *supra* note 33, at 279–83; Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 59 (2005); Susan D. Franck, *The Liability of International Arbitrators*, 20 N.Y. L. SCH. J. INT'L & COMP. L. 1, 4–11, 37, 44 (2000).

[72] England and Wales impose an obligation to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution" of disputes. Arbitration Act 1996, c. 23, § 33(1) (Eng.), http://www.legislation.gov.uk/ukpga/1996/23/contents.

[73] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S 38; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S 159.

[74] Stephan W. Schill, *International Arbitrators as System-Builders*, 106 AM. SOC'Y INT'L L. PROC. 295, 296–97 (2012).

[75] Patrick Sweeney, *Exceeding Their Powers: A Critique of Stolt-Nielsen and Manifest Disregard, and a Proposal for Substantive Arbitral Award Review*, 71 WASH. & LEE L. REV. 1571, 1574 (2014).

[76] *See* Editorial, *The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration; Henry Farrell, *People Are Freaking Out About the Trans Pacific Partnership's Investor Dispute Settlement System. Why Should You Care?*, WASH. POST (Mar. 26, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/26/people-are-freaking-out-about-the-trans-pacific-partnerships-investor-dispute-settlement-system-why-should-you-care/; Jonathan Weisman, *Trans-Pacific Partnership Seen as Door for Foreign Suits Against U.S.*, N.Y. TIMES (Mar. 25, 2015), https://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html?_r=2; *supra* notes 14–17; *see also* Juergen Mark, *German Association of Judges on the TTIP Proposal of the European Commission*, GLOBAL ARB. NEWS (Mar. 21, 2016), https://globalarbitrationnews.com/german-association-judges-proposal-european-commission-introduction-investment-court-system-settle-investor-state-disputes-transatlantic-trade-investmen/

Researchers have studied judges and found that they do not decide cases in a purely rational manner. Instead, judges often make initial intuitive judgments which they might, or might not, override with deliberation.[77] They are influenced, for example, by irrelevant numerical anchors,[78] the way outcomes are framed,[79] and irrelevant emotional cues.[80]

In stark contrast to this research on judges, we know little about arbitrators. Some researchers have conducted qualitative arbitrator interviews[81] or examined

(describing how German judges reject any form of transnational dispute settlement involving suits against states and instead assert national court judges should have jurisdiction); *TTIP Trade Talks: German Judges Oppose New Investor Courts*, BBC NEWS (Feb. 5, 2016), http://www.bbc.com/news/world-europe-35503885 (same).

[77] *See generally* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) [hereinafter Guthrie, Rachlinski & Wistrich, *Blinking*]; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009) [hereinafter Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*]; Guthrie, Rachlinski & Wistrich, *supra* note 10; Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PENN. L. REV. 1251 (2005) [hereinafter Wistrich, Guthrie & Rachlinski, *Disregarding*]. The theories of either a pure formalist or pure realist model of decisionmaking are unsupported by the data; rather the data supports a model of judging called the "intuitive override" model, whereby adjudication involves initial intuitive assessments that can be tested against evidence and logic. *See, e.g.*, Guthrie, Rachlinski & Wistrich, *Blinking*, *supra*; Linda A. Berger, *A Revised View of the Judicial Hunch*, 10 LEGAL COMM. & RHETORIC: JALWD 1, 17–18 (2013).

[78] *See infra* notes 143–51; *see also* Jeffrey J. Rachlinski, Andrew J. Wistrich, & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695 (2015) [hereinafter Rachlinski, Wistrich & Guthrie, *Distorted Damages*].

[79] *See infra* notes 187–92 (discussing framing).

[80] *See* Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586 (2013) (identifying how directing judicial attention shapes outcomes); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Contrition in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189 (2013) [hereinafter Rachlinski, Guthrie & Wistrich, *Contrition*] (finding apologies can induce judges to be more lenient but identifying the limitations of apologies); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 862 (2015) [hereinafter Wistrich, Rachlinski & Guthrie, *Heart*] (finding that "judges' feelings about litigants influence their judgments").

[81] *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years After Dezalay & Garth*, 28 ARB. INT'L 161 (2012); *see also* JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 10 (2013) (drawing upon interviews with international arbitrators "selected to represent as wide as possible a range of backgrounds" to conclude arbitrators and judges decide cases differently); Sophie Nappert & Dieter Flader, *Psychological Factors in the Arbitral Process*, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 134 (Doak Bishop & Edward G. Kehoe eds., 2d ed. 2010) (exploring "what persuades and triggers decision-making in international arbitrators" by circulating questionnaires on listservs, receiving nineteen responses, and failing to identify a response rate).

arbitration outcomes.[82] We are unaware of any scholarship experimentally testing international arbitrator decisionmaking.[83] Until now.

II. RESEARCH QUESTIONS AND METHODOLOGY

In this Part, we introduce our study of arbitrator decisionmaking, including our research hypotheses, the demographic characteristics of our participants, and our experimental methodology.

A. Research Hypotheses

It is an open question whether international arbitrators, like other experts, are influenced by cognitive illusions. Given the existing experimental literature on national court and administrative law judges (ALJs), one reasonable theory is that, like other adjudicators, cognitive illusions affect international arbitrators. An alternative theory is that cognitive illusions affect international arbitrators differently, presumably making them inferior adjudicators and thereby less worthy of resolving complex international disputes.

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[82] *See, e.g.*, Christopher R. Drahozal, *Behavioral Analysis of Arbitral Decision Making*, *in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 319 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (exploring ICA empirical literature); Susan D. Franck, *Development and Outcomes in Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 438 (2009) (exploring whether the context, political or otherwise, of arbitration explains ITA outcomes); Franck & Wylie, *supra* note 45 (exploring arbitrator-based and case-based models of ITA outcomes); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010) (exploring appointment patterns on arbitration outcomes); *see also* Sergio Puig, *Social Capital in the Arbitration Marketplace*, 25 EUROPEAN J. INT'L L. 387 (2014) (exploring the web of the arbitrator marketplace in ITA).

[83] In 2004, Drahozal observed, "[e]mpirical studies of the prevalence of cognitive illusions in arbitral decisionmaking are exceedingly rare. I am aware of no such studies using experimental techniques." Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 114 (2004). This remains true in international arbitration. Scholars, like Drahozal, have largely explored the theoretical application of cognitive illusions to international dispute settlement. *See, e.g.*, Shari Seidman Diamond, *Psychological Aspects of Dispute Resolution: Issues for International Arbitration*, *in* INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 327 (Albert Jan van den Berg ed., 2003); Jan-Philip Elm, *Behavioral Insights into International Arbitration: An Analysis of How to De-Bias Arbitrators*, 27 AM. REV. INT'L ARB. 74 (2016); Ernest A. Haggard & Soia Mentschikoff, *Responsible Decision Making in Dispute Settlement*, *in* LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 277 (June Louin Tapp & Felice J. Levine eds., 1977); Lucy Reed, *The 2013 Hong Kong International Arbitration Centre Kaplan Lecture Arbitral Decision-Making: Art, Science or Sport?*, 30 J. INT'L ARB. 85 (2013); Edna Sussman, *Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do About Them?*, 24 AM. REV. INT'L ARB. 487 (2013). A study published after this article was accepted for publication experimentally explores the cognitive illusions of a small group of domestic arbitrators. Rebecca Helm, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Are Arbitrators Human?*, 13 J. EMPIRICAL LEG. STUD. 666 (2016).

Given existing research on judges, we began our study with five descriptive research hypotheses designed to shed light on the extent to which arbitrators make intuitive, impressionistic decisions or deliberative and fully rational decisions:

1. International arbitrators solve generic problems in an intuitive, rather than deliberative, manner.
2. When faced with a concrete international dispute, international arbitrators are influenced by relevant and irrelevant numeric anchors when awarding damages.
3. International arbitrators respond more strongly to the possibility of losses and less strongly to the possibility of gains when deciding disputes.
4. International arbitrators resolve disputes based on representative cues rather than deliberative reason.
5. International arbitrators are prone to egocentric bias when evaluating themselves and the disputes they address.

We also sought, where possible, to compare arbitrators to national judges who responded to similar hypothetical vignettes in earlier research. Because we did not provide the same problems to judges and arbitrators, and because we did not test them at the same time, we are limited in our ability to make statistically valid comparisons. Where comparison seemed legitimate, we hypothesized that judges would outperform arbitrators, rendering more deliberative decisions.[84]

B. International Arbitrators: Participants

Our target population was international arbitrators. Unlike national judges, there is no unified repository identifying all individuals willing to serve, or with a history of serving, as an international arbitrator. This is, in part, because the international arbitration community changes frequently and unpredictably as people enter and exit the profession.[85]

We sampled arbitrators attending the prestigious biennial Congress of the International Council for Commercial Arbitration (ICCA) in 2014 in Miami. These participants had no special interest in psychology or psychological

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[84] Given the elite and competitive international arbitration market, our research hypothesis could have been that arbitrators exhibit superior cognition. Null-Hypothesis Significance Testing tests both hypotheses, as the objective is to identify group differences.

[85] *See* DEZALAY & GARTH, *supra* note 81, at 12, 28, 61, 117, 157, 242, 248, 296 (1996); Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 167 (1998).

research.[86] ICCA is an important group in the international arbitration community, and the biennial ICCA Congress is a prominent event that many international arbitrators attend. ICCA therefore provided a singular opportunity to research international arbitrators.[87]

At the 2014 ICCA conference, 1031 professionals registered for the Congress.[88] Based on cross-referencing registered participants with publicly available information,[89] we identified 496 registrants (roughly 48% of attendees) with experience as an international arbitrator.

We administered materials to all registrants attending the first plenary session. After excluding four individuals requesting their responses be omitted from published research, 548 international arbitration specialists completed the experiment. As our hypotheses involved the cognition of international arbitrators, rather than counsel,[90] we excluded responses from subjects who had never acted as an arbitrator.[91] We therefore analyzed responses from 262 individuals who self-identified as having been an arbitrator[92] in at least one ICA or ITA dispute.[93] These participants represented roughly 48% of all registrants

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[86] ICCA is a prestigious non-governmental organization of the international arbitration bar. ICCA's governing board includes prominent arbitrators, the ICSID secretary general, past presidents of the American Society of International Law, Principal Legal Counsel for the Government of Mexico in negotiating NAFTA, General Counsel of ExxonMobil, Attorney General of Kenya, Pakistan's former Attorney General, Singapore's Chief Justice of the Supreme Court, Chair of the Hong Kong International Arbitration Centre, Director of the Cairo Regional Centre for International Commercial Arbitration, and authors of several core international arbitration treatises. Franck et al., *supra* note 4, at 441; Franck, et al., *International Arbitration: Demographics, Precision and Justice*, *in* LEGITIMACY: MYTHS, REALITIES, CHALLENGES, ICCA CONGRESS SERIES NO. 18, at 33, 57–9 [hereinafter Franck et al., ICCA MIAMI CONGRESS PROCEEDINGS]. None of the authors are ICCA members.

[87] Franck et al., *supra* note 4, at 440–42.

[88] *See* Franck et al., *supra* note 4, at 441 & n.35 (noting, as twelve registrants worked on the research team and two people reviewed earlier drafts, "only 1,017 of the registrants were capable of answering the survey"). ICCA Congress Proceedings reflect the large, transnational attendees. *List of Participants*, *in* LEGITIMACY: MYTHS, REALITIES, CHALLENGES, ICCA CONGRESS SERIES NO. 18, at 1041 (Albert Jan van den Berg ed., 2015).

[89] We cross-referenced attendee lists with past arbitrator activity in *Who's Who Legal*, *Chambers & Partners*, IAI Paris, *Global Arbitration Review*, company websites, and Google searches. Special thanks is owed to Stephanie Miller, a research librarian at Washington & Lee University School of Law where the lead author formerly worked, for undertaking this background research.

[90] Future research might explore counsel, or the cognition of others in international arbitration, including insurers, third-party funders, experts, parties, or policy makers.

[91] When analyzing those serving as counsel, results tended to be similar. A full discussion of variations between counsel and arbitrators is beyond the scope of this Article. As arbitrators serve as counsel—and international arbitrators are drawn from the arbitration bar—similarities would be unsurprising.

[92] By walking up and down the rows in a large conference hall, we visually observed that many of the subjects completing the survey were arbitrators. Franck et al., *supra* note 4, at 443.

[93] Some participants failed to state they were ICA or ITA arbitrators. *Id.* at 448 n.57.

returning materials and 53% of arbitrators registered for the ICCA Congress.[94] Sixty-seven ITA arbitrators responded. This represents a reasonable proportion (27%) of known ITA arbitrators.[95]

The arbitrator sample included 46 (17.6%) women and 216 (82.4%) men.[96] The average age of an arbitrator was 54,[97] and the average male arbitrator was reliably older than the average female.[98] Most of the international arbitrators were from a developed country.[99] Despite data collection in Miami, the largest proportion (48%) of arbitrators were European,[100] and English was the primary native language of 43.3%.[101] For legal training, 38.5% of arbitrators were exclusively trained in common law, 33.8% were exclusively trained in civil law, and 27.7% had training in *both* common and civil law. Arbitrators in our sample had decided thirty-five cases on average.[102]

C. *Experimental Method*

We created stimulus materials to assess arbitrators' decisionmaking by asking them to resolve mock disputes using brief case vignettes. We created scenarios mirroring realistic international commercial and investment disputes and then used the arbitrators' responses to those scenarios to assess arbitration

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[94] *Id.* at 443 n.44.

[95] *See* SUSAN D. FRANCK, MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION (forthcoming) (coding ITA arbitrators on tribunals rendering public awards); Puig, *supra* note 82, at 403 (coding ICSID arbitrator appointments and identifying 419 arbitrators).

[96] Franck et al., *supra* note 4, at 453.

[97] *Id.*

[98] The mean age was 55.8 for male arbitrators, and 47.5 for female arbitrators. *Id.* at 453–55. The age difference was statistically significant and medium-sized. *Id.* at 454. The gender demographics and age breakdown have been replicated by research from practitioners. For example, the International Chamber of Commerce—one of the world's preeminent international arbitration institutions—recently identified that about 10% of their arbitrators were female, and female arbitrators were generally younger than male arbitrators. Mirèze Philippe, *Speeding Up the Path for Gender Equality*, 14 TRANSNAT'L DISP. MGMT., Jan. 2017, at 4; *see also* Lucy Greenwood & C. Mark Baker, *Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration*, 28 ARB. INT'L 413 (2015) (identifying historical gender balance issues in the field of arbitration and recent efforts, both internal and external, to redress the balance).

[99] This was true irrespective of whether "development status" derived from arbitrators' nationality using Organisation for Economic Co-operation and Development, World Bank, or United Nations Development Programme Human Development Index definitions. Franck et al., *supra* note 4, at 458–65.

[100] *Id.* at 459–60. Largest representation came from the United States (23.2%), United Kingdom (9.6%), France (8.8%), Brazil (7.2%), Switzerland (5.6%), Germany (4.8%), and Canada (4.8%). *Id.*

[101] *Id.* at 458–59. Other dominant primary languages were German (10.6%), French (10.2%), Portuguese (8.3%) and Spanish (7.1%). *Id.* Of the 205 participants fluent in a second language, 60.5% ($n = 124$) spoke English, French 20.5% ($n = 42$), Spanish 7.3% ($n = 15$), and German 2% ($n = 4$).

[102] The median was ten. The 25th and 75th percentile appointment levels were three and forty. *Id.* at 450.

decisionmaking. We followed protocols used in prior studies of judges—including U.S. state court judges,[103] U.S. federal court judges,[104] U.S. bankruptcy judges,[105] U.S. magistrates,[106] U.S. administrative law judges,[107] Canadian judges,[108] Dutch judges,[109] and Swiss judges.[110]

We presented a panel at the first plenary session entitled "Arbitration and Decision-Making: Live Empirical Study."[111] The title was intentionally vague to avoid revealing our research topic before participants responded. At the beginning of the panel, we offered attendees the opportunity to complete a confidential survey. All attendees were orally instructed on protocols, including requests to read the survey, to take the materials seriously, to respond to each question in order, and to work independently without reference to others or internet searches.[112] We asked participants to complete the survey and instructed them not to identify themselves. We then distributed randomized surveys.

The survey materials began with a one-page instruction and consent form. The first page asked participants to read and respond to the questions independently and without discussing it with others, informed them that participation was voluntary and explained we intended to use responses during a follow-up presentation at the Congress.[113] The five remaining pages contained

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[103] Guthrie, Rachlinski, & Wistrich, *Blinking*, *supra* note 77, at 10–11; Wistrich, Guthrie & Rachlinski, *Disregarding*, *supra* note 77, at 1279–82.

[104] Wistrich, Rachlinski & Guthrie, *Heart*, *supra* note 80, at 874–76; Wistrich, Guthrie & Rachlinski, *Disregarding*, *supra* note 77, at 1281–82.

[105] Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1230–32 (2006); *see also* Rachlinski, Guthrie & Wistrich, *Contrition*, *supra* note 80, at 1208–09 (evaluating apologies and adjudication for bankruptcy judges).

[106] Guthrie, Rachlinski & Wistrich, *supra* note 10, at 786–77.

[107] Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1491–94.

[108] Wistrich, Rachlinski & Guthrie, *Heart*, *supra* note 80, at 874–76; Rachlinski, Wistrich & Guthrie, *Distorted Damages*, *supra* note 78, at 720.

[109] Rachlinski, Wistrich & Guthrie, *Distorted Damages*, *supra* note 78, at 726.

[110] Mark Schweizer, *Kognitive Täuschungen vor Gericht* [*Cognitive Illusions in Court*], DISSERTATION ZÜRICH (2005), http://www.decisions.ch/dissertation/diss_methode.html (analyzing Swiss judges through mail surveys).

[111] *See* INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *ICCA Miami Congress 2014 Working Programme* (Apr. 6, 2014), http://www.arbitration-icca.org/media/2/14334105310240/icca_website_schedule_03.27.14.pdf.

[112] We provided instructions orally and on the first page. *See* International Council for Commercial Arbitration, *Monday Plenary ICCA Miami Congress 2014*, ARBITRATION-ICCA.ORG (Apr. 7, 2014), http://www.arbitration-icca.org/conferences-and-congresses/ICCA_MIAMI_2014-video-coverage/ICCA_MIAMI_2014_Plenary_Session_7_April.html (36:52–43:22).

[113] Subjects had the option to avoid use of their data in published research; four participants exercised this option. *Cf.* Guthrie, Rachlinski & Wistrich, *supra* note 10, at 787 (noting one judge of 168 declined to have responses used).

the survey materials; four pages pertained to the experiment and the remaining page asked questions related to Congress themes of legitimacy and precision.[114] For the experimental materials, each participant received questions to test our hypotheses.[115] To create controlled experimental conditions, although neither the introductory instructions nor the first page indicated this, we devised multiple versions of several scenarios which were randomly assigned to participants. Subjects had approximately thirty-five minutes to complete the survey. During survey administration, participants remained in the room, kept silent, and appeared to take the process seriously.

All session attendees returned the survey—whether fully completed, partially completed, or left blank—before leaving the plenary session. In total, 98.2% of the attendees answered at least one question.

III. RESULTS

We found evidence that arbitrators, like judges, tended to make intuitive decisions and were influenced by well-known cognitive illusions like anchoring, framing, and the like. Where comparisons with judges were possible, we were generally unable to reliably distinguish between the responses of arbitrators and judges, suggesting the two groups performed comparably.[116] We also found evidence that arbitrators, as a group, were unlikely to merely "split the baby" between claimants and respondents. Taken together, the findings cast doubt on the bona fides of the normative narrative that international arbitrators should be stripped of jurisdiction and replaced by judges due to cognitive predisposition.

A. Testing the Intuitive-Override Model

We hypothesized that international arbitrators, like their judicial counterparts, make decisions using an "intuitive-override" model[117] whereby arbitrators may initially make an intuitive assessment that they could ultimately

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[114] Demographic information and survey questions involving Congress themes are described elsewhere. Franck et al., ICCA MIAMI CONGRESS PROCEEDINGS, *supra* note 86, at 57–60; Franck et al., *supra* note 4, at 440–45.

[115] We created the materials over two years and beta-tested them on law students in St. Gallen, Switzerland, and Lexington, Virginia.

[116] There were only two instances when international arbitrators outperformed judges, namely one test comparing Cognitive Reflection Test scores with one group of state court judges and the representativeness hypothetical. *See infra* notes 132–35, 226. The two times we identified a reliable difference, the practical significance of the difference was small. The evidence, as measured and analyzed in our studies, never demonstrated that the intuitive cognition of international arbitrators was inferior to judges.

[117] *See supra* note 77 (discussing the intuitive-override model of adjudication).

override using more rational and deliberative cognition. To test this hypothesis, we administered the Cognitive Reflection Test (CRT), a simple test of deliberative reasoning described below.

1. CRT

Economist Shane Fredrick developed the CRT to test whether decisionmaking involves dual processing[118] where subjects have "the ability or disposition to resist reporting the response that first comes to mind."[119] The CRT asks three questions. For each question, there is an intuitive but incorrect answer, as well as a correct answer that is easy to discern upon reflection.

The first CRT question is: "A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost?" The intuitive response, 10¢, is mathematically incorrect. If the bat costs US$1 more than 10¢ (US$1.10) and the ball is 10¢, the total cost is US$1.20. The correct answer is 5¢, with a bat costing US$1.05 and a ball costing 5¢.[120] The calculation is relatively easy, but the analysis requires deliberation to avoid generating inadvertent error.

The second CRT question is: "If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?"[121] The intuitive answer is 100, but this is wrong. Deliberation reveals that if five machines make five widgets in five minutes, then each machine makes a single widget in five minutes. With that base rate, one can calculate it takes five minutes for 100 machines to make 100 widgets.[122]

The final CRT question asks: "In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take the patch to cover half of the lake?"[123] The intuitive (and incorrect) answer is twenty-four days. Using slower cognition to override snap judgments reveals the correct answer is forty-seven days. If the rate of growth means the amount doubles every day, compounding means half the lake was covered the day before (i.e., day forty-seven, not day forty-eight).

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118 Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, 49, 51–52 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

119 Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP., Fall 2005, at 25, 35.

120 *Id.* at 27, 37.

121 *Id.* at 26–27.

122 Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 10–11.

123 Frederick, *supra* note 119, at 27.

2. *Arbitrators' Performance*

We analyzed responses from the arbitrators who answered all three questions.[124] International arbitrators' average CRT score was 1.47,[125] which exceeds mean CRT scores of judges participating in prior studies as shown in Table 1.

Table 1: Overall CRT Results – Arbitrators Compared to Judges and Others (*n*)

Sample (*n*)	Mean	0 Correct Answers	1 Correct Answer	2 Correct Answers	3 Correct Answers
MIT students (61)	2.18	7%	16%	30%	48%
Carnegie-Mellon students (746)[126]	1.51	25%	25%	25%	25%
International Arbitrators (239)	1.47	24.3% (58)	24.7% (59)	30.5% (73)	20.5% (49)
North American Lawyers (247)[127]	1.46	24.3%	26.3%	28.3%	21.1%
Administrative Law Judges (126)[128]	1.33	30.2%	27.8%	20.6%	21.4%
Florida Judges (252)[129]	1.23	30.6%	31.0%	23.8%	14.7%
University of Michigan: Ann Arbor students (1267)[130]	1.18	31%	33%	23%	14%
Web-based Online Studies (525)[131]	1.10	39%	25%	22%	13%

[124] Not all researchers code CRT responses the same way. Frederick did not indicate whether his totals included subjects failing to answer a question. Acknowledging it could inflate mean CRT scores, others exclude answers for judges failing to answer all three items. Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 14–15 n.81; Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 586 (2013). To permit comparison with judges, we followed Guthrie et al.'s coding conventions.

[125] Eleven arbitrators opted not to complete CRT questions ($n = 251$; SD = 1.07). Table 1 excludes subjects failing to answer all three questions. When including non-answers, CRT score was slightly lower (M = 1.44; SD = 1.07; $n = 251$), supporting the theory that coding affects CRT scores. For the expanded sample, 25.1% got zero correct ($n = 63$), 25.5% got one correct ($n = 64$), 29.9% got two correct ($n = 75$), and 19.5% got all three items correct ($n = 49$).

[126] *See* Frederick, *supra* note 119, at 29 (reporting results from MIT and CMU).

[127] *See* Wistrich & Rachlinski, *supra* note 124, at 585–87 (evaluating lawyers from Oregon, Texas, and Ontario in the insurance sector).

[128] Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1499–500.

[129] Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 14–15.

[130] Frederick, *supra* note 119, at 29.

[131] *Id.*

While it appears that international arbitrators slightly outperformed U.S. judges on the CRT, we found a statistically meaningful difference between the arbitrators and the Florida state court judges only,[132] not between the arbitrators and ALJs.[133] These mixed results warrant caution in drawing any inferences that arbitrator reasoning is superior to judicial reasoning.[134] Moreover, the practical significance of any difference was minimal, as effects were statistically small.[135]

In addition, international arbitrators and judges were similarly likely to select the intuitive, but incorrect, responses to the CRT questions. Florida state judges nearly always selected the intuitively incorrect answer for the bat-and-ball question, and more than half of their responses for other questions were the intuitive responses suggested by the problem. Likewise, ALJs, as specialist adjudicators, tended to provide intuitive but incorrect responses.[136] Arbitrators' responses mimicked this pattern. Of the 158 arbitrators providing the incorrect answer on the bat-and-ball problem, 87.3% provided the intuitive answer;[137] on the widget problem, 62% of the 121 arbitrators providing an incorrect response identified the intuitive answer; and on the lily-pad problem, 69.8% of the 86 arbitrators providing incorrect answers gave the intuitive response as shown in Table 2.

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[132] Using a test comparing correct CRT responses for 239 arbitrators and 252 Florida judges, there was a meaningful difference; and arbitrators obtained a higher a proportion of correct responses ($\chi^2(3) = 7.92$; $p = 0.048$; $r = 0.13$; $n = 491$).

[133] A test comparing correct total number of CRT responses for 239 arbitrators and 126 ALJs was unable to detect reliable difference ($\chi^2(3) = 4.42$; $p = 0.22$; $r = 0.11$; $n = 365$). Given the smaller ALJ sample, the null result may derive from low power. The comparison between arbitrators and judges had less than 50% power, which is below the accepted 80% threshold. Given the small effect size, sample of 781 arbitrators should have requisite power.

[134] Although the CRT items judges and arbitrators received were textually identical, temporal differences in administration and other factors limit the strength of inferences directly comparing judges and arbitrators. *See, e.g.*, Maggie E. Toplak, Richard F. West & Keith E. Stanovich, *Assessing Miserly Information Processing: An Expansion of the Cognitive Reflection Test*, 20, THINKING & REASONING 147, 149 (2014) (expressing concern about use of the CRT given its increasing exposure).

[135] According to Cohen, effect sizes (*r*-values) up to 0.10 are "small," 0.11 to 0.30 are "medium," and 0.31 to 0.50 are "large." JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 79–80 (2d ed. 1988). The effect sizes, when comparing arbitrators to U.S. judges, were close to $r = 0.10$. *See supra* notes 132–33.

[136] *See* Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1499–500; *see also* Wistrich & Rachlinski, *supra* note 124, at 587 ("Among the lawyers who got the questions wrong, 94.9 percent (149 out of 157), 58.1 percent (seventy-two out of 124), and 62.6 percent (sixty-two out of ninety-nine) chose the intuitive responses (ten cents, one hundred minutes, and twenty-four days) to the three questions, respectively.").

[137] For incorrect non-intuitive responses, most answers included numerical figures. Some responses, however, included written comments such as "No way to know."

Table 2: CRT Results—Subjects Providing Incorrect Responses from Samples of 239 International Arbitrators, 252 Generalist Judges, and 126 ALJs[138]

	Number of Participants Answering Incorrectly	Incorrect Answer Giving Intuitive Response (*n*)	Incorrect Answer Giving Any Other Response (*n*)
Question 1:		10 Cents	
International Arbitrators	158	87.3% (138)	12.7% (20)
Generalist Judges	181	96.7% (175)[139]	3.3% (6)
ALJs	79	93.7% (74)	6.3% (5)
Question 2:		100 Minutes	
International Arbitrators	121	62.0% (75)	38% (46)
Generalist Judges	141	57.5% (81)	42.5% (60)
ALJs	74	52.7% (39)	47.3% (35)
Question 3:		24 Days	
International Arbitrators	86	69.8% (60)	30.2% (26)
Generalist Judges	125	68.0% (85)	32.0% (40)
ALJs	57	63.2%[140] (36)	36.8% (21)

3. *Synthesis*

International arbitrators provided predominantly intuitive responses on the CRT. These results cast doubt upon narratives that arbitrators always analyze problems in fully rational ways. Like the judges who have been studied, arbitrators, as a whole, did not perform well on this relatively easy test. Although some individual arbitrators and judges showed an ability to overcome intuition with deliberation in some circumstances, members of both groups gravitated toward intuitive and impressionistic decisionmaking.

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[138] Judge data derived from Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 15–16, and data from ALJs derived from Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1499–500, and the original dataset.

[139] *Blinking* incorrectly calculated the percentage as "88.4%," but the stated proportions ("175 of 181 judges") were accurate. Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 15–16.

[140] Upon reviewing the original dataset, the 64.9% reported in Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1500, was incorrect.

The CRT is not a test of legal reasoning, but scholars have identified reliable links between CRT and legal decisions.[141] For instance, judges performing well on the CRT performed well on an evidentiary inference problem based on *Byrne v. Boadle*.[142] Below, we explore whether arbitrators, like judges, tended to make intuitive judgments when confronted not with a general test like the CRT but when confronted with hypothetical disputes similar to those they confront in their professional capacity.

B. Anchoring: Irrelevant and Relevant Anchors

Anchoring is a form of intuitive decisionmaking involving numerical estimates. When people make estimates, they tend to rely upon an initial value that is readily available, which "anchors" subsequent numerical estimations, even when the initial figure is irrelevant or an intentional distractor.[143] While people can adjust away from initial anchors with deliberation, they often fail to adjust sufficiently. Thus, anchors, including both reasonable and completely unreasonable anchors, often have an outsized impact on final estimates.

Kahneman & Tversky's "wheel of fortune" experiment demonstrated the impact of irrelevant anchors on estimates.[144] In this classic study, researchers spun a wheel of fortune to generate a random number and then asked subjects to estimate the percentage of African states in the United Nations. Subjects' responses were biased towards the initial value provided by the wheel of fortune, even though that number had absolutely nothing to do with African representation in the United Nations. Even when individuals are paid for assessments[145] and when information is updated,[146] anchoring persists.

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[141] Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 420 (2011). Judges performing on the CRT did well on an evidential inference problem based on *Byrne v. Boadle*. *Id.*; *see also* Toplak, West & Stanovich, *supra* note 134, at 149 ("Shockingly, since it is based on just three items, the CRT has proven to be a potent predictor of performance on rational thinking tasks.").

[142] We also used this hypothetical. *See infra* notes 217–24.

[143] *See generally* JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING 71–72 (2012); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974) [hereinafter Tversky & Kahneman, *Judgment*]; *see also* Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 19–21; Guthrie, Rachlinski & Wistrich, *supra* note 10, at 790–94; Wistrich, Guthrie & Rachlinski, *Disregarding*, *supra* note 77, at 1286–93.

[144] Tversky & Kahneman, *Judgment*, *supra* note 143.

[145] Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, 120, 125–26 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

[146] Fritz Strack & Thomas Mussweiler, *Heuristic Strategies for Estimation Under Uncertainty: The Enigmatic Case of Anchoring*, *in* FOUNDATIONS OF SOCIAL COGNITION 79, 80 (Galen V. Bodenhausen & Alan

Previous research has demonstrated that anchors affect both generalist and specialist U.S. adjudicators. One experiment asked judges to analyze damages after learning about a plaintiff who suffered serious injuries from a car crash (including several months of hospitalization and being confined later to a wheelchair) due to a truck driver's negligence. It then asked judges to rule on a motion to dismiss and assess damages. The control group was given a basic request for a damage assessment, but judges in the experimental condition were also told the defendant claimed the US$75,000 amount-in-controversy requirement was not satisfied.[147] The natural anchor—US$75,000—affected judges' damage assessments, with judges in the experimental condition awarding roughly 30% less than judges in the control condition.[148] In another study, ALJs assessed damages in employment discrimination where the applicable law permitted compensation for mental anguish and emotional distress. The hypothetical included testimony from the plaintiff that she suffered from "anxiety, sleeplessness, and bad dreams" and she mentioned, as an aside, that she had recently seen a "court TV show featuring a case she claimed was similar to hers."[149] Whereas some judges simply learned the plaintiff discussed the irrelevant TV show, others learned the compensatory damage in the "court TV show" was US$415,300. Once again, data revealed anchors affected damage assessments; the mean award was twice as large for ALJs exposed to an irrelevant anchor.[150] Recent research has demonstrated irrelevant anchors likewise influenced judges from Canada, the Netherlands, and Germany.[151]

In transnational adjudication, relevant anchors are useful when they are grounded in fact or law, but irrelevant anchors create risk of error and injustice. In cases where the financial consequences are meaningful for one or both parties—such as damage assessments in large transnational commercial or investment disputes—irrelevant anchors pose particularly pernicious risks. We set out to examine these risks by developing two vignettes to test the impact of anchors on arbitrator decisionmaking. Whereas the first hypothetical tests

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J. Lambert eds., 2003); Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017, 2026 (2006); Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. DISP. RESOL. 597, 597–98 (2006).

147 Guthrie, Rachlinski & Wistrich, *supra* note 10, at 789–92.

148 Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 21.

149 Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1502–03.

150 *Id.* at 1504–06.

151 *See* Rachlinski, Wistrich & Guthrie, *Distorted Damages*, *supra* note 78; *see also id.* at 710 & n.99 (describing unpublished research demonstrating anchors influenced Taiwanese judges).

relevant anchors, the second hypothetical tests irrelevant anchors. In both scenarios, anchoring had a significant effect on outcomes.

1. Relevant Anchor: Materials and Results

One hypothetical tested two relevant anchors and also offered us an opportunity to test experimentally whether arbitrators "split the baby" when presented with two damage assessments. Nevertheless, quantitative analyses of real awards revealed that arbitrators did not render compromise awards,[152] but the longstanding myth persists[153] that arbitrators ignore the merits and "split the baby."[154]

To test for the impact of a relevant anchor on arbitral decisionmaking, we created a hypothetical involving the commercialization of beachfront property where a developer created a project for low-density, ecologically responsible land development.[155] Later, however, the state where the land was located passed legislation prohibiting the developer from enjoying the beneficial use of the property. In the scenario, all parties—both the investor and the state—agreed a compensable expropriation occurred. The only question was damages. The vignette provided the applicable law, namely that compensation due was for the

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[152] *See* Christopher R. Drahozal, *Busting Arbitration Myths*, 56 U. KAN. L. REV. 663, 665, 673–77 (2008) (identifying the "split the baby" myth of arbitration but providing contradictory empirical evidence); Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split the Baby" Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573, 574–75 (2001) (analyzing arbitration awards to observe, overall, tribunals awarded roughly 47%–50% of claimed amounts but identifying that the average figure masked a bimodal distribution where tribunals either rendered awards in favor of either claimant or respondent); Carter Greenbaum, *Putting the Baby to Rest: Dispelling a Common Arbitration Myth*, 26 AM. REV. INT'L ARB. 101, 101 (2015) (providing empirical data that "the incidence of compromise awards in commercial arbitration is insignificant").

[153] *See supra* note 7; DOUGLAS SHONTZ, FRED KIPPERMAN & VANESSA SOMA, RAND INST. FOR CIV. JUST., BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL, at x, 7–12 (2011), http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf (identifying that parties' "overwhelming believe that arbitrators tend to 'split the baby' with their rulings—that is, they are unwilling to rule strongly for one party"). The history, scope, strength, and persistence of the "split the baby" myth is a topic of quantitative analysis beyond the scope of this Article. We nevertheless observe that many commentators continue to discuss this problem. *See, e.g.*, Zela G. Claiborne, *Top Five Myths about Commercial Arbitration*, JAMS (Sept. 7, 2015), https://www.jamsadr.com/publications/2015/top-five-myths-about-commercial-arbitration; AM. ARB. ASS'N, SPLITTING THE BABY: A NEW AAA STUDY (2007), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_014040; Ana Carolina Weber et al., *Challenging the "Splitting the Baby" Myth in International Arbitration*, 31 J. INT'L ARB. 719 (2014).

[154] Drahozal, *supra* note 152, at 675; Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 454 (2007).

[155] To enhance the external validity of the scenario, we patterned it after other cases confronting relevant anchors to assess the value of beach front property. Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica, ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000); Unglaube v. Costa Rica, ICSID Case Nos. ARB/08/1, ARB/09/20, Award (May 16, 2012).

"fair market value", or "what a willing buyer would pay to a willing seller for the best use of the property." Arbitrators were then instructed to resolve the dispute as if they were a sole arbitrator. We told arbitrators that both parties submitted credible expert reports referencing historical data from real estate sales, listing prices of the original property, sunk costs, market data on the demand for beach rental property, and the potential profits of ecologically-friendly developments in similar states. The only difference between the scenarios subjects received was the valuation in expert reports. In all versions, the respondent state that had expropriated the property asserted the land value was US$1 million. In the low anchor condition, the developer claimed damages of US$10 million; and in the high anchor condition, the developer claimed US$50 million.

Measures of central tendency reflected the influence of relevant anchors. While the mean award for all answers was roughly US$16 million,[156] there was meaningful variation in damage assessments for low and high anchors.[157] Arbitrators in the high anchor condition made reliably larger awards. Whereas the average award in the high anchor condition was nearly US$24.8 million,[158] the mean award for arbitrators in the low anchor condition was roughly US$5.8 million.[159]

At first blush, damage awards might appear to support a "split the baby" hypothesis, as—for both conditions—mean awards were roughly halfway between the values of the two expert reports. The difference between the competing expert reports in the low anchor condition should generate a compromise award of US$5.5 million,[160] which was similar to the US$5.8 million mean. Likewise, splitting the difference between the experts in the high

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[156] M = 16,430,556; n = 90; SD = 16,942,692.

[157] A t-test revealed meaningful variation ($t(96) = -6.844$; $p < 0.001$; $r = 0.57$; $n = 98$). It was not necessary to transform damages, as skewness (1.06) was acceptable. Results remained significant using a non-parametric Mann-Whitney U-test of medians (U = 1548; $p < 0.001$). The smaller n reflects subjects randomly received either a beach-front anchoring hypothetical or settlement framing hypothetical.

[158] M = 24,773,585; n = 53; SD = 18,314,970. For the high anchor, the 25th percentile was US$ 7,500,000 the median was US$25,000,000, and the 75th percentile was US$44,500,000.

[159] M = 5,794,444; n = 45; SD = 3,451,486. For the low anchor, the 25th percentile was US$2,500,000, the median was US$50,000,000, and the 75th percentile was US$10,000,000.

[160] The difference between the two expert reports was US$9 million, so 50% is US$4.5 million. By adding US$4.5 million to the state's US$1 million valuation or subtracting US$4.5 million from the developer's US$10 million claim creates a compromise award of US$5.5 million.

anchor condition would create a US$25.5 million[161] award, which was similar to the reported US$24.8 million mean. Further analysis, however, reveals the visual similarity is an oversimplification that hides fundamental variance in arbitrator decisionmaking.

We used arbitrators' responses to calculate whether an award was a compromise between the two expert valuations. This meant an arbitrator rendered an award precisely 50% between the two expert valuations, when it rendered a US$5.5 million award in the low anchor condition or US$25.5 million in the high anchor condition. Where arbitrators awarded US$1 million, this was a 0% award, as damages fully reflected respondent's expert. When damages were in line with claimant's expert, the arbitrator awarded 100%. Other proportions reflected arbitrators' awards and degree of compromise.[162]

Irrespective of experimental condition, tests were unable to identify meaningful differences in subjects' proportionate responses.[163] In other words, there was no evidence that anchoring affected the relative proportions awarded. This, in turn, suggests arbitrators' propensity to award compromise awards was equivalent across conditions.[164]

The responses revealed variation in damage assessments. Figure 1 reflects less than half of arbitrators (41.8%; $n = 41$) awarded investors *more than 50%* of the claimed damages; and as reflected by red shades, more than half arbitrators (56.1%; $n = 55$) awarded investors *less than 50%* of claimed damages. Only 2% ($n = 2$) of arbitrators rendered pure compromise award that precisely "split the baby" between the two expert reports. Instead, one of the largest sub-groups of responses came from arbitrators awarding 40%–49% of damages.[165]

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[161] The difference between the two reports was US$49 million, so 50% is US$24.5 million. Adding US$24.5 million to the state's US$1 million valuation or subtracting US$24.5 million from the developer's US$50 million claim creates a compromise award of US$25.5 million.

[162] To calculate the percentage, we subtracted US$1 million from awarded damages (to address respondent's concession of a US$1 million valuation). For the low anchor, we divided that amount by US$9 million; for the high anchor, we divided by US$49 million, the respective spreads between the two reports.

[163] The proportions exhibited acceptable skewness (0.03) and required no transformation. With two experimental conditions, a *t*-test analyzed group differences in the high and low anchor groups; and the test was unable to identify a meaningful difference ($t(96) = 0.625$; $p = 0.53$; $r = 0.06$; $n = 98$).

[164] The analysis lacked sufficient power to conclude there was no effect of anchoring on proportion awarded. Given the small effect size ($r = 0.06$), *a priori* power analysis reveals a sample of over 781 arbitrators would be required to make inferences about a null result.

[165] Five arbitrators awarded 49%, two arbitrators awarded 48%, and ten arbitrators awarded 44%. Five arbitrators awarded 39%. One awarded 33%.

The two largest responses did not reflect a compromise between the parties' claims. Rather, the most common response involved arbitrators taking an "all-or-nothing" approach and following the expert report of one party. Leaving aside the 5% of arbitrators who gave less than either party anticipated, 13% ($n = 13$) of arbitrators rendered awards following respondent's expert report, and 26.5% ($n = 26$) of arbitrators used claimant's expert report as the basis of damages. These responses undermine claims that arbitrators, as a group, "split the baby."

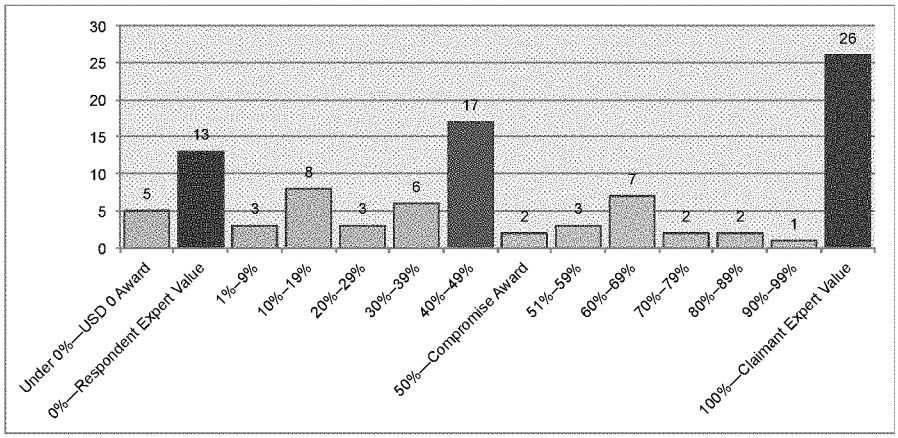

Figure 1. Response Frequency: Arbitrators' Proportionate Damage Awards ($n = 98$).

While the data did not demonstrate arbitrators never "split the baby"—arbitrators sometimes did precisely that—it does cast doubt on the universality and prevalence of such a narrative. It is empirically wrong to suggest that international arbitrators, as a group, exhibited monolithic tendencies. Rather, the data suggest that conventional wisdom about arbitrator decisionmaking must be replaced with an alternative theory.[166] At best, there were three different paradigms for international arbitrators, namely a group inclined to prioritize claimant valuations, a group inclined to prioritize respondent valuations, and a

[166] Judge Posner argues arbitrators seek to maximize appointments by rendering compromise awards. Posner, *supra* note 7, at 1260; Richard Posner, *What Do Arbitrators Maximize?*, *in* LAW AND ECONOMICS OF INTERNATIONAL ARBITRATION: FIFTH INTERNATIONAL CONFERENCE ON LAW AND ECONOMICS AT THE UNIVERSITY OF ST. GALLEN 123, 124–25 (Peter Nobel & Philipp von Ins eds., 2014) ("[T]here would be a tendency of arbitrators to split the difference between the parties rather than side entirely with one party."); *see also* Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 110, 128 (1983) (exploring the theoretical rational actor model). The data disrupted this theory, as a small group of arbitrators rendered "split the baby" awards. More arbitrators rendered "all or nothing" or somewhat more respondent-favorable awards, suggesting an alternative theory is warranted to explain intuitive adjudication styles.

group that was roughly in the middle but tended to render more respondent-favorable awards. It is, however, difficult to predict such propensities in advance or how they might vary by context. Our hypothetical involved an ITA dispute; it is possible—but by no means certain—that arbitrators behave differently in ICA disputes.[167] At a minimum, given the control parties have over the appointment of one arbitrator, the data suggest parties should engage in due diligence when making arbitrator appointments. Parties may even wish to consider providing arbitrators in advance with cognitive assessments to identify their intuitive predispositions and the capacity to override intuitive reasoning with rationality.

2. *Irrelevant Anchor: Materials and Results*

One would hope that relevant anchors that have a nexus with the applicable law and facts influence damage awards, as anchoring has the capacity to be adaptive. The data demonstrated that the relevant anchors exerted this influence, and none of the arbitrators made a damage award in excess of an investors' expert report.[168] This finding left open the question, however, of whether irrelevant anchors—which risk improperly inflating damages—also influence decisionmaking.

To test the influence of *irrelevant* anchors, we created a hypothetical dispute involving a small transnational law firm (Law Firm) that, at its clients' behest, opened a local office in a new country. The host country, however, strictly regulated the practice of law by foreign lawyers. A government raid on Law Firm resulted in destruction of irreplaceable items (including a rare family photo album and specialized technological equipment), incarceration of employees, and deportation of foreign lawyers.[169] Law Firm experienced adverse publicity, damaged reputation, and lost clients. Law Firm then initiated ITA to recover damages, claiming the host state failed to provide "fair and equitable treatment"

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[167] Studies regarding ICA, whereby commercial arbitrators also did not demonstrate a pure propensity to "split the baby" in real cases, cast a degree of doubt on such a hypothesis. *Compare supra* notes 152–53, *with* Figure 1.

[168] We note, however, that five of the arbitrators awarded an amount for expropriation less than what the respondent state conceded was due. *See* Figure 1. It is possible that these arbitrators had an intuitive approach favoring states, did not closely read the question, or there was some other basis for the assessment.

[169] Aspects of the hypothetical were similar to other disputes resolved by arbitration. Al-Kharafi & Sons Co. v. Libya, (Kuwait v. Libya), Final Arbitral Award, 4–5 (Mar. 22, 2013); Desert Line Projects LLC v. Yemen (Oman v. Yemen), ICSID Case No. ARB/05/17, Award, 4–10 (Feb. 6, 2008); Mitchell v. Democratic Republic of the Congo (U.S. v. Democratic Republic of the Congo), ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 3 (Nov. 1, 2006).

(FET). The Request for Arbitration requested moral damages, namely damages for inchoate harms like duress, loss of reputation, or roughly equivalent to pain and suffering.[170] We asked arbitrators to assume they were the tribunal chair, there was jurisdiction over the dispute, there was an FET violation, and the calculation of damages rested on equitable principles under the applicable international law standards.

Unbeknownst to arbitrators, they did not all receive the same version. Like the experiment including information about an irrelevant "court TV show," we injected information about an irrelevant case[171] with no bearing on the dispute. Reflecting a common practice in international arbitration, the hypothetical indicated: "After the final hearing, you go to dinner with your co-arbitrators to relax. During dinner, as an aside, one of your co-arbitrators mentions a case where a U.S. District Court applied U.S. domestic tort law to hold Sudan liable for ____ to those injured by the bombing of a ship in Yemen." We randomly assigned arbitrators to one of four conditions. In the control group, arbitrators received no information about the valuation of the unrelated U.S. tort case. In contrast, three experimental conditions contained different valuations of the irrelevant case, namely: (a) US$1 million in damages (a low anchor), (b) US$50 million in damages (a medium anchor), or (c) US$300 million in damages (a high anchor). Arbitrators were asked: "How much do you award Law Firm in moral damages for the FET violation?"

Irrelevant anchors influenced international arbitrators' damage awards. Using raw data, the average award was US$9.2 million,[172] but damages varied across conditions. The mean award in the control condition was roughly US$10 million.[173] Mean awards in the low anchor condition were roughly US$5 million,[174] and US$5.5 million in the medium anchor condition.[175] The mean raw award in the high anchor condition was US$16.3 million.[176] Median awards likewise reflected the influence of anchors. For both the control group and low-

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[170] *See* Matthew T. Parish, Annalise K. Nelson & Charles B. Rosenberg, *Awarding Moral Damages to Respondent States in Investment Arbitration*, 29 BERKELEY J. INT'L L. 225, 225–30 (2011); Ben Saul, *Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights*, 19 AM. U. INT'L L. REV. 523, 555–60 (2004).

[171] The irrelevant anchor was based upon a case involving U.S. sailors injured during a bombing. Harrison v. Republic of Sudan, 882 F. Supp. 2d 23 (D.D.C. 2012).

[172] M = 9,168,2485; *n* = 218; SD = 29,366,890.

[173] M = 10,347,348; *n* = 49; SD = 36,177,797.

[174] M = 4,975,636; *n* = 55; SD = 18,903,177.

[175] M = 5,478,068; *n* = 59; SD = 10,744,534.

[176] M = 16,269,091; *n* = 55; SD = 41,659,270.

anchor group, Figure 2 demonstrates the median award was US$100,000. By contrast, the median award for both the medium anchor and high anchor groups was US$1,000,000.

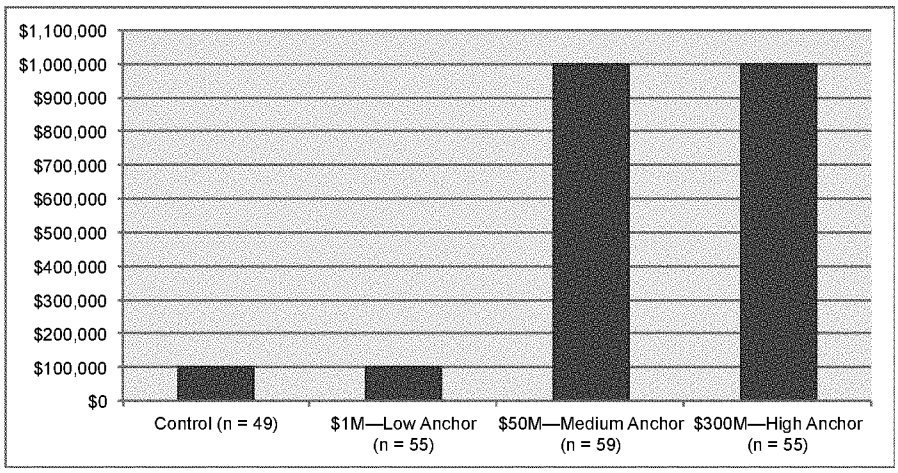

Figure 2. Median Award: Legal Services Hypothetical with Four Anchors.

In an effort to identify the nuance in the variation of damage awards, Table 3 offers a quartile distribution of the different awards across conditions. Particularly in the 75th percentile, medium and high anchors appeared to swing damages in an upward direction.

Table 3: Quartile Distributions of Damage Awards in Anchoring Conditions.

	25th Percentile	Median—50th Percentile	75th Percentile	Total Sample
Control Condition: No Anchor	0	100,000	1,000,000	49
Low Anchor Condition: US$1 million	0	100,000	1,000,000	55
Medium Anchor Condition: US$50 million	1,000	1,000,000	5,000,000	59
High Anchor Condition: US$300 million	0	1,000,000	10,000,000	55

To identify whether variations in damages were meaningful, we conducted a between-groups Analysis of Variance (ANOVA).[177] Because of positive skewing, we transformed the data[178] to ensure it met the assumptions of statistical tests.[179] The test revealed anchoring exerted a statistically significant effect on international arbitrators' damage awards.[180]

Not all anchors had the same effect, however. Conservative follow-up comparisons[181] identified that the high anchor was reliably influential. Damage awards in the high anchor condition were meaningfully larger than awards from arbitrators in either the control group or the low anchor condition.[182] A more liberal test[183] suggested both the high and medium anchor were linked with increased damages.[184] It was never possible, however, to detect a reliable difference between awards in the control group and low anchor condition.[185] The

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[177] *See* TIMOTHY C. URDAN, STATISTICS IN PLAIN ENGLISH 105–10 (3d ed. 2010) (explaining ANOVAs and their proper use).

[178] Winsorizing requires identifying and converting extreme values into the upper and lower bounds of the distribution. W.J. Dixon, *Simplified Estimation from Censored Normal Samples*, 31 ANNALS MATH. STAT. 385, 385 (1960); John W. Tukey, *The Future of Data Analysis*, 33 ANNALS MATH. STAT. 1, 18–19 (1962). Winsorizing identifies outliers using Tukey's hinges, which computes low and high cutoffs, and replaces outlying values with the upper and lower bounds of Tukey's hinges. This reformulates data to fit test assumptions but retains data. DAVID J. SHESHKIN, HANDBOOK OF PARAMETRIC AND NONPARAMETRIC STATISTICAL PROCEDURES 403 (3d ed. 2004); Franck, *supra* note 82, at 456.

[179] Skewness of the raw data was an unacceptable 5.17. After Winsorization, skewness was an acceptable 0.92.

[180] The ANOVA results were significant ($F(3217) = 4.696$; $p = 0.003$; $r = 0.25$; $n = 218$). A non-parametric Kruskal-Wallis test was marginally significant ($\chi^2(3) = 7.203$; $p = 0.06$; $r = 0.18$; $n = 218$). When combining the control and the low anchor conditions, which appeared to operate similarly, a Kruskal-Wallis test revealed a significant group difference ($\chi^2(2) = 6.755$; $p = 0.03$; $r = 0.17$; $n = 218$). When combining the medium and high anchor conditions, which appeared to operate similarly, a Kruskal-Wallis test revealed a significant group difference ($\chi^2(2) = 7.166$; $p = 0.03$; $r = 0.18$; $n = 218$).

[181] Tukey's honestly significant difference (HSD) provides follow-up significance testing. FREDERICK J. GRAVETTER & LARRY B. WALLNAU, ESSENTIALS OF STATISTICS FOR THE BEHAVIORAL SCIENCES 365 (6th ed. 2008).

[182] HSD comparisons between the high anchor and: 1) the control group ($p = 0.03$) or 2) the low anchor ($p = 0.01$) were meaningful. We could not find a meaningful difference when comparing awards in medium and high anchor groups ($p = 0.81$).

[183] A Fisher's Least Significant Difference (LSD) test permits comparison of sub-groups for individual group differences. LSD, however, is more likely to identify meaningful differences when compared to more conservative HSD analyses.

[184] For LSD comparisons using the medium anchor, the significant effect was comparing the medium anchor and low anchor ($p = 0.02$). Comparing the medium anchor with the control group was marginally significant ($p = 0.05$). Comparisons between medium and high anchors remained non-significant ($p = 0.37$).

[185] For HSD comparisons between control and low anchor conditions, there was no significant effect ($p = 0.99$); and for LSD, there was no identifiable effect ($p = 0.74$). Because of the proportion of responses in the control condition where arbitrators rendered awards that were below the value provided in the "low" anchor condition, these results have limited value in identifying the lack of an effect of a "low" anchor. Moreover, the

significant results about high anchors nevertheless opens the possibility that, in international arbitration, anchors must be sufficiently large to exert a meaningful influence.

The results demonstrated that, like generalist and specialist judges, anchoring influences international arbitrators. It is, unfortunately, not possible to compare the influence of anchoring on arbitrators and judges directly, as hypotheticals provided to the groups involved distinct legal questions, different anchors, and different categories. Nevertheless, we can conclude with some confidence that anchoring influenced both groups.

The results suggest that it may be prudent to explore reforming international arbitration to require parties to plead damages with specificity at an early phase (or otherwise provide detailed expert reports in advance) to justify amounts claimed. As claimants are positioned to know their own damages and relevant information is within their control, the burden of such a requirement is likely minimal; and the potential benefit of creating procedural mechanisms to minimize the pernicious effect of anchoring likely outweighs systemic costs. Moreover, as ensuring there are thorough assessments of damages at the outset of a case is consistent with best practices in international arbitration, it is likely that quality counsel already conduct these analyses and consult with their clients in advance about the costs-and-benefits of pursuing arbitration. Imposing formal requirements—whether in institutional rules or party agreement—will therefore not change the practice of many lawyers and will create incentives for quality in others.

We also note that some of the international arbitrators were not fully content with the brief information we provided when responding to the anchoring questions. Among those responding to the beachfront property hypothetical testing relevant anchors, 25% complained about insufficient information; among those responding to the legal services hypothetical testing irrelevant anchors, 18.8% of arbitrators made manuscript comments complaining about insufficient information to make a calculation. For the beachfront property dispute, one subject noted that, "much depends upon quality of experts" and identified concerns about the subjective aspects of what is a "willing buyer." This, however, also makes them somewhat similar to U.S. judges, as similar proportions of judges who received one-page anchoring hypotheticals also expressed discontent with the sufficiency of material provided.

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lack of a statistically significant effect means that drawing reliable inferences about the absence of an effect is problematic.

Anchoring is a uniquely powerful phenomenon, but other information—including other numbers, like the amounts claimed or expert reports with relevant values—may minimize anchoring's deleterious effects. Moreover, arbitrators in live cases will have much more information about the parties and the dispute. Opposing counsel will likely use opposing anchors in the course of their advocacy, which one would hope would offer a relevant anchor based upon the fact and law. International arbitrators also have the authority to ask questions to test the integrity of anchors and to appoint experts. Even where anchors exert a powerful influence, effects could be muted using existing procedures within arbitration as debiasing tools.[186]

Although there are inevitable limitations, there are reasons to believe the results are generalizable beyond the laboratory. Damage demands, whether by claimants or respondents in a counter-claim, are salient anchors. Other research has demonstrated that, even with more information or alternative anchors, adjudicators were unable to fully disregard initial anchors. International arbitrators do have time and opportunity to deliberate, but it is unclear whether deliberation will ameliorate the effects of an anchor by encouraging deliberation or exacerbate the effects of an anchor through group polarization.

C. Framing

The framing of options can influence how people make decisions.[187] When choosing between options that appear to be gains relative to the status quo, people become risk avoiders, preferring a sure thing to a gamble. When choosing between options that seem like losses relative to the current state of affairs, people often make risk-seeking choices, rejecting a certain loss in favor of a

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[186] Normative reforms deriving from evidence-based insights are discussed in Section IV. Debiasing in anchoring is notoriously difficult, as inoculants can create alternative anchors or facilitate over-correction. *See* Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1757 (2003); Rachlinski, Wistchrich & Guthrie, *Distorted Damages*, *supra* note 78, at 732–35; Jeffery J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 603 (1998).

[187] *See, e.g.*, Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 AM. PSYCHOLOGIST 341 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and Psychology of Choice*, 211 SCI. 453 (1981). *But see* James N. Druckman, *Using Credible Advice to Overcome Framing Effects*, 17 J.L. ECON. & ORG. 62 (2001) (suggesting framing can diminish or disappear when subjects obtain credible information).

gamble that might enable them to avoid losing anything at all. People find losses more aversive and unfair than they find equivalent gains attractive and fair.[188]

In one illustrative study, researchers gave subjects the following problem: "A company is making a small profit. It is located in a community experiencing a recession with substantial unemployment . . . ."[189] In the loss condition, subjects learned there was "no inflation," but the company was decreasing wages by 7%. In the gain condition, subjects learned that there is "substantial unemployment and inflation of 12%," but the company decided "to increase salaries by only 5%."[190] Researchers asked subjects to evaluate the fairness of these options. Although employees' real income shifts were approximately the same, "judgments of fairness are strikingly different. A wage cut is coded as a loss and consequently judged unfair. A nominal raise which does not compensate for inflation is more acceptable because it is coded as a gain to the employee . . . ."[191]

Researchers have found that framing influences both novice and expert decisionmakers, including judges.[192] We set out to examine whether it also influences international arbitrators. We used two groups of framing scenarios to test international arbitrators. The first set of hypotheticals involved more traditional gain versus lost framing effects, which used a standard methodology to request either a numerical price adjustment or a fairness adjustment. The second hypothetical involved framing deriving from a contract rescission, which also permitted exploration of the potential effect of arbitrator appointment on commercial disputes.

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188 Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297, 307–08 (1992). Low-probability losses and gains can operate differently. *See* Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017, 2034–35 (2006).

189 Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 731 (1986).

190 *Id.*

191 *Id.* at 731–32.

192 *See* Linda Babcock et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 293–97 (1995) (framing affects lawyers); Guthrie, Rachlinski & Wistrich, *supra* note 10, at 796–97 (framing affects judges); Barbara J. McNeil et al., *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENG. J. MED. 1259, 1262 (1982) (framing affects physicians); Devon G. Pope & Maurice E. Schweitzer, *Is Tiger Woods Loss Averse? Persistent Bias in the Face of Experience, Competition, and High Stakes*, 101 AM. ECON. REV. 129, 155 (2011) (framing affects professional golfers).

1. Framing: Price Adjustment and Fairness Assessment

We tested whether arbitrators evaluated gain and loss frames differently using a scenario involving an international price renegotiation dispute.[193] In our materials, two commercial entities—Outsourcer and Service Provider—had a contract for IT-related services. The contract required periodic price adjustment, but permitted pricing disputes to be resolved with arbitrators deciding *ex aequo et bono*, which requires decisions based upon fairness and equitable principles, and is a well-known basis for decision in international arbitration.[194]

We randomly assigned arbitrators to different conditions to explore the effect of framing. In the loss version, arbitrators learned, "A group of prominent economists predict that the economic outlook is muted with an inflation rate of 0%. Outsourcer proposes to cut its pay to Service Provider by 3%." In the gain version, arbitrators learned: "A group of prominent economists predict that the economic outlook is bustling with an inflation rate of 5%. Outsourcer proposes to increase its pay to Service Provider by 2%." In both scenarios, the net economic impact to Service Provider is a 3% difference in revenues.

Having presented the arbitrators with one of these two basic substantive frames, we asked two different questions requiring them to assess the dispute.[195] First, we asked a randomly assigned group of arbitrators to make a price adjustment. We asked a second randomly assigned group of arbitrators to evaluate the relative fairness of Outsourcer's proposed price adjustment on a four-point scale (from "completely fair" to "very unfair").

We found that gain and loss frames affected arbitrators' evaluations.

When asked to make price adjustments, the arbitrators in the gain condition adjusted, on average, 4.44%, while those in the loss condition adjusted by an

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[193] Price review disputes, for example, are typical within the oil and gas industry. *See, e.g.*, Julian Cardenas Garcia, *An Era of Petroleum Arbitration Mega Cases*, 35 HOUS. J. INT'L L. 537, 539 (2013); Christopher Goncalves, *Breaking Rules and Changing the Game: Will Shale Gas Rock the World?*, 35 ENERGY L.J. 225, 251 (2014); *Gas Price Renegotiation: A Sign of the Times*, WINSTON & STRAWN LLP (Jan. 21, 2015), http://cdn2.winston.com/images/content/9/2/v2/92799/Gas-Price-Renegotiation-JAN2015.pdf; *see also* Suez v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 83 (July 30, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf (discussing price review disputes within the water distribution and waste water treatment context).

[194] Statute of the International Court of Justice art. 38(2), June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187; Trakman, *supra* note 35, at 631–32.

[195] One subset of arbitrators randomly received the price adjustment version and was randomly assigned to the gain or loss condition; and another subset of arbitrators randomly received the fairness assessment version and was randomly assigned to the gain or loss condition.

average of only 1.03%[196] as shown in Table 4. Stated simply, arbitrators in the gain condition adjusted prices four times as much as those in the loss condition.

Table 4: Percentage of Price Adjustment when Framed as Loss or Gain.

	Mean	Standard Deviation	Total
Gain Condition: 5% Inflation and 2% Raise	4.444	1.838	65
Loss Condition: 0% Inflation and 3% Cut	1.030	3.414	50

Likewise, we also used the same Outsourcer and Service Provider scenario to request fairness assessments. Rather than asking for a numerical decision, as international arbitration law sometimes requires arbitrator to make assessments based upon equitable principles, we asked the arbitrators to assess the fairness of the modification. The results, illustrated in Table 5, demonstrated that framing affected arbitrators' fairness assessments.

Table 5: Fairness Evaluation of Price Disputes when Framed as Loss or Gain: Percentage Giving Classification (*n* = number of responses).

	Completely Fair	Acceptable	Unfair	Very Unfair	Total
Gain Condition: 5% Inflation and 2% Raise	6.3% (4)	39.7% (25)	41.3% (26)	12.7% (8)	63
Loss Condition: 0% Inflation and 3% Cut	1.6% (1)	25.4% (16)	65% (41)	8% (5)	63

Because so few arbitrators in both conditions identified Outsourcer's proposal as "Completely Fair," we condensed the four-category variable into a two-category variable. We combined responses evaluating the proposal as fair—namely, Completely Fair and Acceptable—and responses evaluating the

[196] A *t*-test analyzed identified reliable difference in price adjustments ($t(135) = -6.875$; $p < 0.001$; $r = 0.54$; $n = 115$). Using Cohen's conventions, the effect size was small-to-medium. *See generally* COHEN, *supra* note 135, 113–16.

proposal as unfair—namely Unfair and Very Unfair, and then tested for differences. We found evidence that framing affected arbitrators' decisions.[197]

In short, arbitrators, like judges, were susceptible to the effects of framing. Direct comparisons are not available, but based on a review of the prior studies on judges,[198] it appears that arbitrators were not more susceptible to framing.

2. *Framing: Contract Rescission and Appointment*

Framing creates asymmetries between parties in transactions (e.g., buyers versus sellers), as well as parties embroiled in disputes (e.g., claimants versus respondents). These natural frames might influence judges and arbitrators.[199]

In an unpublished study, Rachlinski and Wistrich found that framing affected judges' decisions.[200] They gave Utah state judges a vignette involving a dispute over a video game sale. Both litigants, who were attending a video game convention, misunderstood the game's value when concluding the contract. The only issue was whether there was a mutual mistake about a basic assumption of the contract warranting rescission. The hypothetical was analogous to *Sherwood v. Walker*, where a mutual mistake by both parties voided a contract.[201] In *Sherwood*, the issue was whether the cow was fertile or infertile; and in the hypothetical, the question was whether the goods being sold was a rare vintage game or not.[202]

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[197] Condensing the categories into a 2x2 design, a Fisher's exact test revealed that gain and loss frames reliably influenced arbitrators' fairness assessments ($p = 0.04$; $r = 0.20$; $n = 126$). Using Cohen's conventions, the effect size was small-to-medium. *See id.*

[198] *See* Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1507–09; Rachlinski, Guthrie & Wistrich, *supra* note 105, at 1240–41. For example, ALJs assessed framing in a different context using identical categories. Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1507–09. When assessing economically equivalent rent payments framed as a gain (i.e., a discount) or a loss (i.e., a surcharge), framing exerted a reliable effect on ALJs. *Id.* For judges in the gain condition responding to rent payments, 29% evaluated the payment as "Completely Fair," 67% evaluated rent payment as "Acceptable," 5% evaluated the assessment as "Unfair," and 0% ranked the assessment "Very Unfair." *Id.*; *compare id.*, *with* Table 4.

[199] *Cf.* Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269 (2015) (experimental research on ordinary individuals in the United States reflected that intuitive predispositions affected assessments of contract formation and also revealed a gap between existing U.S. contract doctrine and colloquial understandings of contracts).

[200] Jeffrey J. Rachlinski & Andrew J. Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary* (Apr. 2017) (unpublished manuscript) (on file with authors).

[201] 33 N.W. 919 (Mich. 1887).

[202] *Id.* at 923–24. Although a classic in contracts casebooks, *Sherwood* is of limited value in Michigan given *Lenawee County Board of Health v. Messerly*, 331 N.W.2d 203 (Mich. 1981).

Not all judges received the same version of the hypothetical. In one version, both parties believed the video game had little value and the plaintiff was the *seller* who sold the video game for US$1 but later learned it was worth US$38,000. In the second version, both parties believed the video game had high value and the plaintiff was the *buyer* who bought the videogame for US$38,000 but later learned it was worth US$1.[203] Both scenarios asked judges to decide whether to grant plaintiff's summary judgment motion for rescission. Although the applicable law arguably required rescission in both cases,[204] framing influenced judges' willingness to rescind contracts. When the plaintiff was the buyer (who paid US$38,000 for a worthless game), 82.3% (14 out of 17) of judges rescinded the contract.[205] In contrast, when the plaintiff was the seller (who received US$1 for a valuable game), only 40.6% (13 out of 32) of judges rescinded the contract.[206]

We developed an analogous scenario for the arbitrators participating in our study.[207] Rather than a video game contract, the dispute involved a five-year concession contract to extract "all minerals" on a 2000 hectare site.

In one version, the concession was for a site named "LaKapa," where both parties believed the site contained iron pyrite (i.e., fool's gold) and agreed on a contract price of US$1 million. An independent expert appointed by both parties valued the site at US$2.5 million but mistakenly surveyed Lake Apa (i.e., the

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[203] This hypothetical is a slight variation on classic gain/loss framing. Selling a valuable videogame for US$1 is the equivalent of a foregone gain where the seller obtained some value but nevertheless did not obtain the value both parties believed to exist. By contrast, buying a videogame for US$1 that both parties believed was worth US$38,000 is a loss. Rachlinski & Wistrich, *supra* note 201.

[204] As the hypothetical invoked the *Restatement (Second) of Contracts*, it is possible that rescission would not be granted. The judges were told: "Utah courts have adopted the rule regarding mutual mistake stated in the *Restatement (Second) of Contracts*, which provides that a contract is voidable when 'a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of promises.'" The judges were not instructed on other *Restatement* provisions, including the full text of § 152 or § 154. Those provisions—involving risk allocation, which party bears the risk of a mistake, and when a contract is voidable—create a possibility that rescission is improper. It is possible judges used their pre-existing knowledge of the full scope of contract doctrine to adjudicate the doctrinal question elements of rescission.

[205] In this loss condition, fourteen of the seventeen judges rescinded the contract; only three judges failed to rescind. *Id.*

[206] In the foregone gain condition, thirteen of the thirty-two judges rescinded; nineteen judges failed to rescind the contract. *Id.*

[207] As contract disputes heard by judges and international arbitrators likely vary, it was necessary to adjust the hypothetical to keep materials as realistic as possible within experimental constraints. Parties' natures can vary, contract subject matter varies, amounts in dispute are larger, and practices regarding expert valuation can vary. Given the transnational context, we did not rely on U.S. legal materials when instructing arbitrators on the applicable law.

wrong site); but in reality, LaKapa contained gold deposits and was worth US$500 million. In a second version, the concession still involved "LaKapa," but this time, both parties believed the site contained gold and agreed on a contract price of US$380 million. A jointly appointed independent expert valued the site at US$500 million but again mistakenly surveyed the wrong location; in reality, LaKapa contained significant iron pyrite deposits and was only worth US$2.5 million. The arbitrators were also instructed that under the applicable law, parallel to the instruction in the videogame hypothetical, "a contract is voidable when 'a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of promises.'"[208] Like the judges' hypothetical, the contract dispute provided two frames, and in both conditions, parties made mutual mistakes about the contract.

Regardless of condition, 89.9% of international arbitrators rescinded the contract.[209] We nevertheless found some evidence of a small framing effect. Where a buyer sought rescission, a slightly smaller proportion of arbitrators (6.6%) disregarded the applicable law to enforce the contract. In contrast, where a seller sought rescission, a slightly larger proportion of arbitrators (14%) enforced the contract, as shown in Table 6.

Table 6: Contract Rescission and Framing: Percentage Rescinding
(n = responses)

	Rescind Contract	Enforce Contract
Intended Purchase of Gold Mine: Buyer/Investor Seeks Rescission	93.4% (127)	6.6% (9)
Intended Purchase of Fool's Gold: Seller/State Seeks Rescission	86% (104)	14% (17)
Total	89.9% (231)	10.1% (26)

Overall, the data demonstrate that framing appeared to influence international arbitrators.[210] As compared to their judicial counterparts answering

[208] As international arbitrators come from different legal traditions, our experiment omitted any reference to the *Restatement (Second) of Contracts* and provided a clean statement of the governing law.

[209] Two hundred thirty-one arbitrators rescinded the contract and twenty-six enforced. Five arbitrators did not respond.

[210] A Fisher's exact test revealed that framing was marginally significant ($p = 0.06$; $n = 257$). The technical non-significance could be due to insufficient power. E*x post* power analysis reveals that power of the analysis was 60%. *A priori* power analysis reveals a sample of 343—nearly 100 more arbitrators—would be required to reliably ascertain the lack of a framing effect. Although the Fisher's test is arguably preferable, a Pearson's Chi-Square Test of Independence revealed that arbitrators were reliably affected by whether the claimant was a buyer

a different question, arbitrators did not appear more susceptible to framing than the Utah judges. Framing could, however, operate both similarly and differently when comparing arbitrators and judges. One can imagine that it is possible that other types of judges, who answered the precise hypothetical we administered to arbitrators—rather than the hypothetical involving consumers, without an independent expert report, and with an express reference to the *Restatement (Second) of Contracts*[211]—could perform differently than the Utah judges and more similarly to the international arbitrators. The more critical insight, based upon our framing experiments, is that we were unable to identify evidence that the cognition of international arbitrators was inferior to their judicial counterparts.

As a final matter, although it is not a traditional cognitive illusion but is of interest to international arbitration, we tested whether rescission decisions varied based on whether the arbitrator was appointed by the claimant, respondent, or a neutral arbitration institution. The tests were unable, however, to ascertain a reliable link: (1) between appointment process and rescission decisions,[212] or (2) the larger model that tested interactions among framing and appointment variables.[213] Table 7 provides a breakdown of arbitrator responses purely as a function of appointment.

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or seller ($\chi^2(1) = 3.889$; $p = 0.049$; $r = 0.16$). Using Cohen's convention, the effect size for the significant effect was statistically small.

[211] *See supra* note 205.

[212] When focusing purely on the appointment variable, a Pearson's Chi-Square Test of Independence failed to confirm our hypothesis that appointment affected decisions ($\chi^2(2) = 0.181$; $p = 0.91$; $r = 0.03$; $n = 257$). The overall pattern was, irrespective of appointment condition roughly 90% of arbitrators correctly applied the applicable law and rescinded the contract. Inferences about the lack of a reliable relationship are improper as *ex post* power analysis reveals that, because of the small effect size, the power of the analysis was 30%–40%.

[213] For the 2x3 design that analyzed both the frame and the appointment conditions, it was not possible to identify an interaction where frame and appointment variations produced meaningfully different rescission decisions ($\chi^2(5) = 8.121$; $p = 0.15$; $r = 0.18$; $n = 257$). For buyer/investor claims: (a) with buyer/investor appointment, forty-two (89.4%) rescinded and five enforced; (b) with seller/state appointment, forty-two (95.5%) rescinded and two enforced; and (c) for ICSID appointment, forty-three (95.6%) rescinded and two enforced. For seller/state rescission: (a) with seller/state appointment, thirty-six (92.3%) rescinded and three enforced; (b) with buyer/investor appointment, twenty-nine (80.6%) rescinded and seven enforced; (c) with ICSID appointment, thirty-nine (84.8%) rescinded and seven enforced. For the 2x3 design, the power of the analysis was between 0.60–0.70. Although standard social science protocols tolerate an error of 20%, the *ex post* power analysis reflects a 30%–40% risk of error. Note 214, *infra*, offers an *a priori* power analysis of the sample required to reliably identify the reliable lack of an effect.

Table 7: Contract Rescission and Appointment: Percentage Rescinding (n = responses)

	Rescind Contract	Enforce Contract
Claimant Appointment	90.7% (78)	9.3% (8)
Respondent Appointment	88.8% (71)	11.2% (9)
Institutional Appointment	90.1% (82)	9.9% (9)
Total	89.9% (231)	10.1% (26)

We observe that, as these are null results (i.e., the tests were unable to identify a statistically significant effect), particular caution is warranted in drawing inferences. The null results cannot prove the lack of an effect, but they are a piece of evidence to consider before drawing firm conclusions about the intuitive predisposition of international arbitrators.[214] We nevertheless offer the raw data in the hopes of advancing the science of arbitrator decisionmaking.[215]

D. Representativeness

People often make evaluations based on surface similarities, rather than base rates or statistical realities. One archetypal example of this phenomenon, which psychologists call "representativeness,"[216] can be illustrated by the classic case,

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[214] There are a variety of reasons to be cautious about drawing strong inferences from the results. For instance, for a 2x3 design to have acceptable power, a sample of 1029 arbitrators would be required. This necessitates testing replication would require over 700 additional arbitrators to make a reliable conclusion about the lack of a statistical effect. Relatedly, there are concerns about eternal validity. For example, the two to three years it may take to resolve a case, the potential financial self-interest in repeat appointment, and the implications of interactions with co-arbitrators could mean our study was unrealistic on appointment-related matters; and inferences drawn from a hypothetical on appointment in this experimental setting are limited.

[215] We observe, for example, that appointment effects might be constrained by clear rules of law and minimal arbitrator discretion. One preliminary study suggested that, in one limited situation, appointment could influence outcomes; namely, where an arbitrator made a decision on costs, a winning party-appointed arbitrator (possibly appointed by either an investor or a state) often made a 100% cost shift in favor of the winner. Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach* 24–25 (Ariz. Legal Studies, Discussion Paper No. 16-31) (copy on file with author). Puig and Strezhnev's research may, however, be confounded by the failure to address that successful investors reliably have costs shifted in their favor but successful states did not. The research nevertheless raises the possibility that, in areas of arbitral discretion, an "appointment effect" might contribute to arbitral decisionmaking; but likewise, where there is clear law and bounded discretion, there could be decreased risk. Future research should explore this in greater detail.

[216] Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430 (1972); Amos Tversky & Daniel Kahneman, *Judgments of Representativeness*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 84, 84–85 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

Byrne v. Boadle.[217] Previous research has used that case to test cognitive illusions in judicial decisionmaking:

> The plaintiff was passing by a warehouse owned by the defendant when he was struck by a barrel, resulting in severe injuries. At the time, the barrel was in the final stages of being hoisted from the ground and loaded into the warehouse. The defendant's employees are not sure how the barrel broke loose and fell, but they agree that either the barrel was negligently secured or the rope was faulty. Government safety inspectors conducted an investigation of the warehouse and determined that in this warehouse: (1) when barrels are negligently secured, there is a 90% chance that they will break loose; (2) when barrels are safely secured, they break loose only 1% of the time; (3) workers negligently secure barrels only 1 in 1,000 times.[218]

In the earlier scholarship, researchers then asked the generalist judges: "Given these facts, how likely is it that the barrel that hit the plaintiff fell due to the negligence of one of the workers?" Judges could then select one of four options: (a) 0%–25%, (b) 26%–50%, (c) 51%–75%, or (d) 76%–100%.[219] The correct answer, which requires deductive analysis, reveals the correct probability of negligence was 8.3%.[220] A more intuitive response, however, would treat the 90% figure as the likelihood that negligence caused the accident, thereby converting the 90% statistic (i.e., the likelihood of negligence) into something else (i.e., the likelihood of negligence given the injury).[221]

The earlier research observed that judges used intuitive, representative thinking rather than rational, deductive thought. They found that only 40.9% of judges selected the correct response, while a comparable 40.3% selected the

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[217] (1863) 159 Eng. Rep. 299 (Ex. Ch.).

[218] Guthrie, Rachlinski & Wistrich, *supra* note 10, at 808 (quoting *Byrne*, 159 Eng. Rep. 299).

[219] *Id.*; Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 22–23.

[220] *See* Guthrie Rachlinski & Wistrich, *supra* note 10, at 809 ("Because the defendant is negligent .1% of the time and is 90% likely to cause an injury under these circumstances, the probability that a victim would be injured by the defendant's negligence is .09% (and the probability that the defendant is negligent but causes no injury is .01%). Because the defendant is not negligent 99.9% of the time and is 1% likely to cause an injury under these circumstances, the probability that on any given occasion a victim would be injured even though the defendant took reasonable care is 0.999% (and the probability that the defendant is not negligent and causes no injury is 98.901%). As a result, the conditional probability that the defendant is negligent given that the plaintiff is injured equals .090% divided by 1.089%, or 8.3%."); *see also* Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 23 n.125.

[221] Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 22–23; Guthrie, Rachlinski & Wistrich, *supra* note 10, at 808–10; *see also* Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 939 (2006).

intuitive, but incorrect, response, professing the belief that the accident was more than 75% likely to have resulted from negligence.[222]

We gave the arbitrators who participated in our study a nearly identical question, involving a storage company that had contracted with an engineering corporation to deliver and maintain storage equipment. After a product defect caused damage, the storage company pursued arbitration to recover for breach of contract warrantees and negligent equipment maintenance. The arbitrators learned that government safety inspectors:

> determined that in this warehouse: (a) when containers are negligently secured, there is a 90% chance that they will break loose; (b) when containers are safely secured, they break loose only 1% of the time; (c) workers negligently secure containers only 1 in 1,000 times. Given these facts, how likely is it that the container fell due to the negligence of one of Storage's workers?

We asked participants to select one of four probability ranges: "(a) 0–25%, (b) 26–50%, (c) 51–75%, or (d) 76–100%." Of responding arbitrators,[223] 60.6% ($n = 152$) answered the question correctly, while only 17.9% ($n = 45$) of the international arbitrators selected the erroneous, but intuitive, answer. A small proportion of international arbitrators selected incorrect non-intuitive answers, with 8.8% ($n = 23$) and 11.8% ($n = 31$) selecting options (b) and (c), respectively.[224] On a structurally similar problem, international arbitrators outperformed domestic judges, as Figure 3 suggests.[225]

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[222] Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 77, at 23–24; Guthrie, Rachlinski & Wistrich, *supra* note 10, at 809–10.

[223] All participants received this hypothetical. Eleven arbitrators (4.2%) failed to respond.

[224] Thirty-two arbitrators (12.4%) made manuscript comments to calculate probabilities.

[225] A Fisher's exact test compared the correct and incorrect assessments of international arbitrators and U.S. federal magistrate judges. The test demonstrated arbitrators were reliably better at identifying the correct answer ($p = 0.0001$; $r = 0.19$; $n = 410$). Whereas 152 arbitrators (60.6%) answered correctly and 99 answered incorrectly, 65 judges (40.9%) answered correctly and 94 answered incorrectly. Guthrie, Rachlinski & Wistrich, *supra* note 10, at 809–10; Figure 3.

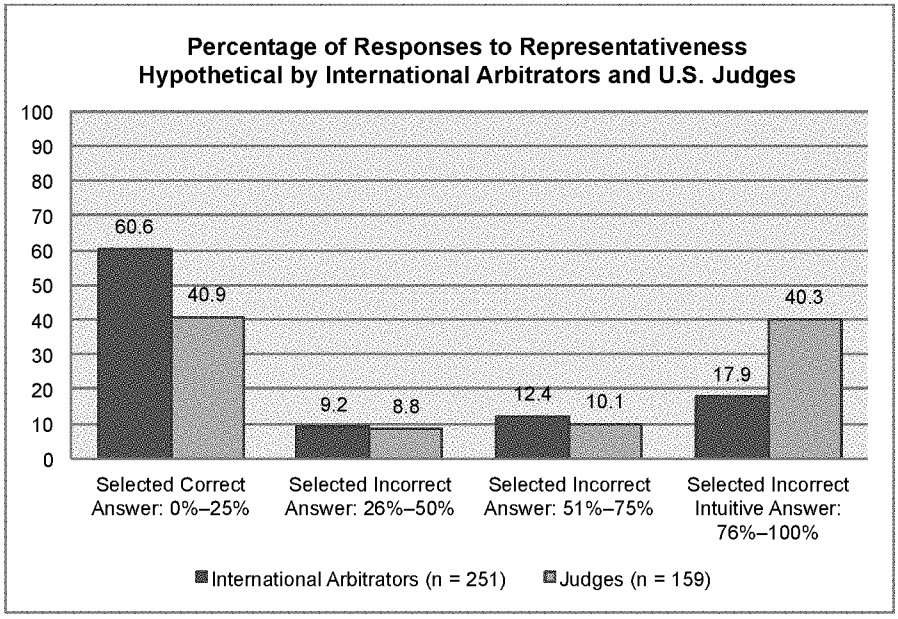

Figure 3. Percentage of Responses to Representativeness Hypothetical by International Arbitrators and U.S. Judges.

Arbitrators also facially outperformed other professionals responding to similar questions. In a *New England Journal of Medicine* study, fewer than 20% of doctors at Harvard teaching hospitals responding to a similar problem answered correctly, while 45% provided intuitive and incorrect responses.[226] Only 10% of Norwegian law students correctly answered a similar problem, while 58% of students selected the intuitive response.[227] In short, international arbitrators, though influenced by representativeness, appeared to do somewhat better than other professionals confronting similar problems.

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[226] *See* Ward Casscells, Arno Schoenberger & Thomas B. Graboys, *Interpretation by Physicians of Clinical Laboratory Results*, 299 NEW ENG. J. MED. 999, 1000 (1978) (stating "[e]leven of the 60 participants, or 18 per cent, gave the correct answer" and noting twenty-seven subjects (45%) selected the intuitive, incorrect response).

[227] Erling Eide, *Two Tests of Base Rate Neglect Among Law Students* (2011), http://www.uio.no/studier/emner/jus/jus/JUS4121/v12/undervisningsmateriale/Evidence RLE2 kopi 4 avd.pdf. The sampled Norwegian law students may differ from law students elsewhere. When beta-testing the entire first-year class at Washington & Lee Law School in January 2014 using the same question administered to arbitrators, 54% (n = 54) selected the correct answer and 11% (n = 11) selected the intuitive incorrect answer.

E. Egocentrism

People routinely overestimate their talents and life prospects. In one classic study, for example, researchers found that recently married U.S. couples almost unanimously expected they would not divorce, even though they knew the divorce rate was 50%.[228] Psychologists call this phenomenon the egocentric or self-serving bias.

Egocentric bias can negatively impact adjudicators and the parties who appear in front of them because it can "prevent judges from maintaining an awareness of their limitations . . . [and] may make it hard for judges to recognize that they can and do make mistakes."[229]

Researchers have explored whether egocentrism affects judges. Eisenberg originally identified a self-serving bias in bankruptcy judges. Specifically, judges evaluated themselves as more fair, more efficient, and better case managers than lawyers evaluated the same judges.[230] Guthrie, Rachlinski, and Wistrich similarly explored whether generalist[231] and specialist[232] judges exhibited egocentrism. They found U.S. adjudicators likewise had self-serving views of their adjudicative skills.

To explore whether and how egocentrism affects arbitrators, we randomly gave subjects two questions asking them to assess themselves on several arbitrator tasks—i.e., assessing witness credibility, making quality decisions, providing parties with procedural efficiency, and the rate of challenges to their awards. We asked the arbitrators to place themselves in one of four quartiles: (1)

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[228] Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993); *cf.* Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers*, 47 ACTA PSYCHOLOGICA 143, 146 (1981) (finding 88% of U.S. drivers and 77% of Swedish drivers believed themselves to be safer driver's than the median, but observing more U.S. drivers (46.3%) placed themselves in the most skilled group as compared to Swedes (15.5%)).

[229] Guthrie, Rachlinski & Wistrich, *supra* note 10, at 815.

[230] Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 982 (1994). While 96% of judges reported ruling on requests for interim awards within thirty days, only 79% of lawyers reported that judicial conduct. *Id.* at 984. Compared to lawyers' assessments, bankruptcy judges perceived themselves as more closely monitoring cases and providing efficient fee reimbursement. *Id.* at 984–87. *See generally* Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133 (2010).

[231] Guthrie, Rachlinski & Wistrich, *supra* note 10.

[232] Guthrie, Rachlinski & Wistrich., *Hidden Judiciary*, *supra* note 77, at 1519–20.

the top 25%, (2) the second quartile, (3) the third quartile, or (4) the bottom 25%.[233]

As shown in Table 8, we found that international arbitrators, like U.S. adjudicators, provided egocentric or self-serving interpretations of their adjudicative skills. The distribution of arbitrators' responses departs significantly from what one would expect if there was no egocentrism bias.[234]

Table 8: Self-assessment of Adjudicative Skill: International Arbitrators, Judges, and ALJs.[235]

Skill (sample)	Percentile in each Quartile			
	Top Quartile: Better than 75%	Second Quartile: Better than 50%, worse than top 25%	Third Quartile: Better than 25%, worse than top 50%	Bottom Quartile: Worse than 75%
Evaluating Credibility				
International Arbitrators (124):	29.8%	46.8%	21.0%	2.4%
ALJs (36):	25.0%	58.0%	17.0%	0.0%
Unbiased or Impartial Decisions:				
International Arbitrators (124):	43.5%	41.1%	13.7%	1.6%
ALJs (36):	50.0%	47.0%	3.0%	0.0%
Procedural Efficiency:				
International Arbitrators (124):	36.3%	55.6%	7.3%	0.8%
Challenges to Decisions:				
International Arbitrators (122):	53.3%	32.8%	10.7%	3.3%
Judges (155):	56.1%	31.6%	7.7%	4.5%

In response to the query, "If the researchers were to rank all of the arbitrators currently in this room according to their skill at reliably assessing witness

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[233] The instruction was to evaluate, based upon those in the room, whether arbitrators fell in the highest, second highest, second lowest, or lowest quartile for a specific skill. *See infra* note 239.

[234] In the absence of egocentrism, results should have been evenly distributed across quartiles. Instead, there was a large and meaningful departure for responses to questions on witness credibility ($t(123) = 27.983$; $p < 0.001$; $r = 0.93$; $n = 124$), efficiency in dispute resolution ($t(123) = 30.549$; $p < 0.001$, $r = 0.94$; $n = 124$), impartial decisionmaking ($t(123) = 25.554$; $p < 0.001$, $r = 0.92$; $n = 124$), and challenges to awards ($t(121) = 22.534$; $p < 0.001$, $r = 0.90$; $n = 122$). *See* COHEN, *supra* note 135, 113–16 (noting Cohen's conventions that a "large" effect is present when $r \geq 0.50$).

[235] Data from Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1519–20.

credibility, what would your rate be?", 76.6% of arbitrators[236] identified that they were better than the median arbitrator in the room.

Arbitrators were even more bullish in assessing their capacity to provide unbiased decisions. When asked: "If the researchers were to rank all of the arbitrators currently in this room according to their skill at making accurate and impartial decisions, what would your rate be?", nearly 85% of responding arbitrators[237] indicated they were better than the median arbitrator present at an elite conference.

Arbitrators were most self-serving when assessing their procedural efficiency. When asked, "If the researchers were to rank all of the arbitrators currently in this room according to their skill at efficiently resolving disputes in a timely manner, what would your rate be?", nearly 92% of arbitrators[238] ranked themselves as superior to the median arbitrator in attendance.

In addition to evaluating themselves more favorably than their counterparts, international arbitrators also assumed their decisions had been challenged much less frequently than the decisions of their peers. We asked: "If the researchers were to rank all of the arbitrators currently in this room according to the rate at which their decisions have been challenged during their careers, what would your rate be?"[239] For the international arbitrators, 86.1% assumed that their reversal rates were better (i.e., lower rates of challenge) than the median arbitrator in the room.

Direct comparisons between judges and arbitrators remain difficult. On balance, we found arbitrators and judges were similarly influenced by

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[236] One hundred thirty-one arbitrators received the credibility question. Seven arbitrators (5.3%) failed to answer.

[237] One hundred twenty-nine arbitrators received the decision-making question. Five arbitrators (3.9%) did not answer.

[238] One hundred thirty-three arbitrators received the efficiency question, but nine (6.7%) failed to answer.

[239] This information can be found in the stimulus materials, which are available upon request from the lead author.

egocentrism,[240] though international arbitrators seemed somewhat less likely than ALJs to overestimate the quality and integrity of their decisions.[241]

IV. INTERPRETATION AND IMPLICATIONS

In this first-ever psychological experiment involving international arbitration, we found that arbitrators often made intuitive and impressionistic decisions rather than the fully rational and deliberative decisions that might be normatively desirable. This finding, though perhaps disappointing, is unsurprising. Arbitrators are people, and they make judgments and decisions the way other people do.

More encouraging, and perhaps more surprising, we found evidence contradicting common tropes against arbitration. Although direct comparisons are difficult, our data revealed that international arbitrators performed at least as well as, but never demonstrably worse than, judges. There may be reasons to prefer judges to arbitrators,[242] but quality of judgment and decisionmaking, at

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[240] A Fisher's Exact Test was unable to identify a meaningful difference in the responses of international arbitrators and ALJs self-assessments of capacity to evaluate witness credibility. Using ALJ responses from Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 77, at 1520, it was not possible to detect different response patterns for ALJs ranking themselves above ($n = 30$) or below the median ($n = 6$) and arbitrators who ranked themselves above ($n = 95$) and below ($n = 29$) the median ($p = 0.495$; $r = 0.07$; $n = 160$). Similarly, a Fisher's exact test was unable to detect a meaningful difference in how magistrate judges and international arbitrators self-assessed whether their decisions would be successfully challenged in later court action ($p = 0.72$; $r = 0.02$; $n = 277$). Guthrie, Rachlinski & Wistrich, *supra* note 10, at 809–10, found 136 judges ranked themselves above the median in reversal rates (i.e., having low reversal rates), whereas nineteen judges ranked themselves as being below the median. One hundred five arbitrators ranked themselves as being superior to the median (i.e., having lower challenge rates) and seventeen arbitrators evaluated themselves as being in the two lowest quartiles (i.e., having a higher challenge rate). The results lacked sufficient power to definitively exclude presence of a relationship; but as the effect size was less than small, null-results may not reflect low power.

[241] A Fisher's exact test analyzed ALJs ranking themselves above ($n = 35$) and below ($n = 1$) the median for unbiased decisions, and international arbitrators ranking themselves above ($n = 105$) and below ($n = 19$) the median for impartial decisions. A greater proportion of ALJs over-estimated their skill in making unbiased decisions as compared to arbitrators ($p = 0.048$, $r = 0.16$). This does not mean arbitrators were immune from egocentrism in evaluating their capacity to make impartial decisions, as data reflects they fell prey to the same fallacy. Rather, a lower proportion of international arbitrators self-identified high skills and greater proportion were somewhat more modest. Slight variations in wording limit the value of comparison, however.

[242] There may be legitimate concerns about arbitration, including concerns of public access and transparency. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075–76, 1078 (1984). UNCITRAL's new treaty and arbitration rules provide increased transparency, particularly in ITA. G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Dec. 10, 2014), http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf; G.A. Res. 68/109, UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (Dec. 16, 2013), http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf. Concerns about arbitrators' incentives for ethical conduct can and should be addressed. Existing duties of impartiality and laws permit challenge and dismissal of biased arbitrators. *See supra* notes 70 and accompanying

least as measured in these experimental studies, is not one of them. In addition, our work casts doubt on the common assumption that arbitrators simply "split the baby" when making decisions. Rather, confirming existing research on real awards,[243] international arbitrators did not appear to "split the baby" when making awards.[244]

The experimental results explicate the possible ongoing normative value of arbitration. Having failed to identify international arbitrators' inferior capacity, the possibility remains that structural safeguards might improve arbitration and to decrease risk of error. We acknowledge the limitations of the results yet wish to make normative recommendations that system designers may consider for managing disputes.

A. Limitations

The fact that we find evidence of intuitive decisionmaking in our experimental research does not conclusively demonstrate that arbitrators behave similarly during actual proceedings.

First, as we have noted in this Article and elsewhere,[245] selection effects limit the value of inferences. Because we do not know, and likely will never be able to know, the demographic characteristics of the global population of international arbitrators, we cannot definitively confirm how representative our sample might be. It is possible that the international arbitrators who attended ICCA and participated in our study skewed older, more economically advantaged, more elite, and with a greater proportion of women.[246]

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text. The recently signed Trans-Pacific Partnership includes a "code of conduct" for international arbitrators. OFFICE OF THE U.S. TRADE REPRESENTATIVE, SUMMARY OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (2015), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership. A full discussion of net normative costs and benefits of international arbitration is beyond this Article, which focuses on experimental manipulation in search of evidence-based insights for targeted reform and informed decisionmaking. *See supra* notes 4, 58 (describing concerns about international arbitration addressed by other literature).

[243] *Supra* note 152 and accompanying text.

[244] In contradiction to claims that arbitrators are intuitively predisposed to parties appointing them, our experiment was unable to identify evidence that party appointment reliably influenced contract rescission. *See supra* notes 213–14 and accompanying text. These null results also come with limitations. *See supra* note 215.

[245] *See, e.g.*, *supra* notes 133–34, 165, 244–46 (identifying some of the issue-specific limitations); s*ee also* Franck et al., *supra* note 4, at 443–46, 501.

[246] Franck et al., *supra* note 4, at 443–45. Recent research suggests female arbitrators remain less than 10% of the population of international arbitrators. Lucy Greenwood & C. Mark Baker, *Is the Balance Getting Better? An Update on the Issue of Gender Diversity in International Arbitration*, 31 ARB. INT'L 413, 415 (2015). By

Second, international arbitrators' conduct in real disputes could differ from responses to our hypotheticals. International arbitration proceedings are often lengthy, complex, and rely upon numerous witness statements and voluminous documents. Rather than making snap judgments during a survey, arbitrators have access to time, resources, tribunal secretaries who function like judicial clerks, and group deliberations.[247] Applicable substantive and procedural law could inject debiasing mechanisms that limit the influence of cognitive illusions. The differences between our experiment and the natural ecology of international arbitration therefore necessitate caution in making strong inferences. Nevertheless, the results likely have some application beyond the laboratory. The research employed standard cognitive psychology research methods used successfully on other adjudicators for over a decade, and similar methodologies have proven successful in identifying strategies people use to make decisions in real life.[248] Moreover, decisionmakers may be even more likely to rely on cognitive shortcuts, like anchoring and framing, in real-world settings precisely because of the volume of information and complexity of decisionmaking.

Third, the inherent heterogeneity of international economic disputes may limit the external validity of our research. Our materials explored decisionmaking within ICA and ITA disputes. It is possible the results are not generalizable more broadly given variation in disputes, context, facts, applicable law, or culture.

Fourth, several hypotheticals asked arbitrators to make independent decisions, as if they were a sole arbitrator or one arbitrator on a three-member tribunal.[249] It is unusual for arbitrators to act alone; rather, three-member tribunals are standard. Our research was unable to capture one of the fundamental rule-of-law values and debiasing tools embedded within

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contrast, our study identified roughly 17% of the arbitrators were female, which creates a risk women were overrepresented in our research.

[247] Group deliberation could, but need not, guarantee enhanced quality. *Infra* note 262.

[248] Guthrie, Rachlinski & Wistrich, *supra* note 10, at 819; Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions*, 103 PSYCHOL. REV. 582, 582 (1996). Others dispute the influence of cognitive psychology. Gerd Gigerenzer, *How to Make Cognitive Illusions Disappear: Beyond "Heuristics and Biases"*, 2 EUR. REV. SOC. PSYCHOL. 83, 84–85, 109–10 (1991).

[249] In the one hypothetical that manipulated party appointment—and placed subjects in the role of acting as a claimant, respondent, or institutional appointee—we were unable to identify that appointment reliably affected arbitrators' legal decisions. *See supra* note 213. There is a difference, however, between answering a hypothetical question during a thirty to forty minute survey and living through a case for two to three years as a party-appointee. While we may have captured some aspects of arbitrator intuition, this does not address the sustained influence of environmental factors occurring over an arbitration's lifetime.

international arbitration—namely, the deliberation process. Future research should explore panel effects in decisionmaking.

Fifth, the results may be sui generis to international arbitration. International dispute settlement is highly specialized, involving different practices, different legal rules, and high barriers to entry.[250] It is possible that inferences for domestic arbitration are limited, as international arbitrators do not necessarily adjudicate domestic consumer and employment disputes. Likewise, although there is a degree of overlap between international arbitrators and judges on international courts and tribunals,[251] that overlap is not complete. Caution is therefore warranted about the scope of inferences.

Sixth, we acknowledge that linguistic capacity could influence responses. Yet, English is a *lingua franca*[252] and has become dominant in international arbitration.[253] It is possible that a conference in English did not generate a large selection effect, as those without English skills may not be actively engaged in international arbitration. Yet the risk is not eliminated, and non-native English speakers could systemically differ. Native language, however, did not explain the performance of international arbitrators. For those items where arbitrators performed particularly well, we were unable to identify meaningful differences in the responses of native and non-native English speakers.[254]

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[250] DEZALAY & GARTH, *supra* note 81, at 10, 124, 198; Rogers, *Vocation*, *supra* note 3, at 963–64.

[251] Past and present judges on the International Court of Justice (ICJ) have been arbitrators. Multiple ICJ members have been ITA arbitrators in disputes or *ad hoc* committees, including: James Crawford, Chris Greenwood, Peter Tomka, Joan Donoghue, Abdulqawi Ahmed Yusuf, and Patrick Robinson. Two former ICJ judges (Bruno Simma and Stephen Schwebel) were also arbitrators. Charles Brower and David Caron were or are serving as a judge on the Iran-U.S. Claims Tribunal; and both have been international arbitrators. Giorgio Sacerdoti, Georges Abi-Saab, Florentino Feliciano, and Donald McRae have been arbitrators and WTO adjudicators. *See* José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators*, 1 ONATI SOCIO-LEGAL SERIES, 2011, at 1, 14; Joost Pauwelyn, *Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761, 768–69 (2015).

[252] Timothy Lau, *Offensive Use of Prior Art to Invalidate Patents in U.S. and Chinese Patent Litigation*, 30 UCLA PAC. BASIN L.J. 201, 250 (2013).

[253] Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 86 (2003); Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 887 (2001).

[254] Bivariate correlations could not identify reliable links between native English speakers or non-native speakers for: CRT scores ($r(232) = 0.08$; $p = 0.24$) or correct responses on representativeness ($r(243) = -0.03$; $p = 0.61$). Native English capacity was not reliably associated with responses on the beach front property ($r(95) = 0.08$; $p = 0.43$) or contract rescission ($r(249) = -0.05$; $p = 0.41$) hypotheticals. As all analyses were less than statistically small ($r < 0.10$), the analysis may not be underpowered. A sample of 781 arbitrators would be sufficiently powered to reliably exclude the possibility of a native-language effect.

Lastly, in those instances when tests were unable to detect differences, it is not possible to rule differences out. Although many latent effects were statistically small, various tests were statistically underpowered. *Post hoc* power analyses revealed samples of 780–1000 arbitrators would be required to ascertain the lack of an effect.[255] More research is therefore necessary. We acknowledge the limitations and hope this first-generation research provides a baseline for future scholarship.

B. Normative Implications

In this study, we sought to explore whether international arbitrators, like other adjudicators, make decisions in ways that depart from the rational actor model in transnational adjudication. We found that they do, and this, in turn, has implications for the design of transnational dispute settlement systems (as well as domestic dispute systems).

1. Allocating Adjudicative Authority

Our research demonstrates that, like other expert adjudicators, international arbitrators were susceptible to cognitive illusions including anchoring, framing effects, representativeness, and egocentrism. While comparisons between arbitrators and judges are difficult, we found no evidence that arbitrators were inferior to judges.

When choosing to allocate adjudicative authority to judges or arbitrators, then, designers of dispute settlement systems should not presume that national (or international) judges will inevitably provide decisionmaking services that are superior to international arbitrators. Earlier research demonstrates that national judges over-rely on intuition and make errors in legal decisionmaking. So do arbitrators. Regardless of title or mandate, adjudicators are fallible beings who generate error, even with the best of intentions and effort. When making normative design choices about who should resolve international disputes, arbitrators should neither be favored *nor* disfavored based on their cognitive skill.

While there are undoubtedly costs to using arbitration—including paying for the services of the arbitrators and related institutions—there are likewise benefits. International arbitration might offer opportunities to minimize the risk

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[255] *See, e.g.*, *supra* notes 133, 164, 210, 212–14 (offering power analyses and identifying requisite sample size).

of some adjudicative error. For example, international arbitrators are a transnational group speaking multiple languages. Research suggests that people are less likely to fall prey to cognitive illusions when evaluating options in a language other than their mother tongue.[256] This generates the possibility that international arbitrators' standard practice, involving regular interaction with different languages or cultures, increases the likelihood of careful attention and focused deliberation. Beyond this, the elite nature of international arbitration—and strong barriers to entry—likely generate market forces where highly qualified lawyers and transnational professionals ultimately serve as arbitrators.[257]

2. *Minimizing Risk of Error Through Structure and Procedure*

If intuition influences all adjudicators, critics are correct that judicial systems require procedural safeguards to minimize inaccurate or sub-optimal decisionmaking. There is obviously a potential trade-off between accuracy on the one hand and speed on the other. Adding procedures or implementing other debiasing mechanisms could decrease the risk of error but increase the time and cost of a dispute settlement process. Thus, dispute system designers, as well as parties selecting among dispute resolution mechanisms, should carefully weigh the benefits and costs of procedures designed to enhance decision accuracy.[258]

International arbitration typically includes some structures that might have debiasing effects and could easily incorporate others.[259]

For example, parties in international arbitration typically choose to have disputes resolved by three-member tribunals. The presence of multiple

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[256] *See* Micheline Favreau & Norman S. Segalowitz, *Automatic and Controlled Processes in the First- and Second-Language Reading of Fluent Bilinguals*, 11 MEMORY & COGNITION 565, 567 (1983) (theorizing foreign language evaluations require more deliberate processing and fewer intuitive assessments); Boaz Keysar, Sayuri L. Hayakawa & Sun Gyu An, *The Foreign-Language Effect: Thinking in a Foreign Tongue Reduces Decision Biases*, 23 PSYCHOL. SCI. 661, 661, 667 (2012) (observing framing effects and loss aversion disappeared or decreased when subjects were tested in a foreign language).

[257] It is difficult to make uniform observations about the over 190 national judiciaries. Some judges are elected or partisan. Others may be elite professionals, but lack linguistic and inter-cultural competencies. There may also be partisanship concerns deriving from national or regional sympathies. International judges may share characteristics of international arbitrators, including language skills, training in multiple legal systems, and inter-cultural competencies.

[258] Elm, *supra* note 83, 114–24 (proposing several amendments to the UNCITRAL Rules to debias arbitrators).

[259] Both international arbitration and litigation permit evidence testing. In arbitration, parties challenge material facts and applicable law, providing an opportunity to disrupt and assess claims rather than relying on intuition or supposition. Court litigation can be similar.

adjudicators, who must interact and deliberate together, permits coordinated decisionmaking and group deliberation. While group deliberation is not necessarily an unmitigated good—indeed, it can lead to polarization and exacerbate decision errors—it can facilitate collaborative deliberation that serves as a check upon intuitive assessments.[260]

Moreover, many, if not most, international arbitration panels produce written opinions. In ITA, for example, 100-plus page opinions are common. The process of opinion writing itself could also serve as a check on intuition and facilitate deliberation, leading to higher quality outcomes. In those instances where arbitrators are not required by governing rules to write opinions, parties could contract for opinions, if so inclined. Parties also might mandate that tribunals include subsections in awards, follow prescribed checklists, or provide substantive reasoning of critical, replicable issues, if the parties believe they would benefit from a more detailed and precise explication of decisionmaking.

This speaks to a general virtue of international arbitration. In arbitration, in contrast to litigation, parties can adopt procedural rules and structures to enhance adjudicative quality and minimize the risk of decision error. For example, parties can structure procedures to give arbitrators more time to devote to deliberation. Likewise, parties can draft arbitration agreements to inject additional procedural rigor to decrease risks of error from intuitive adjudication.

Consider, for example, anchors. Our results show that irrelevant anchors, particularly large anchors, influenced the damage assessments of international arbitrators. Parties to arbitrations might craft rules to require a good-faith pleading rule or to provide clear cost-shifting rules to incentivize accurate damage assessments at the start of the case.[261] Alternatively, rules might require parties to produce supported damage assessments at the outset so that, when pleading damages, parties do so with particularity and support. Other

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[260] Group deliberations do not necessarily enhance quality or accuracy. DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 152–53, 158–59 (2012); Daniel Gigone & Reid Hastie, *Proper Analysis of the Accuracy of Group Judgments*, 121 PSYCHOL. BULL. 149, 149 (1997); Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 L. & CONTEMP. PROBS., 2012, No. 2, at 167, 193–200; Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 26–35 (2009).

[261] The ICSID Convention does not have clear cost-shifting rules, and tribunals have not offered consistent rulings on costs or a clear set of incentives for cost assessments. *See, e.g.*, Franck, *supra* note 11, at 801 & n.170 (noting that "there is no international convention on the treatment of costs in investment treaty arbitration"); David Smith, *Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration*, 51 VA. J. INT'L L. 749, 751–52 (2011) (noting that tribunals have rendered "scattershot" rulings on costs under the ICSID Convention).

stakeholders may wish to take this approach. For example, international arbitration institutions revising rules, national legislatures amending law, or states negotiating treaties may wish to explore providing clear default rules for international arbitration that: (a) require parties to plead damages with specificity and in good faith or (b) create incentives for reasonable, evidence-based damage claims. Such an approach could maximize the value of relevant anchors and decrease the risk that irrelevant anchors exert improper influence on damage assessments.

With each of these procedural innovations, there is tension between efficiency and accuracy. The tension may be more theoretical than real. One could imagine a complex international dispute, being decided by three subject matter experts, with adequate time and prepared parties, creating a written opinion that would minimize the chance for error and produce a just and timely result.[262] As long as parties and arbitrators acknowledge that humans must test intuition with deliberation, arbitration's flexibility allows parties and arbitrators to create a tailor-made process to do so.

CONCLUSION

Arbitrators, like judges, are fallible. Arbitrators, like judges, make intuitive decisions that they might, or might not, override with deliberation. Arbitrators, like judges, are influenced by anchoring, framing, representativeness, and egocentric bias. In short, arbitrators are like judges, and arbitral decisionmaking is like judicial decisionmaking. Whether appointed by the state and appearing in robes, or selected by parties and appearing in business suits, adjudicators are human beings, and human beings make predictable judgment and decisionmaking errors.

The insight that adjudicators, whether judges or arbitrators, will commit decision errors should inform those designing dispute systems, whether domestically or internationally. Those designing dispute resolution systems should focus less on who decides and more on structural features and procedural safeguards that increase the likelihood that the decisionmaker, whomever or whatever she is, provides justice.

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[262] This observation may have limits, as experimental research suggests offering increased time does not enhance adjudication quality. Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U. L. REV. 931, 939 (2012).

Iura Novit Arbiter revisited: towards a harmonized approach?

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I. Introduction

In French-language Decision 4A_538/2012 of 17 January 2013, the Swiss Federal Supreme Court provided clarification regarding the arbitrators' duty to inform parties before rendering an award based on an unexpected legal reasoning.[1] In this case, the appellant argued that a piece of evidence had been adduced only to establish certain facts, whereas the tribunal had diverted the evidence from its goal, deducing from it another fact. The Federal Supreme Court held that, according to the case law, the tribunal may be exceptionally under a duty to advise the parties when it considers basing its decision on a provision or a legal consideration that was not raised during the proceedings and the pertinence of which the parties could not guess, but that this jurisprudence does not concern the establishment of facts. Based on this recent decision, this article aims to analyse the origin and current practice of *iura novit curia* in relation to the application of foreign law in state litigation as well as in arbitration. It also seeks to examine reasons and limits for the principle, to propose a reformulation of the principle according to the results of the analysis, as well as to offer relevant recommendations.

The principle of *iura novit curia*, having a long tradition as well as being well established in modern-day domestic litigation in a variety of jurisdictions, does not enjoy an equally clarified status in international commercial arbitration. The issue of its applicability and scope in arbitration, however, is of the utmost practical importance, as it directly affects the procedural positions of the parties as well as the status of an arbitrator and the scope of his or her rights and duties. At the same time, the traditionally offered rationales for the presence of this principle in national legal orders (as discussed in section II.2 in this article) do not necessarily remain valid in the context of arbitration.

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[1] Decision of the Swiss Federal Supreme Court, 17 January 2013, 4A_538/2012, cons 5.1.

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The neutrality of the court, as opposed to the involved positions of the parties (who forward renditions of applicable law favourable to them), is a frequently raised argument in favour of the principle; however, it should be reformulated in arbitration. While neutrality remains one of the most rudimentary duties of the arbitral tribunal, institutional and procedural determinants of its execution are significantly different, with the authority of the arbitrators depending upon the appointment by the parties. Regard for the consistency of case law and the predictability of results of legal interpretation and application is vital in the practice of the courts, which function within an integrated national judicial system. However, it loses much of its power in the arbitral environment, characterized by a strongly globally decentralized, competitive and private character of the arbitration centres, with ad hoc arbitrations increasing the level of dispersion even further. Analogically, the argument of *iura novit curia* as a merits-related principle, which allows for the determination of the content of applicable law by the adjudicators (deemed to be, by definition, particularly competent in this regard), seems to weaken in the context of arbitration, and the law governing the case might very well not be from the arbitrators primary legal training.

The analysis of *iura novit curia* in arbitration thus calls for a carefully calibrated study, taking into account these reservations and the specific character of arbitral decision making. It also considers in a broader perspective whether signals of a development of a globalized (or 'glocalized'[2]) arbitration culture might be observed. One of the key findings of the article is the discovery of a relatively coordinated practice of application of the discussed principle in different arbitral jurisdictions, despite divergences between the existing national approaches in this regard. In particular, the oftentimes raised differences between the common law and the civil law traditions on this issue have turned out not to be among the decisive factors in the formulation of the scope and limits of application of *iura novit curia* in the practice of arbitral tribunals. In spite of diversified regulatory regimes and jurisprudence, it can thus be argued that a transnationalized, hybrid practice in this area is emerging. However, it is transnational in a sense that is Westphalian rather than a-national and delocalized, to paraphrase Emanuel Gaillard's terms.[3] It harmonizes different municipal approaches rather than transcending them.

Whereas the *iura novit curia* principle has traditionally informed the actions of municipal courts in relation to the application of the law in general, this article concentrates on the principle in regard to foreign law only. The first reason for such a delineation of its scope is to focus on international commercial arbitration, where the de facto lack of *lex fori* largely determines the assumption of such an approach (and the adequate point of reference is thus the national courts' practice of *iura novit curia* in regard to foreign—and not just any—law). Second, the

[2] Fan Kun, 'Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China' (2013) 18 *Harvard Negotiation Law Review* 175.

[3] Cf Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010).

earlier-mentioned development of a hybrid approach in arbitration, combining the components known from the civil law and common law jurisdictions, also directs the analysis towards the discussion of existing judicial models of foreign law application and to the study of divergences between them and the practice of arbitration.

Consequently, the structure of the article develops from general concepts to the analysis of increasingly specific issues. Introductory remarks are followed by a general part, beginning with a discussion of the historical origins of the principle and leading to a comparative examination of the regulatory framework and practice in state litigation in selected jurisdictions. This analysis serves as a background for a further study of the state of the art and a discussion of the recurrent problems in this regard in international commercial arbitration. Choice-of-law issues are then considered. In the second part of the article, the issues of the detailed legal framework for *iura novit curia* in arbitration are addressed. The relationship between *iura novit curia* and other potentially conflicting principles (including, among others, party autonomy, *ne ultra petita,* and the right to be heard) is also examined. In the concluding part, a conceptualization of *iura novit curia* as a right of the arbitral tribunal is offered, followed by recommendations and guidelines as to its exercise in arbitration practice.

II. The concept of *iura novit curia*

The principle of *iura novit curia*, informing the discussed case, has deservedly drawn much attention in recent years in relation to international commercial arbitration. Its content, limits, justifications, and interplay with other procedural principles, as well as the extent to which it has been adopted in different jurisdictions, have been discussed by several authors in the context of its possible applicability in arbitration. The specific consequences of such application have been considered, such as its relationship with fundamental procedural rights, its impact on the enforceability of an award, and the limits of its rational use in arbitration (in regard to procedural time and cost efficiency as well as the weight of new issues of the law, introduced *sua sponte* by arbitrators). Thus, the *iura novit curia* principle, with its well-established and rich history in various domestic systems, which is also recurrently addressed by recent arbitral case law, calls for a closer analysis, aimed at capturing its characteristic features and challenges in relation to its application in the context of arbitral decision making.

1. Origins of iura novit curia

Iura novit curia ('the court knows the law') is a principle traditionally associated with the civil law tradition. Its first known *verbatim* formulations were discovered in the commentaries of medieval glossators on Roman law.[4] Along with an often accompanying paremy, *da mihi factum, dabo tibi ius*, it has been perceived as an

[4] Sofie Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford University Press 2004) 30.

expression of the role of a judge as an active participant in civil proceedings, directly involved in their inquisitorial course. Consequently, the judge is not only entitled to be engaged in the process of cooperative fact finding with the parties, the procurement of evidence, and so on but also empowered to conduct his or her own research in regard to the contents of the applicable law, instead of relying on parties' presentations in this regard. As a result, it has been (somewhat simplistically) indicated that the parties in continental legal systems might primarily focus on proving the facts that they assert and on the proper definition of the relief they seek, while relying on the judge's competence as to the determination of the relevant law.[5]

Such a notion of the role of an adjudicator resonates with the Montesquieuan perception of the judge as 'the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour',[6] which has largely influenced continental jurisprudence. Such a concept of the role of a judge is related to a logocentric concept of the law itself as a superior and original set of rules embodied in a text and possessing a definite contents and limits. The process of legal interpretation is, as a consequence, treated in the more traditional approaches connected with the theory as a discovery of the pre-coded meaning of the law and its possibly full, transparent, and unaltered transmission to the litigants. This aspect of judicial powers as an exclusive and elevated art can be seen in the context of the historical development of Roman law and hieratical origins and connotations of ancient Roman administration of justice.[7] The proper resolution of a dispute in this paradigm naturally requires an identification and application of the complete set of relevant rules.

In its modern version, the presence of the principle *iura novit curia* has been characterized as one of the significant differences between the continental and common law traditions. It has been considered to be an expression of the basic assumption, underlying the continental procedural approach, that justice can be administered more efficiently and fully if the courts are vested with inquisitorial powers and do not have to rely upon the representations offered by the parties,[8] since these might turn out to be incomplete, one-sided, or suffering from an insufficiently professional and legal qualification due to a missing or inferior legal representation by a party. Application of this procedural model has also been an object of a rather far-reaching critique, expressed by J. Gillis Wetter, who claims that:

[5] Jeff Waincymer, 'International Arbitration and the Duty to Know the Law' (2011) 28 *Journal of International Arbitration* 203.

[6] Charles de Secondat Montesquieu and others, *The Spirit of the Laws* (Cambridge University Press 1989) 163.

[7] Joanna Jemielniak, 'Just interpretation: The Status of Legal Reasoning in the Continental Legal Tradition' (2002) 15 *International Journal for the Semiotics of Law* 330.

[8] Christian P Alberti, 'Iura Novit Curia in International Commercial Arbitration: How Much Justice Do You Want?' in Stefan Michael Kröll and others, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 3.

> persons trained and employed on a lifelong basis as judges acquire a bureaucratic *besser Wissen* sense of superiority; they alone are ordained and vested with the power to administer justice. These attitudes ingrained in the minds of the judiciary have been accepted by the local bars and encountered little opposition. As a result, in action and interaction, the bars have become submissive and not risen to a level of equality of legal knowledge and sophistication with the judiciaries. In turn, the judiciaries have been constrained to the exclusive role of authoritative expounders and finders of the law.[9]

Such a general formulation of arguments on the influence of *iura novit curia* on the development of legal professions (as well as of the characterization of continental bars as submissive), however, seems quite disputable.

Alternatively, the common law approach has been presented as attributing the function of material truth finding to the adversarial procedural relation between the parties, without the substantive intervention of a judge. His or her direct involvement has been argued to lead potentially to a distortion of equality of the parties and to possibly result in an appearance of a bias (through the substitution for the specific party's efforts). Both solutions are thus based on different sets of rationales, aimed at securing and preserving standards of due process.

The issue of the presence and limits of the *iura novit curia* principle in domestic legal systems has been indicated frequently as posing particular practical challenges in the context of the judicial application of foreign law. In private international law cases, substantive law determined as applicable to the merits of the dispute might be foreign to the court. If the court (following the *iura novit curia* principle) is considered to be primarily burdened with an *ex officio* exercise of research on its contents, as well as the proper subsumption and qualification of applicable remedies, it significantly increases the level of difficulty in the accurate administration of justice. However, if the common law doctrine of treating foreign law as a fact to be proven by the parties is followed, it shifts the burden of evidencing its contents and resulting legal consequences for the case onto the litigants.

The principle of *iura novit curia* refers not only to the law governing the substance of the dispute but also to the procedural aspects as well as to the conflict-of-law considerations. The problem of the application of foreign law by the court, however, is generally present in the sphere of substantive law. Thus, it is this level of consideration where the assumption that the adjudicator is by definition most competent to determine the issues of the law might turn out to be not only a particular challenge but also a procedural operative fiction. The problem of *iura novit curia* with regard to foreign law is even more pronounced in international commercial arbitration, where there is no real *lex fori* but where every law is in fact foreign.

The traditional association of the procedural model encompassing the *iura novit curia* principle with the civil law tradition, and the treatment of the 'law-

[9] J Gillis Wetter, 'Procedures for Avoiding Unexpected Legal Issues' in Albert Jan van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ICCA Congress Series (Kluwer Law International 1996) 90.

as-a-fact' approach as a characteristic feature of the common law system, has also been reconsidered in the context of a more detailed analysis of solutions adopted in this regard in specific jurisdictions. The question whether, and to what extent, the *iura novit curia* assumption informs civil procedure in selected domestic systems is addressed in the following section of this article.

2. Iura novit curia *in the context of judicial application of foreign law in State litigation*

A. The power of State courts to apply the law ex officio

The powers of domestic courts in relation to ascertaining the contents and applying foreign law *ex officio* are not uniformly regulated, and the differences between national legal systems do not necessarily reflect the common law–civil law demarcation line. The English procedural model, shaping the common law tradition, requires the parties to prove foreign law as a fact.[10] However, if such sufficient evidence is missing, the court shall not dismiss the case but, rather, resolve it on the basis of English law, which is assumed to be identical with the applicable foreign law, unless proven otherwise.[11] The English standards for pleading and proving foreign law, which are rather uncontroversial in the domestic context yet rather outstanding in a comparative perspective, have also been an object of criticism by some European commentators, who see them challenging international and European Union harmonizing efforts and leading to the non-fulfilment of relevant obligations of the United Kingdom.[12]

However, an effectively similar solution has been adopted in France. If the contents of proper foreign law has not been sufficiently demonstrated by the parties, the court will apply French law to the merits of the case. The obligation to resolve the case 'according to the rules of law applicable to it', which results in a duty to apply foreign law *ex officio* (compare Article 12(1) of the Nouveau Code de procédure civile),[13] was elaborated by the jurisprudence of the Cour de Cassation in the 1980s.[14] In later decisions, however, the Court interpreted this duty as not binding in relation to claims on issues where the parties can freely dispose of their rights, notably including contractual obligations. Nevertheless, the court is obliged to apply foreign law *ex officio* to matters being regulated by an international convention to which France is a party.

[10] See in general Yaad Rotem, 'Foreign Law as a Distinctive Fact–To Whom Should the Burden of Proof Be Assigned?' (2014) 14 *Chicago Journal of International Law* 625.

[11] Cf Pippa Rogerson and John Collier, *Collier's Conflict of Laws* (Cambridge University Press 2013) 49 ff.

[12] Cf Trevor C Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared' (1996) 45 *International and Comparative Law Quarterly* 271.

[13] Article 12(1) of the Nouveau Code de procédure civile, consolidated version of 11 January 2015, available at: <http://legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716&dateTexte=20150228> accessed 28 February 2015.

[14] Cf Cass civ, 11 and 18 October 1988 (arrêts Rebouh and Schule) Clunet 1989, 349.

An approach adopted in US legislation has vested the courts with the powers to establish the contents of foreign applicable law, if they wish to do so. Rule 44.1 of the Federal Rules of Civil Procedure (on determining foreign law) provides that:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

The court is thus not bound by the representations of foreign law offered by the parties. It is also entitled to conduct its own research to ascertain the contents of the law by very broad means, notwithstanding its admissibility under the Federal Rules of Evidence.[15] Moreover, foreign law is notably treated purely as law and not as fact, as firmly expressed by jurisprudence dating from the 1970s[16]—a stance that sets the US approach against the supposed civil law–common law divide. As recently emphasized in *Estate of Botvin ex rel Ellis v Islamic Republic of Iran*, the court's discretion in this regard is extensive, including the right to reject even an uncontradicted expert testimony.[17]

A development leading towards increased judicial responsibility for the proper determination of foreign applicable law in American jurisprudence may also be traced. For instance, in the 1968 decision of *Bartsch v Metro-Goldwyn-Mayer,* the Court noted that, although Rule 44.1 vests the courts with discretionary powers to examine foreign legal sources independently, they are not obliged to do so in absence of any suggestion that such a course would be fruitful.[18] A different stance was adopted in the 2012 decision of *In re: Griffin Trading Company*[19] decision. The appellate court, faced in this case with the issue of the non-application of proper foreign law by the bankruptcy court and then the district court, characterized the district court's reasoning as a ruling that 'failed to appreciate the nature of Federal Rule of Civil Procedure 44.1, and amounted to an abuse of discretion'. The exercise of powers, bestowed upon the courts by Rule 44.1, thus leans towards a possibly authentic scrutiny of the content of foreign law, with its interpretation further suggesting that it was undertaken by the courts of foreign jurisdiction in question.[20]

[15] *Trinidad Foundry and Fabricating, Ltd v M/V KAS Camilla*, CA11 (Fla) 1992, 966 F2d 613.

[16] Cf K*almich v Bruno* CA7 (Ill) 1977, 553 F2d 549, certiorari denied 98 SCt 432, 434 US 940, 54 LEd2d 300, on remand 450 FSupp 227.

[17] *Estate of Botvin ex rel Ellis v Islamic Republic of Iran* 772 FSupp2d 218 (DDC 2011).

[18] *Bartsch v Metro-Goldwyn-Mayer, Inc*, CA2 (NY) 1968, 391 F2d 150, 157 USPQ 65.

[19] *In re Griffin Trading Co.,* C.A.7 (Ill.) 2012, 683 F.3d 819.

[20] *Anglo American Ins Group, PLC v CalFed, Inc* 899 FSupp 1070 (SDNY 1995).

German procedural solutions might be seen as being placed even further in the spectrum of civil procedure with the *iura novit curia* principle, which is applied to both domestic and foreign law. The rule in regard to foreign law is enshrined in section 293 of the German Code of Civil Procedure (ZPO)[21] (on foreign law, customary law, and statutes):

> The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use.[22]

The competence of the court with respect to foreign law is thus presumed, and although the parties might be requested to produce relevant evidence, the court is not limited by its findings. The duty to determine the contents of foreign law *ex officio* is thus treated as a consequence of the duty to apply foreign law, with the right to be heard considered to be restricted in this regard to such circumstances as the avoidance of surprise.[23] Moreover, according to section 545 of the ZPO as well as to the established case law of the German Federal Court (Bundesgerichtshof), appeal (revision) to the Court based on questions of law can only refer to violations of federal law and not to foreign law ('irrevisibility of foreign law').[24]

In Switzerland, the enactment of the 1987 Federal Act on Private International Law (PIL)[25] has shifted the issue of determination and application of foreign law from the procedural sphere, regulated by cantonal law, to the level of federal legislation. Article 16 of the PIL explicitly introduces the duty of the court to ascertain the contents of applicable foreign law on its own motion:

> Art. 16
> IV. Establishment of foreign law
> 1. The content of the applicable foreign law shall be established ex officio. The assistance of the parties may be requested. In the case of pecuniary claims, the burden of proof on the content of the foreign law may be imposed on the parties.
> 2. Swiss law shall apply if the content of the foreign law cannot be established.[26]

According to the established case law, the judge cannot simply rely on the representations of foreign law submitted by the parties.[27] He or she must assess the parties' representations. In the absence thereof, the judge has to establish for

[21] Zivilprozessordnung. Available at: Bundesministerium der Justiz und fur Verbraucherschutz <http://www.gesetze-im-internet.de/zpo/index.html> accessed 28 February 2015.

[22] German Code of Civil Procedure, Zivilprozessordnung (ZPO). Available at: <https://dejure.org/gesetze/ZPO> accessed 28 February 2015.

[23] Alberti (n 8) 7.

[24] Rainer Hausmann, 'Pleading and Proof of Foreign Law: A Comparative Analysis' (2008) 1 *European Legal Forum* 2.

[25] Bundesgesetz über das Internationale Privatrecht (IPRG). Available at: <http://www.admin.ch/opc/de/classified-compilation/19870312/index.html> accessed 28 February 2015.

[26] See <http://www.umbricht.ch/pdf/SwissPIL.pdf> accessed 15 January 2014.

[27] Decision of the Swiss Federal Supreme Court, 27 May 2013, 5A_60/2013, cons 3.2.1.1.

himself the content of the applicable law. Only if the content of the foreign law cannot be established despite the additional research conducted by the judge, will the Swiss law apply (Article 16(2)). Hence, the principle of *iura novit curia* is deemed to apply even in the context of the application of foreign law.

Thus, the traditional doctrinal differences, explained through divergent common law and civil law approaches to *iura novit curia*, seem not to be completely relevant. Moreover, not only is the principle applied to a varied degree across the jurisdictions, but the models of its application also do not necessarily follow the civil law–common law divide. This heterogeneous background of national approaches shall serve as a basis for a further analysis of the state of the art in arbitration, offered in the following section.

B. The power of appeal instances to control the correct application of foreign law

Court judgments are normally subject to review by superior instances, in particular, judgments that apply foreign law. In France, the Cour de Cassation controls whether the lower courts have properly applied foreign law. Although it does not review the interpretation of foreign law in detail, it will review the reasoning of lower decisions that contain information on foreign law.[28] In Germany, both an error in applying the procedure to determine foreign law as well as errors in the application or interpretation of substantive foreign law can be brought in appeal proceedings. In the latter case, the appellate court will identify the content of the foreign law.[29] Appellate court judgments are subject to a revision that can also be based on a violation in the application of foreign law.[30] Swiss appellate courts will also review lower judgments for their application of foreign law.[31] The Swiss Supreme Court, as the highest and third instance court, however, will only control the application of foreign law in non-pecuniary disputes.[32] It is argued that the function of the Supreme Court is only to ensure the uniform application of the *lex fori*.[33]

[28] Decision of the French Court de Cassation, 3 March 2010, 09-13599; M.-E. Ancel, *Tu traiteras avec précision la loi étrangère compétente* (Droit et patrimoine 2008) 91.

[29] Swiss Institute of Comparative Law, *The Application of Foreign Law in Civil Matters in the EU Member States and Its Perspectives for the Future,* Part 1: Legal Analysis (11 July 2011) 200.

[30] Jens Adolphsen, *Europäisches Zivilverfahrensrecht* (Springer 2011) 59–60. Prior to 2009, s 545(1) of the German ZPO provided that a revision could only be based on a violation of federal law. Accordingly, prior to 2009, the German Bundesgerichtshof did not review the application of foreign law. Decision of the German Bundesgerichtshof, 29 June 1987, II ZR 6/87, NJW (1988) 648.

[31] ZPO (n 22) art 310.

[32] Swiss Statute on the Federal Supreme Court, Bundesgesetz über das Bundesgericht (BGG). Available at: <http://www.admin.ch/opc/de/classified-compilation/20010204/index.html> accessed 28 February 2015, art 96.

[33] F Vischer, *Recueil des Courts 1992-I* (Hague Academy of International Law 1992) 87.

In England, the appellate court is able to allow an appeal against a judgment based on the ground that the judgment was wrong.[34] Appellate courts normally review only the judgment or order appealed from the transcript of the proceedings that led to the issuance of that judgment or order and any documentary evidence that was presented to the court appealed from.[35] Evidence of foreign law that is not presented in the prior proceedings is usually not reviewed by the appellate court.[36] In addition, an appellate court will usually refrain from criticizing first instance findings in regard to the contents of applicable foreign law, but will normally be prepared to review the reasoning employed at first instance in order to reach a conclusion as to the effect of the foreign law in the case at hand.[37]

In the USA, Rule 44.1 of the Federal Rules of Civil Procedure (on determining foreign law) is subject to full appellate review (*de novo*).[38] Appellate courts may find and apply foreign law just as well as trial courts.[39] As shown earlier, legal systems differ to a certain extent in their treatment of the alleged errors of lower courts in applying foreign law. A certain common approach is apparent, on the contrary, when the error results from an incorrect application of the relevant conflict-of-law rule leading to the application or non-application of a foreign law.[40]

3. Iura novit curia *as a transnational principle*

The issue of determining foreign applicable law has also been addressed at a transnational level of regulation by the American Law Institute (ALI) / UNIDROIT Principles of Transnational Civil Procedure (PTCP).[41] This instrument, designed as 'standards for adjudication of transnational commercial disputes', is equally applicable to international arbitration, except to the extent of being incompatible with arbitration proceedings (as explained in the official introductory comment of both institutions). Thus, the PTCP may be perceived as a formulation of rules commonly accepted in different legal systems and expressed from a comparative angle or as a procedural *lex mercatoria* for cross-border commercial cases (analogically related to the medieval procedural law merchant, which was applied by

[34] English Civil Procedure Rules. Available at: <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part52> accessed 28 February 2015, Rule 52.11(3) [CPR].

[35] Swiss Institute of Comparative Law (n 29) 540.

[36] Decision of the Court of Appeal (Chancery Division), *Shaker v Al-Bedrawi*, 18 October 2012, [2003] Ch 350, paras 87–9.

[37] L Collins, *Dicey, Morris & Collins on the Conflict of Laws* (volume 1, Sweet & Maxwell 2006) 259, para 9-010, note 37 and 38.

[38] Advisory Committee Notes of 1966, stating that 'the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a).'

[39] Decision of the District Court, *In re Tyson,* 26 July 2010 (SDNY 2010) 433, on remand 2011 WL 1841881; see also Decision of the US Court of Appeals, 7th circuit, *Kalmich v Bruno,* 25 April 1977, CA 7 (Ill) 1977, 553 F2d 549, certiorari denied 98 SCt 432, 434 US 940, 54 LEd2d 300, on remand 450 FSupp 227.

[40] Swiss Institute of Comparative Law (n 29) 38.

[41] American Law Institute–UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press 2006) <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroit-principles-e.pdf> accessed 14 January 2015, [PTCP].

mercantile tribunals resolving cases on the basis of a uniform set of trade customs).[42]

Principle 22 ascribes to the court (or arbitral tribunal) notable, independent competences in regard to the discussed matter, including taking evidence of the applicable law *sua sponte* and appointing its own experts:

> 22. **Responsibility for Determinations of Fact and Law**
> 22.1 The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law.
> 22.2 The court may, while affording the parties opportunity to respond:
> 22.2.1 Permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly;
> 22.2.2 Order the taking of evidence not previously suggested by a party; or
> 22.2.3 Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party . . .
> 22.4 The court may appoint an expert to give evidence on any relevant issue for which expert testimony is appropriate, including foreign law.[43]

The powers of the court in this regard are characterized in the official ALI / UNIDROIT Comments, which accompany the instrument, as 'universally recognized'[44]—a formulation that indicates the transnational character of the *iura novit curia* principle, as it is forwarded in a, *sensu largo*, 'continental' version.[45] An additional reservation that 'all parties have a right to be heard concerning applicable law and relevant evidence'[46] points to the avoidance of surprise as a value pursued in transnational civil proceedings. Similarly, the *ne ultra petita* principle is indirectly referred to in Comment P-22C, subject to possible amendment in the interest of justice, and provides that the parties may respond accordingly. As explained in Comment P-10C to Principle 10 (on party initiative and the scope of the proceeding), despite strong restrictions of the right to amend a pleading in a number of jurisdictions, the specific context of transnational cases calls for more flexibility, particularly when new or unexpected evidence is confronted. As a result, the scope for application of the *iura novit curia* principle is also significantly broadened. Thus, if transferred to, and applied in, international commercial arbitration, the PTCP open the floor for a quite liberal construction of the *iura novit arbiter* rule.

[42] Stephen McAuley, 'Achieving the Harmonization of Transnational Civil Procedure: Will the ALI/UNIDROIT Project Succeed?' (2004) 15 *American Review of International Arbitration* 231.

[43] PTCP (n 41).

[44] Ibid Comment P-22A.

[45] Xandra E Kramer, *De IPR-bepalingen in de ALI/UNIDROIT Principles of Transnational Civil Procedure* (Tijdschrift voor Civiele Rechtspleging 2009) 84.

[46] Ibid.

4. Iura novit curia *in international commercial arbitration (status quo)*

The specific feature that differentiates arbitration from litigation in the context of *iura novit curia* is the fact that the former has no foreign law, since it also does not have—in a sense analogous to the status of the domestic court—*lex fori*. While the question of the power of the court in regard to investigating the sources and contents of the law generally arises in the context of applying foreign law, it is relevant in arbitration in any case and in regard to any law, as formally none of them is foreign (or all are equally foreign) to the tribunal.[47]

This formal assumption in practice often turns out to be a fiction, as the arbitrators might demonstrate high command of the applicable substantive law (which indeed might also be an important reason for their appointment by the parties). However, the issue of the extent to which they are entitled to make use of this knowledge *ex officio* is addressed by different legal systems in a non-uniform way. Consequently, many commentators have addressed the issue of direct applicability of the *iura novit curia* principle in arbitration with observable scepticism[48] while also pointing to the practical disadvantages of replacing it with a strict 'law-as-a-fact' approach and postulating a balanced solution, adjusted to the international commercial arbitration context.[49]

Teresa Giovannini distinguishes—in order of logical implication—the following three aspects of the potential application of the *iura novit curia* principle in arbitral practice:

- the duty of the tribunal to verify (and supplement) through independent research legal sources provided by the parties;
- new qualification of the claim (which might be exercised by the tribunal, based on the findings from the legal sources verification stage); and
- new remedies (to be potentially awarded on the basis of the requalified claims).[50]

Thus, discussion of the degree to which particular jurisdictions, as well as the rules of procedure of arbitral institutions, support the implementation of this principle in arbitral decision making should possibly involve these specific considerations. Moreover, it should be noted that they remain interconnected and

[47] Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2003) 36 *Vanderbilt Journal of Transnational Law* 1313, 1331.

[48] Cf eg Yves Derains, *Observations: Cour d' appel de Paris (1re CH C) 13 de noviembre de 1997–Lemeur v. SARL Les Cités invisibles*, 1998 Revue de l'Abitrage (Comité Français de l'Árbitrage 1998) 711; Philippe Fouchard and others, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 698.

[49] Gabrielle Kaufmann-Kohler, *The Governing Law: Fact or Law? A Transnational Rule on Establishing Its Contents*, July Best Practices in International Arbitration ASA Special Series (ASA Swiss Arbitration Association 2006).

[50] Teresa Giovannini, *International Arbitration and Jura Novit Curia: Towards Harmonization in* Liber Amicorum Bernardo Cremades, edited by Miguel Ángel Fernández-Ballesteros and David Arias (La Ley 2010) 500.

related to other procedural rights (for example, the right of the tribunal to grant new remedies depends on its ability to decide *ultra petita*).

On the level of national legislation on arbitration, the issue of *iura novit curia* remains generally unregulated, with the notable exception of the English Arbitration Act,[51] which provides that:

> Section 34. Procedural and evidential matters.
>
> (1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.
> (2) Procedural and evidential matters include —
>
> . . .
>
> (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.

According to this provision, it is left expressly to the discretion of the tribunal, unless the parties agree otherwise, whether it will choose to conduct independent research on the contents of the applicable law. And if the tribunal decides to do so, it is also granted relevant powers. However, it should be noted that, according to Jeff Waincymer, the consequence of construing this provision in connection with section 33(1)(a), which establishes the obligation of the tribunal to give 'each party a reasonable opportunity of putting his case and dealing with that of his opponent' and which has a *ius cogens* status, shall be an extreme limitation of the cases in which the application of the *iura novit curia* can be justified.[52] Among the initiatives aimed at clarifying this issue, the ongoing work of the ALI on the (currently) Third Restatement of the Law, specifically the US law on international commercial arbitration, should also be indicated.[53]

The matter in question seems to be even more tacitly handled by the rules of procedure of arbitral institutions as well as by the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[54] According to the law of the place of arbitration—as discussed in detail later in this article—as well as to other procedural obligations (such as ascertaining the fulfilment of the right to be heard by both parties), it is generally left to the discretion of the tribunal in planning and executing the proceedings.

The issue of *iura novit arbiter* can also be considered in a broader context of discussion on arbitration as an administration of justice. The persistence of the

[51] Arbitration Act 1996, available at: <http://www.legislation.gov.uk/ukpga/1996/23/contents> accessed 28 February 2015.

[52] Waincymer (n 5) 208.

[53] Cf <http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20> accessed 14 January 2015.

[54] UNCITRAL Arbitration Rules (as revised in 2010) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html> accessed 14 January 2014.

tribunal in applying proper law in its exact form, also *sua sponte*, seems to be directly related to the perception of the main role of the arbitrators. Is the tribunal oriented primarily at the specific dispute resolution? In such a case, the enhanced inquiry into the contents of foreign law might not be necessary or even called for by the parties? Or is it necessary in order to reach beyond a pragmatic solution to a present case and to assume jurispowers (in accordance with the concept of the growing autonomization of commercial arbitration).[55] It is clear then that *iura novit curia* has a close connection to fundamental procedural rights such as the parties' right to be heard, and the article will now discuss the interaction of *iura novit curia* with these other procedural rights.

III. Choice-of-law issues

The question of the law governing the issue of presence and limits of applicability of the *iura novit curia* principle in arbitration points to the law of the place of arbitration, namely the system offering the general basis for delineating the scope of powers of a specific arbitral tribunal, which is further specified by the relevant rules of procedure within the authorization of *legis loci arbitri*. A possible, albeit arguably somewhat more abstract, consideration is whether tribunals, acting in accordance with the general obligation of issuing an enforceable award, shall also take into account the rules of the legal system(s) of the place(s) of anticipated enforcement. In addition to the increased difficulty, as mentioned earlier, of ascertaining the relevant standards on the ground of *lex loci arbitri*, tribunals face particular challenges in cases where such standards turn out to be significantly different (especially if they are more liberal) than those of the place of enforcement.

However, this time-consuming operation generally seems unnecessary in light of the New York Convention.[56] A possible concern for tribunals would be that such a *sua sponte* exercise of the application of proper substantive law would constitute a violation of the public policy of the state of enforcement and thus serve as a ground for its refusal on the basis of Article V(2)(b) of the New York Convention. However, the classification of a procedural rule on the scope of *iura novit arbiter*, as part of a country's public order, seems highly unlikely. It would also go against the well-established doctrine of the exceptional character of public order arguments as well as their international and transnational orientation in enforcement cases.[57]

[55] Gaillard (n 3) 33 ff.

[56] Convention on Recognition and Enforcement of Foreign Arbitral Awards, 7 ILM 1046 (1968).

[57] Cf Hascher (after Lalive). Dominique Hascher, 'Note to ICC Award No. 8891' (2000) 4 *Journal du Droit International (Clunet)* 1083. Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration* (Ashgate 2014) 193 ff.

IV. Legal framework and policy considerations for *Iura novit curia*

1. *Legal framework for* iura novit curia

A. International law

As already indicated (section II.4 in this article), the *iura novit curia* principle is usually not expressly stipulated, and neither is the case in international law on international commercial arbitration. Recognizing the need for guidance and the development of best practices for parties, counsel, and arbitrators in relation to ascertaining the contents of the applicable law in international commercial arbitration, the Committee on International Commercial Arbitration of the International Law Association (ILA) was mandated to study the topic of the determination of the contents of the applicable law in international commercial arbitration. The ILA enacted Resolution 6/2008 on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration. The Resolution concludes that:

> [a] balanced approach is the most acceptable general approach to the determination of the contents of the applicable law in international commercial arbitration. Arbitrators should primarily rely on the parties to articulate legal issues and to present the law, and disputed legal issues. They should give parties appropriate directions in relation thereto and should give appropriate weight to information so obtained.[58]

As a result, there has already been an attempt to formulate and express a doctrinal stance in a formalized manner.

B. Civil law countries

Similarly, the *iura novit curia* principle is usually not expressly stipulated in the *lex arbitri* of civil law countries. However, case law shows that it is widely applied. The French *lex arbitri* does not contain a provision on *iura novit curia* in arbitration, but the application of the principle is confirmed by case law. For example, in the case *Engel Austria GmbH v Don Trade*, the arbitral tribunal partially annulled the contract, based on the Austrian principle of *Wegfall der Geschäftsgrundlage* (ceasing to exist in the basis of the contract), even though neither party had raised it.[59] The Court of Appeal set aside the award,[60] considering that the decision of the arbitral tribunal had been taken in breach of due process because the principle of *Wegfall der Geschäftsgrundlage* had been raised *sua sponte* by the

[58] International Law Association, Resolution 6/2008 on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (21 August 2008).

[59] *Engel Austria GmbH v Don Trade*, unpublished, but see the reference in the appellate decision of the Cour d'Appel Paris (pol 1, 1re ch.), 3 December 2009, 08/13618.

[60] Decision of the Cour d'Appel Paris (pole 1, 1re ch.), 3 December 2009, 08/13618. For comments, see Andrea Carlevaris, 'L'arbitre international entre Charybde et Schylla: le principe iura novit curia entre principe de la contradiction et impartialité de l'arbitre' (2010) 2 *Le Cahiers de l'Arbitrage* 433.

tribunal without giving the parties a possibility to be heard on the application of such a principle. Commentators have supported the decision, arguing that the principle of *iura novit curia* has 'no place' in arbitration because contradictory proceedings require the tribunal to invite the parties to express themselves on the consequences of the rules of law that they intend to apply if the parties have not done so.[61]

German law, as explained, is governed by the principle of *iura novit curia*—that is, the legal evaluation of a case is the task of the judge who is not bound in this respect by the submission of the parties. However, in court proceedings, section 139(2) of the ZPO requires that a judge who wants to rely on a legal argument not raised by the parties must inform them about this argument and discuss it with them. An older decision by the German Federal Court of Justice held that the principle of section 139(2) does not apply to arbitral proceedings.[62] However, according to more recent decisions, the holding should also apply in arbitration so that an arbitral tribunal has to inform the parties if it wants to base its decision on a legal argument not raised by the parties.[63] However, this obligation does not mean that the arbitral tribunal has a general obligation to discuss its legal views with the parties.[64]

In the Swiss *lex arbitri*, there is also no explicit rule on *iura novit curia*. Yet the principle is established in case law. According to the standard case law of the Swiss Federal Supreme Court, an arbitral tribunal may base its findings on legal principles that have not been raised by the parties. The application of legal principles other than those argued by the parties does not violate the parties' right to be heard.[65] However, the arbitral tribunal may not take the parties by surprise by applying legal provisions or principles that neither party could reasonably have anticipated. If the arbitral tribunal considers that the parties have entirely overlooked legal issues that are determinative for the outcome of the case, it must point this problem out to the parties and provide them with an opportunity to present their case on these issues.[66] This duty to invite the parties for comments is applied restrictively by the Federal Supreme Court.[67]

[61] Yves Derains, 'Observations: Cour d'appel de Paris (1re Ch. C) 13 novembre 1997 – *Lemeur v SARL Les Cités* invisibles (1998) 4 *Revue de l'Arbitrage* 711.

[62] Decision of the German Bundesgerichtshof, 11 November 1982, BGHZ 85, 288, 291; Decision of the German Bundesgerichtshof, 8 October 1958, WM 1959, 1373, 1375.

[63] Decision of the OLG Frankfurt, 26 July 2005 <http://www.dis-arb.de> accessed 15 January 2014; Decision of the OLG Stuttgart, 18 August 2006 <http://www.dis-arb.de> accessed 15 January 2014. The decisions relate to domestic arbitration.

[64] Decision of the OLG München, 22 January 2007 <http://www.dis-arb.de> accessed 15 January 2014.

[65] Decision of the Swiss Federal Supreme Court, 15 February 2010, 4A_464/2009, cons 4.1; Decision of the Swiss Federal Supreme Court, 3 August 2010, 4A_254/2010, cons 3.1; Decision of the Swiss Federal Supreme Court, 9 June 2009, 4A_108/2009, cons 2.1; Decision of the Swiss Federal Supreme Court, 30 September 2003, DFT 130 III 35, cons 5 and 6.

[66] Decision of the Swiss Federal Supreme Court, 30 September 2003, DFT 130 III 35, cons 5 and 6; Decision of the Swiss Federal Supreme Court, 9 February 2009, 4A_400/2008, cons 3.1.

[67] Decision of the Swiss Federal Supreme Court. 3 August 2010, 4A_254/2010, cons 3.1; Decision of the Swiss Federal Supreme Court, 15 February 2010, 4A_464/2009, cons 6.4.

C. Common law countries

Similarly to civil law countries, most *leges arbitri* of common law countries are silent on the issue of whether or not the principle of *iura novit curia* applies in international arbitration. The 1996 English Arbitration Act is considered to be an exception as it gives arbitrators the right to decide on the applicability of the law, unless the parties agree otherwise (compare with section 34, as outlined earlier in this article). In line with this, section 33(1)(a) and (b) provides for a duty of the arbitral tribunal to give each party 'a reasonable opportunity of putting his case and dealing with that of his opponent' and to 'adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense'. In earlier cases, arbitral tribunals were given considerable latitude, and awards were only rarely set aside.[68] However, in a 2007 case, *OAO Northern Shipping Company v Remolcaderos de Marin SL*,[69] the High Court of England and Wales annulled an award because the tribunal relied on *iura novit curia* in an improper manner. In *OAO*, counsel proceeded on the assumption that a specific issue was no longer in issue. The arbitral tribunal, without inviting submissions, later used this issue as an 'essential building block' for its conclusion. The Court found this to be 'a serious irregularity', causing 'substantial injustice', and therefore set aside the award.[70]

The USA, where the parties have the primary task to plead foreign law, can be considered to use an intermediate approach. On the one hand, the court is not limited by the material presented by the parties and may engage in its own research. It may wish to re-examine and amplify material that has been presented by counsel. On the other hand, the court is free to insist on a complete presentation by counsel.

D. Conclusion

As discussed earlier, there is no universal rule stating that the *iura novit curia* principle shall be applied in international arbitration. Most *leges arbitri* also do not expressly stipulate the principle. Yet, in light of the existing case law, it cannot be ignored either. In jurisdictions where the principle is anchored in State litigation, mostly civil law countries, it is likely that it may find appreciation in the arbitration context. However, even in civil law countries, where the *iura novit curia* principle usually applies in international arbitration, tribunals do not have complete freedom to apply the law. They are bound by the parties' right to be heard. And even in common law, which apply the principle of *iura novit curia* to a

[68] Decision of the English High Court, *Hussmann (Europe) Ltd v Al Ameen Development & Trade Company and others*, 19 April 2000, [2000] EWHC 210 (Comm).

[69] Decision of the English High Court, *OAO Northern Shipping Company v Remolcaderos de Marin SL*, 26 July 2007, [2007] EWHC 1821 (Comm).

[70] Decision of the England and Wales Court of Appeal (Civil Division), *Bandwith Shipping Corporation v Intaari*, 17 October 2007, [2007] EWCA Civ 998.

lesser extent, tribunals are, to a certain extent, free to apply the law. Hence, it seems that the outcome is not substantively different in jurisdictions that recognize the application of *iura novit curia* in international arbitration from jurisdictions that do not do so.

2. *Rationale of* iura novit curia

The idea behind the *iura novit curia* principle is that the court is in the best position to apply the law correctly and in its entirety as its only interest is to decide the dispute in a fair manner. In contrast, the parties may present the law in a partisan manner or even deliberately not advance the full scope of the applicable law. Allowing the judge to search beyond the parties' legal submissions helps to make sure that the substantive law is being applied correctly.[71] The prospect that like disputes will be decided in the same way is fostered,[72] which secures a consistent and predictable application of the substantive law.[73] Finally, *iura novit curia* also promotes equality before the law as some may be better versed in the applicable law.[74]

However, as indicated earlier (section I), the rationales traditionally offered to legitimize the presence of the principle of *iura novit curia* in the practice of domestic courts are not fully adequate to international commercial arbitration. The reformulated status of the *iura novit curia* principle in arbitration thus calls for a detailed analysis, including an examination of its relationship with other key principles.

V. Interdependence of *iura novit curia* with other fundamental principles

1. General remarks

The power of arbitrators to introduce new issues of law touches upon the essence of the hybrid nature of arbitration as private jurisdiction and of the clash between the contractual and jurisdictional mission of an arbitrator. The autonomy of the parties finds its limits in what constitutes the essence of jurisdictional power.[75] At issue are the fundamental procedural rights of the parties, namely the right to be heard, equal treatment of the parties, and the impartiality of the arbitrators, as well as the limits of the mandate of the arbitrators—that is, the principle *ne ultra petita*. Non-respect for these principles by the arbitrators may lead to the

[71] Wolfgang Wiegand, *Studien zur Rechtsanwendungslehre der Rezeptionszeit, Dissertation in Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung* (Verlag Rolf Gremer 1977) 130.

[72] Theresa Isele, 'The Principle Iura Novit Curia in International Commercial Arbitration' (2010) 13 *International Arbitration Law Review* 16.

[73] Ibid 17.

[74] Geeroms (n 4) 1.34; Douglas Brooker, *Va Savoir! The Adage 'Iura Novit Curia' in Contemporary France* (Berkeley Electronic Press 2005) 9.

[75] See 'Note of Charles Jarrosson on the decision of the Cour d'Appel Paris, 19 May 1998, *Société Torno SpA v/ Société Kagumi Gumi Co Ltd*' (1999) *Revue de l'Arbitrage* 619.

annulment or non-enforcement of an award.[76] The next sections of the article will analyse the interdependence of *iura novit curia* with these principles with a view of assessing to what extent *iura novit curia* can be applied in international arbitration.

2. Party autonomy

Arbitration is governed by the agreement of the parties; they can control the choice of law and procedure to be applied to their disputes. This aspect of arbitration raises questions with respect to the *iura novit curia* principle. If the parties to an arbitration proceeding, the existence of which is based on the autonomy of those parties, do not present a particular legal issue to the arbitral tribunal, why should the latter be able to raise it?

Problems arising from the collision of *iura novit curia* with party autonomy may be overcome by specific procedural provisions implemented by the arbitral tribunal. The tribunal can and should establish rules of procedure and standards of conduct. By creating sensible procedural rules, the tribunal can anticipate possible issues with a later application of the law and the principle of *iura novit curia* and can provide for solutions for these cases.[77]

3. Ne ultra petita

The *ne ultra petita* principle serves the purpose of confining the matter in dispute. An arbitral tribunal has to render a decision within the limits provided. If the arbitral tribunal exceeds these limits by granting higher or different remedies, it violates the *ne ultra petita* principle.[78] The principle of *ne ultra petita* usually does not enter into play so much when arbitrators introduce new *ex officio* issues of law. Indeed, introducing new issues of law is not the same as granting non-requested remedies.[79] Accordingly, past case law finds that tribunals do not violate the *ne ultra petita* principle by awarding corresponding damages for breach of contract when the claimant requests indemnification for non-compliance with the parties' agreement. As long as the recharacterization of the claim is covered by the originally requested relief, the tribunal does not violate the principle.[80] Legal writers have generally agreed with the concept set forth by the courts.[81]

[76] Antonias Dimolitsa, 'The Equivocal Power of the Arbitrators to Introduce ex officio New Issues of Law' (2009) 27 *ASA Bulletin* 432.

[77] Gillis Wetter (n 9) 94.

[78] Wiegand (n 71) 133–4, including references.

[79] See, eg, Decision of the Swiss Federal Supreme Court, 1 November 1996, 20 ASA Bull 258 (2002).

[80] Decision of the Swiss Federal Supreme Court, *Bank Saint Petersburg PLC v ATA Insaat Sanayi ve Ticaret Ltd*, 2 March 2001, 4P.260/2000, 19 ASA Bull 531 (2001). See also Decision of the Cour d'Appel Paris, 27 November 2008, *GFI Informatique v Engineering Engegneria Informatica SPA*, 07/11672; Decision of the Audiencia Provincial de Madrid, 29 June 2004, 524/2004.

[81] Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Thomson Sweet Maxwell 2007) 746; Wiegand (n 71) 133.

There is a limitation to the conclusion that *ne ultra petita* does not enter into play when arbitrators introduce new issues of law, particularly when the arbitration agreement confines the tribunal's jurisdiction to only decide damages based on contract law.[82] If a party makes a legal characterization in its prayer for relief, the tribunal cannot follow another route.[83] The Swiss Federal Supreme Court confirmed this limitation, holding that 'the arbitral tribunal is . . . limited by the subject matter and the amount of the conclusions submitted to it, in particular when the interested party qualifies or limits its claims in the conclusions themselves'.[84] Thus, the *iura novit curia* principle is effectively restricted as the arbitral tribunal will decide *ultra petita* by choosing another legal reasoning (and applying *iura novit curia*).

4. Right to be heard

The right to be heard is one of the pillars of due process. Still, one may ask whether an arbitral tribunal must give the parties an opportunity to submit comments whenever it intends to introduce new legal reasoning. Hence, the parties' right to be heard is frequently invoked when a tribunal introduces new issues of law based on *iura novit curia*. An example from the case law on the parties' right to be heard is a 2009 decision by the Court of Arbitration for Sports (CAS)[85] regarding an agreement between an agent and a soccer player, guaranteeing the former the exclusive right to represent the latter on the European market. Eventually, the soccer player signed an agreement with a soccer club apparently without the agent's involvement. The CAS tribunal rejected the claim (on appeal), considering that the exclusivity violated mandatory provisions contained in the Swiss Federal Law on the Employment Exchange and the Hiring-out of Personnel.[86] The agent appealed the decision, arguing that the decision violated his right to be heard because this law was not advanced by either party. The Federal Supreme Court held that the *iura novit curia* principle prevails as to questions of law.[87] Yet it found that the application of the Federal Law came as a surprise and could not have been anticipated by the agent. The Court found that the CAS tribunal should have submitted the application of the Federal Law to the parties for comments before making its decision.

[82] Wiegand (n 71) 134–5, with more references.

[83] Giovannini (n 50) 95–509.

[84] Decision of the Swiss Federal Supreme Court, *P GmbH v S*, 1 November 1996, 20 ASA Bull 264 (2002).

[85] CAS Award, *José Urquijo Goitia v Liedson da Silva Muñiz*, 2007, Case no A/1371.

[86] Bundesgesetz über die Arbeitsvermittlung und den Personalverleih (AVG). Available at <http://www.admin.ch/opc/de/classified-compilation/19890206/index.html> accessed 28 February 2015.

[87] Swiss Federal Supreme Court, *José Urquijo Goitia v Liedson da Silva Muñiz*, 9 February 2009, 4A_400/2008, 27 ASA Bull 495–496 (2009); see also Hansjörg Stutzer, *Arbitration Newsletter Switzerland: Federal Supreme Court Annuls CAS Award for Violation of the Right to Be Heard* (11 March 2009). See also Swiss Federal Supreme Court, *X v Y*, 16 December 2009, 4A_240/2009; Decision of the Federal Supreme Court, *Westland Helicopters Ltd v The Arab British Helicopter Company*, 19 April 1994 191, DFT 120 II 172.

In line with this case is a more recent decision of the Swiss Federal Supreme Court,[88] where it clarified that the parties do not need to be specifically heard with regard to legal qualifications of the facts as long as these qualifications do not come as a surprise that could not have been reasonably anticipated as being relevant. This was not the case since the party challenging the award had indirectly referred to the contractual terms applied *ex officio*. This decision demonstrates that not every circumstance is excessive in order to justify an annulment based on a violation of the right to be heard. It also reminds counsel to work through the facts and consider any reasonable evaluation under the law. Such legal evaluation can also be the application of a contractual provision, which shows that the Swiss Federal Supreme Court qualifies contracts impliedly as 'law'.

It follows from these decisions that the right to be heard is also an essential element in the context of the *iura novit curia* principle. Tribunals should provide the parties with an opportunity to be heard if they intend to base their decision on legal reasoning that has not been advanced by the parties and that could otherwise lead to an unforeseeable decision. They must also be cognizant that the significance of the facts often depends on the legal reasoning. Should the new legal reasoning prompt new facts, tribunals must provide the parties with an opportunity to be heard.[89] However, a party should not be allowed to misuse the right to be heard. A surprise effect should be denied where the legal nature of the parties' contractual relationship is in issue or the consequences of certain contractual terms have been referred to without specifically mentioning the legal reasoning. The question that remains is who determines what a surprise is.

5. Equal treatment

The *iura novit curia* principle may also coincide with equal treatment. There is case law that demonstrates that equal treatment of the parties is not affected as long as the parties have been provided the opportunity to be heard on the new issues.[90] In our view, the answer needs to be more differentiated. When new issues of law are introduced *ex officio* by the arbitrators, such as a different legal ground for a remedy, it may prompt a party to amend its claim or defence in order to improve its chances.[91] This could lead to the apprehension of judicial bias.[92] A discussion with the parties, in an appropriate manner, about the new issues that the tribunal wishes to base its decision on may eliminate a danger of apparent bias. In particular, if the new issues relate to an important specific premise and are introduced with the underlying legitimate purpose of an accurate and complete

[88] Swiss Federal Supreme Court, *X v Y*, 9 June 2009, 4A_108/2009, 28 ASA Bull 553–4 (2010). See also Decision of the French Supreme Court, *Conselho Nacional de Carregadores v Charasse*, 14 March 2006, Rev Arb 2006, 653.

[89] See Decision of the English Commercial Court, *Bulfracht (Cyprus) Ltd v Boneset Shipping Company Ltd*, 7 November 2002, Lloyd's Report 2 (2002) 687.

[90] Decision of the Cour d'Appel Paris, *Société Ganz Mozdony et autres v SNCFT*, 16 November 1993, Rev Arb 1995, 480.

[91] Gillis Wetter (n 9) 95–6.

[92] Brooker (n 74) 41–2.

reasoning of the award, which will not be subject to a review on the merits, then the risk of appearance of bias can be significantly reduced. The experience and skills of the arbitrators are of course determinant in this respect.[93]

6. Uniformity in the application of the law

Another aspect of arbitration is uniformity in the application of the parties' choice of law. This is especially important when the parties have chosen a body of law that aspires towards uniformity—for example, an international convention, such as the United Nations Convention on Contracts for the International Sale of Goods.[94] However, what if, in an arbitral proceeding, neither party introduces a legal theory that is required for the Convention's uniform application (or another law's application, for that matter)? There could even be more delicate cases, for example, if both parties' theories are consistent with the text of a law but contradict earlier holdings by courts dealing with the same substantive issue. There are good reasons to argue that the arbitral tribunal is under a duty to follow the text of the law and established case law issued thereunder to provide for a uniform application. However, it is sometimes not easy to decide which court's holdings should be followed. This obviously complicates the task of a uniform application of the law.

7. Practical considerations of iura novit curia

Finally, there are practical considerations that need to be taken into account to decide whether an arbitral tribunal may apply the *iura novit curia* principle or whether a tribunal needs to seek the parties' views on legal aspects. For example, in international arbitration, the arbitrators may not necessarily be qualified in the applicable law. In addition, the parties may have a different background and thus have different expectations regarding the determination of the relevant legal principles. Seeking the parties' views on legal aspects will obviously contribute to a level playing field. The decision of introducing new issues of law is also related to timing. Often such new issues appear after the closure of the proceedings when the arbitrators enter into deliberations. Taking into account the fundamental principles that were explained earlier, there may well be cases where the arbitral tribunal will need to reopen the proceedings.

VI. Recommendations and a reformulation of *iura novit curia*

1. Iura novit curia *as the tribunal's right*

As explained, although there is no universal rule providing for the application of *iura novit curia* in international arbitration, it cannot be ignored either. The question remains: is *iura novit curia* a right or a duty? *Leges arbitri* and arbitration

[93] Dimolitsa (n 76) 438.

[94] Cf UN Convention on Contracts for the International Sale of Goods 19 ILM 668 (1980) art 7(1).

rules remain mostly silent on this issue, with a few exceptions. Section 34(2)(g) of the 1996 English Arbitration Act provides that the tribunal has the right to determine whether it should take the initiative in ascertaining the law. In other words, the provision suggests that there is no obligation of the tribunal to ascertain the law *ex officio*. This notion is also reflected in the English case of *Hussman (Europe) Ltd. v Al Ameen Dev. & Trade.*[95] A recent Swiss case also suggests that the application of the *iura novit curia* principle should not be mandatory. The Swiss Federal Supreme Court found that the non-application of this principle does not of itself put the award at risk for being set aside.[96] The Court further stated that the tribunal does not have to provide its own research and may rely entirely on the arguments advanced by the parties if it finds that it is sufficient to ascertain the contents of the applicable law. In the absence of any specific rules or trends to the contrary, one may argue thus that *iura novit curia* should be treated as a tribunal's right—and not as a duty—to ascertain the contents of the law.

However, should states make the *iura novit curia* a mandatory rule? This question must be considered in light of the fundamental principles of international arbitration, as mentioned earlier. One could argue that states have an interest in making the *iura novit curia* principle a mandatory rule in order to develop a coherent body of case law. In fact, a mandatory *iura novit curia* provision would induce tribunals to apply the law in a correct and uniform manner. However, a mandatory *iura novit curia* provision in arbitration would also open the possibility for parties to have a second shot at unfavourable decisions based on an alleged violation of the *iura novit curia* by not *sua sponte* applying all of the possible legal principles.[97] There are also more practical reasons why a mandatory *iura novit curia* provision is not recommendable. In contrast to courts, tribunals may have to apply more often laws with which they are not necessarily familiar.[98] Exposing them to such a mandatory rule could result in a rise in the arbitration costs and time spent on the case to familiarize themselves with the unknown law or to hire an expert. On a side note, parties do not always select an attorney as their arbitrator. In such a case, the parties cannot then expect the arbitrator to cover all facets of the applicable law. Lastly, such a mandatory provision would place tribunals in an uncomfortable situation where a respondent has not advanced a defence.[99] If the tribunal raises this defence, equal treatment is endangered. However, by not addressing it, it may put the award at risk of being challenged for a violation of the *iura novit curia*.

[95] Decision of the English Commercial Court, *Hussman (Europe) Ltd v Al Ameen Dev & Trade Co*, 19 April 2000, Arbitration, Practice and Procedure Law Reports 04/19 (2000) para 42.

[96] Swiss Federal Supreme Court, *D doo v Bank C*, 27 April 2005, 23 ASA Bull 719 (2005).

[97] Gary B Born, *International Commercial Arbitration* (2nd edn, Alphen aan den Rjin 2014) 82.

[98] See Julian DM Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 442.

[99] As has happened in the *Patrick Mitchell v Democratic Republic of the Congo case*, ICSID Case no ARB/99/7, 9 February 2004.

2. *Recommendations regarding the application of* iura novit curia

Based on this discussion, it can be said that the *iura novit curia* principle has a place in international arbitration. However, its application needs to take into account the interaction of the principle with other fundamental procedural principles. Once applied, it should be treated as a right the tribunal has in ascertaining the contents of the law. Tribunals should apply this principle with great deference to the circumstances of the case and provide the parties with the opportunity to be heard on new legal reasoning that they wish to introduce and that may otherwise come as a surprise to the parties.

This view is supported by court decisions in State court proceedings and in proceedings designed to control the correctness of proceedings of arbitral tribunals. As explained earlier, in the context of the judicial application of foreign law in State litigation, the court is entitled to apply the law by itself, if it is not obliged to do so. When doing so, it has to take into account that its judgment will be subject to review by appellate courts, in particular with regard to the correct judicial interpretation of the relevant conflict-of-law rule.[100] There is no such 'substantive' review of awards in international arbitration. Nevertheless, arbitral tribunals are not acting in a legal vacuum. Their awards can be challenged, particularly in the case of a denial of a party's opportunity to present the case. As one judge rightly put it:

> [i]n truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. . . . The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties.[101]

Tribunals are not obliged to invite the parties to devote detailed attention to what will prove to be the decisive point,[102] and they are free to give judgment between the positions presented by the parties.[103] However, the parties have a right to be heard on the legal assessment of the facts they bring into the proceedings when a court intends to base its decision on a legal reason that the parties did not invoke and that they could not reasonably have deemed as being pertinent.[104]

The following guidelines may serve as guidance on how tribunals as well as parties may take advantage of this principle and how surprises can be best avoided.[105] The overarching goal must be to reduce the risk of uncertainty on

[100] Cf section II.2 in this article.

[101] Decision of the English High Court, *Cameroon Airlines v Transnet Ltd,* 29 July 2004, [2004] EWHC 1829, paras 100–1.

[102] Decision of the English High Court, *Terna Bahrain Holding Co WLL v Al Shamsi,* 22 November 2012, [2012] EWHC 3283, para 106.

[103] Decision of the Oberlandesgericht München, 5 October 2009, 34 Sch 12/09.

[104] Decision of the Swiss Federal Supreme Court, 16 December 2009, BGE 4A_240/2009, cons 3.2.

[105] These guidelines are based on the recommendations for tribunals contained in the International Law Association's report for 2008. Cf section IV.1.A in this article.

how a tribunal comes to its decision. Generally, tribunals should respect the confinements of their mandate and preserve due process. As soon as possible (usually on the occasion of a preliminary meeting), the tribunal should remind the parties that it is primarily their task to advance all facts and legal reasoning on all disputed issues they wish the tribunal to consider. It is worth clarifying that the tribunal will primarily rely on these arguments but that it is not confined by the legal reasoning on the contents of the law and may review legal sources not advanced by the parties. Tribunals should take the circumstances of a case into consideration when determining to what extent they may wish to play an active role in ascertaining the contents of the applicable law. They may need to take a more active role when mandatory rules, or public policy, are involved or when the parties are not equally knowledgeable about the applicable law. Where a tribunal believes that the parties have missed the real legal issue or have not sufficiently explored an issue, it should put the point to the parties so that they have an opportunity to deal with it. However, not every legal inference made from the primary facts need to be brought to the parties' attention. If in doubt, the tribunal should present these new points to the parties.

While most of the recommendations for tribunals are of equal importance to the parties, there are a few additional considerations that parties should keep in mind. Tribunals usually operate under the assumption that the primary burden of establishing the law and its contents lies on the parties, even in the absence of any explicit order. The tribunal may even fully rely on the parties' submissions. The tribunal should address early on the process of education on the law so that everyone understands the tribunal's expectations. In addition, party agreements that limit the mandate of the tribunal to some specific legal framework (for example, no tort claims) should be brought to the tribunal's attention early on. Finally, the parties should try to find out which legal conclusions will be deemed by the tribunal to derive from the facts established on the basis of the applicable law and may be barred from raising a 'surprise decision' by failing to do so.[106]

[106] Dimolitsa (n 76) 439.

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Iura Novit Curia and Due Process

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Iura Novit Curia and Due Process

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I. Introduction

1. The 2010 survey of the School of International Arbitration on *Choices in International Arbitration*[2] records that English and New York law applied in 40% and 17% respectively of the arbitrations in which the companies interviewed were involved.[3] In 24% of arbitrations the applicable law was various different national laws. By contrast, ICC statistics record that in 2009 the most frequently chosen laws were English (14.3%), Swiss (13.1%), French (7.2%), US (7.1%), German (6%) and Brazilian (2.6%). Ninety one different laws or systems were applicable out of 817 cases.[4] The number of different laws shows the importance of determining the applicable law in every case.

2. In the greatest number of cases the applicable law is chosen in the first instance by the parties and, in the absence of choice, by the tribunal. ICC statistics show that in 88% of cases parties choose the specific substantive rules to be applied.[5] This means the Tribunal only needs to decide on the applicable law in 12% of ICC arbitrations.[6] To determine what law governs (national or non national), many books and studies have been published,[7] and methodologies have been developed conversant with the applicable choice of law provisions in national arbitration laws and under international and ad hoc arbitration rules.[8] By contrast, comparatively little attention is given to the process by which the arbitrator ascertains sufficient knowledge of the *content* of that applicable law.[9]

3. This chapter is not concerned with the macro choice of law question, i.e. which national or other applicable law or rules apply. Rather it addresses the determination of the specific and detailed rules relevant to be applied to the particular issue before a tribunal, i.e. the micro choice of law. This determination generally only becomes relevant after the applicable law has been chosen or fixed.[10]

4. This issue is important for three reasons. First, parties want to know who should present the specific rules to the tribunal, i.e. on whom is this burden, and how should this be done. Second, the tribunal needs to know what the relevant specific rules are, and whether and how such rules are to be applied. Third, if awards are to avoid challenge for lack of due process and or excess of authority by the tribunal, the process of finding and proving the applicable rules applied by the tribunal should be known and followed by the parties and the tribunal.

5. Whilst the concerns here are the practises followed in international arbitration, the starting off points are the national legislative enactments and laws on proof of law and how they are applied by national courts. This is crucial for all disputes which come before national courts where the specific "foreign" law rules to apply in respect of an international transaction or other issue where the parties and/or subject-matter of the dispute are from or in different jurisdictions. For this purpose most national laws have rules according to which the relevant specific rules are to be determined. These are generally national procedural rules akin to private international law rules which direct the court on how to determine the choice of law issue.

6. In international arbitration, as with the absence of the forum's conflict of law rules, there are no rules expressed as to how a tribunal should determine the content to the relevant law and the specific rules it should apply. However, the expectation is that a tribunal will correctly apply the substantive rules to issues presented by the facts in each case. The need to ascertain the content of the applicable law is an essential task of the international arbitral tribunal.

7. International arbitration rules, institutional and ad hoc, do not address this issue. As noted, they do assist with the macro choice of law issue, containing provisions that instruct the tribunal on the hierarchy of laws to be applied,[11] i.e. chosen by parties, in accordance with a conflict of laws system or rule considered appropriate, the law or rules the tribunal considers most appropriate, the contract terms (elevated to having the weight of law) and trade usages.[12] However, there are no rules which guide the tribunal as to who is and how to identify the specific rules of the applicable law to be applied to the circumstances of each case. However, some rules are clear that whatever national law is applicable, the conflict of laws rules of that country are not to be applied.[13]

8. Unlike a national court, an international tribunal has no personal "national" law which applies except where the parties have agreed and/or the national conflict of laws rules provide that some "foreign law" is to be applied. The international tribunal also has no "national" substantive or procedural law; it equally has no foreign law to apply or consider. In an international arbitration all national laws are what they are; there is no foreign law, only another national law or non-national law.[14]

9. Accordingly, in considering how international tribunals can determine the specific rules or content of the applicable law, we consider briefly the following:

    1. National law rules on proof of "foreign" law
    2. Determination of the content of law by arbitral tribunals
    3. Due process in the proof of law

II. National law rules on proof of law

10. The content of law problem is frequently faced in national domestic courts when a dispute involves or requires the application of a "foreign" law. National courts have procedural rules to deal with this issue which reflect broader differences in civil law and common law court procedures and the role of the court. This can be well illustrated by the simple use of experts in courts for issues outside of the judge's personal area of expertise or knowledge. In some civil law jurisdictions experts are always and can only be appointed by the court. In other jurisdictions experts may be appointed by the Court if the judge considers it necessary or helpful or if the parties want an expert to be appointed. In these situations the expert reports primarily to the judge and there may be circumstances where the judge may communicate with the expert on an *ex parte* basis, i.e. without the parties being present or even knowing that there is or was a meeting between the judge and the expert. By contrast, in many common law systems experts are selected, retained, prepared and paid for by the parties or their lawyers. The judge will ordinarily have no contact with the expert until the day of trial. In all these cases the specific rules will be found in the procedural code or rules of the court in question.

11. The use of experts in national courts, where the content of law or specific rules of foreign law are proved by an expert opinions rather than through submission or argument brought to the court, shows that determining the content of foreign law is an area of significant difference in both legal theory and court practice in different jurisdictions. In international arbitrations these differences need to be addressed, particularly where arbitrators and parties are from different legal systems.

12. The courts in most civil law jurisdictions follow the Latin maxium *iura novit curia* – the court knows the law.[15] Of course the court does not know the law – other than its own (and even then the court does not always know it, has to decide what it is and may even get it wrong with it then being appealed to a higher court). This is equally true of many other issues of a technical, scientific, constitutional and general nature. Rather there is an assumption that "knowing the law" means that the court will research and find the

"foreign" law. It is primarily for the court to take the necessary action to find the law in whatever way it considers appropriate.

13. Accordingly, the judge can generally apply "foreign" law by right of his authority or office (*ex-officio)*. The courts of countries that apply this principle are not bound by the submissions or evidence of the parties or by the parties' classification of the legal issues.[16] For example, Article 16 of the Swiss Private International Law Act provides:

> *The contents of the foreign law shall be established by the authority of its own motion. For this purpose, the cooperation of the parties may be requested. In matters involving an economic interest, the task of establishing foreign law may be assigned to the parties.*

14. Similarly, Article 14 (1) of the Italian Private International Law[17] provides:

> *The judge shall ascertain the applicable foreign law ex officio. To that effect, he may use, in addition to the instruments referred to in international conventions, information obtained through the Ministry of Justice, or from experts or specialized institutions.*
>
> *Should the judge be unable to ascertain the foreign law to which reference is made, even with the co-operation of the parties, he shall apply the law that can be determined on the basis of other connecting factors as possibly provided for with respect to the same matter.*

15. German law is even more explicit that the right of the court to find the law extends also to customary law and by-laws that may be applicable to a given situation. Article 293 of the German ZPO provides:

> *The law which is in force in another state, customary law and by-laws require proof only to such extent as they are unknown to the court. In the establishment of these legal norms, the court is not limited to the evidence brought forward by the parties; it is empowered to make use of other sources of knowledge and to order whatever is necessary for the purposes of such utilization.*

16. Accordingly, if the court does not know the law it may use any means as it thinks appropriate to determine the law which it knows. The judge may research it himself; he may seek expert advice from competent thirds parties, e.g. university or academic institutions; and/or ask the parties to bring him the law on a particular point. The basis for this approach is inherent in the function of the court to determine the matter before it whether this means determining facts, law or anything else.

17. In France, foreign law will be applied by French courts if it is invoked (and proved) by one of the parties. If the parties fail to invoke or prove foreign law, the French Court is not obliged to apply foreign law where only dispositive rights of the parties are the subject matter of the action. However, the court must apply the law *ex-officio* whenever the claim involves matters or rights that the parties cannot freely dispose of ("*droits indisponibles*") or where required by international conventions.[18] Where the court is uncertain as to the law it "*may invite the parties to proffer submissions on points of law which he [the judge] shall deem necessary for the resolution of the dispute."*[19]

18. On the other hand, many common law and some civil law systems require the parties to state the law and prove the content and how the foreign law should be applied to the court as a matter of fact and through presentation of evidence and expert opinion. This is

because the court only knows its own law and therefore seeks to determine "foreign" law as a fact. The task of proving foreign law is borne by the parties and the judge does not need to go beyond what is presented.

19. The position in England is contained in Rule 33.7 of the Civil Procedure Rules which states:

> *(1) This rule sets out the procedure which must be followed by a party who intends to put in evidence a finding on a question of foreign law by virtue of section 4(2) of the Civil Evidence Act 1972.*
>
> *(2) He must give any other party notice of his intention.*
>
> *(3) He must give the notice-*
> *(a) if there are to be witness statements, not later than the latest date for serving them; or*
> *(b) otherwise, not less than 21 days before the hearing at which he proposes to put the finding in evidence.*
>
> *(4) The notice must-*
> *(a) specify the question on which the finding was made; and*
> *(b) enclose a copy of a document where it is reported or recorded.*

20. This is explained clearly in Rule 18 of Dicey, Morris & Collins as follows:

> *(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means. (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.*[20]

21. Accordingly in the English courts foreign law must be pleaded and proved.[21] The judge must rely on the parties for the material upon which he is to decide the dispute and does not have the power to go beyond this material. The judge may not seek to decide issues for himself, do his own research and seek assistance from outside the sources including academics and research centres and government. In English law the *"way of knowing foreign laws is by admitting them to be proved as facts"*.[22]

22. In contrast to the position in England, under the US Federal Rules of Civil Procedure whilst the principle remains that parties must plead foreign law as a fact, the court has and exercises great flexibility when seeking to determine the content of the foreign law. Rule 44.1 Fed. R. Civ. P provides:

> *A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.*

23. A Note of the Advisory Committee on Rule 44.1 explains that the court *"may engage in its own research and consider any relevant material this found"* but may insist on complete presentation from counsel. The Note goes on to state: *"There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them."* However, despite this

flexibility the Note cautions: *"Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented.*[23]

24. Differences in approach in the application of this rule are well illustrated by conflicting views expressed by the judges in a judgment of the 7th Circuit of the US Court of Appeals.[24] Judge Posner expressed the view that a court does not have to, and should only exceptionally, rely on expert testimony regarding foreign law because:

> *Lawyers who testify the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client. These are the banes of expert testimony.* [25]

25. Judge Posner added that judges should research the law themselves as there is an *"abundance of published materials, in the form of treatises, law review articles, statutes, and cases … to provide neutral illumination of issues of foreign law."*[26] rather than rely on paid witnesses to *"spoon feed them foreign law"*[27]. The court did not see that foreign language as a particular obstacle, as most such materials, at least in developed legal systems, are translated or translatable into the language understood by the judge.

26. In the same case Judge Wood cautioned against rejecting expert testimony on foreign law too quickly. She said:

> *Rule 44.1 itself establishes no hierarchy for sources of foreign law, and I am unpersuaded by my colleagues' assertion that expert testimony is categorically inferior to published English language materials. Exercises in comparative law are notoriously difficult, because the US reader is likely to miss nuisances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors US law when it does not. … There will be many times when testimony from an acknowledged expert in foreign law will be helpful, or even necessary to ensure the US judge is not confronted with a "false friend" or that the US judge understands the full context of the foreign provision.*[28]

27. Concern with foreign law experts was also expressed in a report by members of the Committee on International Commercial Dispute Resolution Association of the Bar of the City of New York. Judges referred to in that report variously said: *"We have quite a few things to do besides decoding the Codigo Civil"*; they *"are leery of being blindsided by partisan guns for hire whom they cannot adequately check because of their own lack of familiarity with the law in question"*; *"I am not greatly enamoured of taking testimony from a foreign law expert, however, and think that it would be necessary only in a rare case"*.[29]

28. A most significant factor in the exercise of a court seeking to determine and apply foreign law rules is the fallback position where it is unable to identify those rules with the requisite precision to enable it to apply those rules to resolve the issues before the court. For many judges, however foreign law is determined, there may well be discomfort and uncertainty due to their unfamiliarity with that foreign law. In such cases, the natural and inevitable fallback is to the substantive law of the court. This is recognised as the basic rule in the common law system where foreign law is generally to be proved as a fact. Although not an absolute rule Judge Roger Miner of the 2nd Circuit suggested that in a particularly difficult case the federal courts have a tendency to *"duck and run*" and apply the law of the forum.[30] Article 16(2) of the Swiss Private International Law Act provides similarly: "*Swiss law shall apply if the content of the foreign law cannot be established.*"

29. The description above demonstrates that different legal systems and even different individual judges within the same system take widely different approaches as to the appropriate method for acquiring and proving the content of the applicable law. In international arbitration, the problem is manifestly amplified.

III. Determination of the content of law by arbitral tribunals

30. International arbitration tribunals do not have the formal or support infrastructure that a national court has by way of the substantive or private international law rules relating to jurisdiction, its own procedural code or rules, or its own rules for determining the content of a foreign applicable law.

31. As already noted, in international arbitration there is no "foreign" law. The tribunal has no nationality. Whatever its origins (institutional or ad hoc), whichever arbitration rules may be applied (chosen directly by the parties or by default), however the seat of the arbitration may have been fixed (by the parties or an institution), whoever the arbitrators may be (numbers or nationality, origins, experience or expertise), does not ascribe a specific nationality to the arbitral tribunal.[31] Quite the contrary, it emphasises the neutral, non-national and autonomous nature of the international arbitral tribunal. Accordingly, an international arbitral tribunal needs to establish its own rules for determining the content of the applicable law, just as it does to determining procedure and conflict of laws, i.e. on an ad hoc basis according to the needs and character of each case.

32. There are four sources to which a tribunal can look to assist with this issue:

1. Applicable arbitration rules;
2. Agreement of the parties;
3. Applicable national laws;
4. International arbitration practice.

33. These sources can be looked at individually or together to find a suitable method. However, the method adopted will be for the particular arbitration and, as discussed below, must be made clear to the parties – after consulting with them. One important determining influence may be the lawyers representing the parties who may be reluctant to follow a method different to that with which they are familiar in their home jurisdiction and/or which they believe will work to their advantage.

A. Applicable arbitration rules

34. Most international arbitration rules are in general terms and apply in default of the parties agreeing or the tribunal ordering something different. Few rules directly address issues of procedure, determination of law, admissibility of evidence or burden and forms of proof of the law.

35. An exception is contained in Section 22.1(c) of the LCIA Rules on Arbitration, which expressly empowers the Tribunal to conduct its own enquiries into the applicable law.[32] It provides:

> *Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining*

> *the relevant* ***facts and the law(s) or rules of law applicable to the arbitration****, the merits of the parties' dispute and the Arbitration Agreement.* [Emphasis added]

36. However, arbitration rules do make arbitrators the masters of their own procedure empowering them to select and fix what they consider the appropriate rules for the circumstances of the case. For example:

- Article 14(2) of the LCIA Rules states:

> *Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable: and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.*

- Article 16.1 of the Singapore International Arbitration Centre Rules of Arbitration 2010 provides:

> *The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final determination of the dispute.*

- Article 19 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce states:

> *(1) Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate. (2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case.*

- Article 15(1) UNCITRAL Arbitration Rules provides:

> *The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*

B. Agreement of the parties

37. It is rare that parties expressly address procedural issues in their arbitration agreement, and in particular how the tribunal is to ascertain the content of the applicable law. It may be different, but is still rare, where after a dispute arises the parties enter into a submission agreement. In such circumstances often the dispute is detailed, the arbitrators appointed and the procedure and timetable are specified in whole or in part. Here it can be that parties could agree of how the applicable legal rules are to be proved. This is also the case when arbitration has commenced and the parties pragmatically try to agree on the procedure and timetable to follow; if relevant they may address various areas of the dispute to be addressed, technical and legal, and agree how these technical and legal issues should be addressed.[33]

38. A tribunal will generally accept and follow the procedure agreed between the parties except where for some reason it does not provide the certainty the tribunal needs. In such case the tribunal may seek to change or vary what the parties agreed to have a more practical and pragmatic approach. Absent an agreement the tribunal may look to fall back on a national legal procedure, such as that of the place of arbitration or the law governing the substantive contract, which in turn may result in unexpected outcomes for parties from different legal systems.

C. Applicable national law

39. Similarly most arbitration statutes are generally silent on the issue. An express exception is found in the English Arbitration Act 1996 which gives arbitrators the right to find the law themselves unless the parties agree otherwise. Section 34 provides:

> *(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.*
>
> *(2) Procedural and evidential matters include*
>
> *...*
>
> *g. whether and to what extent the tribunal should itself take the initiative in ascertaining the facts **and the law**.* [emphasis added]

40. Less clearly, other arbitration statutes provide the arbitrator with a broad discretion over the procedural conduct of the proceeding, subject always to the agreement of the parties and ensuring the parties have the opportunity to present their case. For example:

- Article 19 of the UNCITRAL Model Law provides:

> *1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
>
> *(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

- Articles 21 and 22 of the Brazilian arbitration statute[34] provides:

> *Article 21*
> *The arbitral procedure shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitration institution or specialized entity, it being possible for the parties to empower the ... tribunal to regulate the procedure.*
> *First Paragraph: In the absence of any provisions on the procedure, the ... tribunal shall rule on the matter.*
> *...*
>
> *Article 22*
> *The arbitrator or the arbitral tribunal may take the parties' deposition, hear witnesses and determine the production of expertises and other evidence deemed necessary, **either ex officio or at the parties request**.* [Emphasis added]

- Article 1460 of the French Civil Procedure Code provides:

> *The arbitrators shall determine the arbitration procedure; they **shall not be bound by any rules applicable in court proceedings** unless the parties have provided otherwise in the arbitration agreement.* [Emphasis added]

- Article 25 of the Spanish Arbitration Act 2003[35] provides:

> *(1) In accordance with the previous article, the parties may freely agree on the procedure to be followed by the arbitrators in the conduct of the proceedings.*
> *(2) Failing such agreement, the arbitrators may, subject to the provisions of this Act, conduct the arbitration **in such manner as they consider appropriate**. The power conferred upon the arbitrators includes the power to determine the admissibility, relevance, and usefulness of any evidence, the manner of taking evidence, **including on the arbitrators' own motion**, and its weight.* [Emphasis added]

- Article 182 Swiss Private International Law Act states:

> (1) *The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice.*
> *(2) Where the parties have not determined the procedure, the arbitral shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules.*
> *(3) Whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure.*

41. These provisions show clearly that in the absence of agreement between the parties or a clear rule incorporated by reference to arbitration rules, an arbitral tribunal has the flexibility to fix the process it deems appropriate. However, the practices and prejudices of national systems continue to filter through and are imposed on arbitral procedures by national courts. This is well illustrated by two examples.

42. First, where an arbitration has its seat in England, absent agreement to the contrary, the English courts have held that "foreign law" should be proved. This follows the requirement in Section 46(1)(a) of the Arbitration Act that: "*The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute.*" If the parties do not raise an issue about the applicability of a foreign law rule, a tribunal with its seat in England is entitled to presume that the applicable law is the same as the law of England and Wales. The court reasoned:

> *" ... to hold otherwise would mean that arbitrations held in London would be encumbered with the considerable extra expense of obtaining general evidence of foreign law relevant to the matters in issue in every case where the proper law of the contract was not the law of England and Wales".*[36]

43. The rationale for this approach is that if the parties elect not to prove the content of the applicable law, they are deemed to have impliedly chosen that the dispute be decided in accordance with English domestic law – whether or not the case is wholly domestic.[37] This approach does not sit easily with the arbitrators' duty to decide the dispute in

accordance with the parties' express choice of applicable law set out in the arbitration agreement or in accordance with the law otherwise found to be applicable.

44. Whatever the pragmatic merits of this approach it will be a surprise and frequently unacceptable to the party not aware or confident of the English system. The selection of arbitration is to avoid the strict national law mechanisms and procedures. In some cases the seat of arbitration is fortuitous and not chosen as a fallback to the procedure of that system.[38] Even where London may have been selected expressly as a neutral and convenient seat for the arbitration it is more likely to have been relevant that the United Kingdom is party to the New York Convention, the flexibility of the Arbitration Act 1996 and the perception of London as one of the major international arbitration seats. Most seriously, if an arbitral tribunal fails to ascertain and apply the applicable rules of the law chosen by the parties this could well be grounds to refuse enforcement of an award under the New York Convention on the basis that the tribunal has acted outside the remit of the arbitration agreement.[39]

45. In contrast, the Swiss Federal Tribunal has held that arbitrators have an obligation to apply the law *ex officio*[40] but may rely entirely on the arguments of the parties where proof is sufficient or may request the parties to establish the content of the applicable law.[41] The effect of this decision is that even if a tribunal applies the governing law beyond or differently to the submissions of the parties, there will be no case for an annulment of the award.[42] It follows that a party will not be entitled to raise an objection of lack of substantive jurisdiction. There is no violation of due process as the parties (ought to) know that in Switzerland arbitrators are deemed to know the law. However, in extreme circumstances where the parties did not mention and where they had no possibility to perceive the relevance and materiality of a point of law, the parties' right to due process may prohibit the tribunal from basing its award on points of law not raised or considered by the parties. A key issue is that parties should not be surprised when they find the tribunal has relied on legal arguments that the parties could never have expected.[43] Failure to give parties an opportunity to comment may constitute grounds for setting aside the award.[44]

D. International arbitral practice

46. As described above, there is no clear or definitive directive which tells arbitrators how to find the content of the applicable law. International arbitration rules are silent and national laws are not directly relevant or appropriate. The problem is manifest in the typical international arbitration where the parties and one or more of the arbitrators come from different jurisdictions and legal systems. Often the tribunal, or at least some of its members, will have little or no knowledge of the applicable substantive law.

47. In the circumstances the traditional methods to find the applicable rules to apply are rarely appropriate. *Iura novit curia* is wholly artificial unless at least one of the arbitrators is truly an expert in the particular applicable substantive law[45] – but even then the law ought to be known and decisions made by the tribunal as a whole. Finding the law could place "*excessive demands*" on international arbitrators.[46] Equally, the fact approach to proof of law exempts the arbitrators from finding or even understanding the relevant rules, and leaves the tribunal to follow the more persuasive expert and may leave the parties dissatisfied with the outcome. Falling back on a default law, whether of the seat or that best known the tribunal, ignores the duty of arbitrators to apply the applicable law or rules.

48. There is no hard evidence of how international tribunals fill this vacuum or the rationale with which they do so. The few cases that are known (e.g. the cases discussed at §§ 42 and 45 above) have come before a national court asked to review and or set aside or refuse enforcement of an award for a procedural or substantive irregularity. The focus of a

national court is inevitably against the backdrop of its systems. Anecdotal evidence suggests that the processes used in national courts are followed by international tribunals but often with variations developed to meet the circumstances of the case. This includes not only the tribunal researching and finding the law itself and reliance on expert evidence, but also variations and mixing of these methods, all aimed at finding the correct rules to be applied.

49. Relying on the various rules and laws discussed above (§§ 39 and 40), international tribunals frequently fix procedure and chose the applicable law by applying hybrid processes, drawn from different and several legal systems, they consider appropriate in the circumstances. The methods used at the seat of the arbitration, under the applicable substantive law, or the law governing the arbitration agreement if it differs, the origins of the tribunal members and the origins of the lawyers representing the parties, are no more than factors which can influence the method to be used by the tribunal in a given case. This is done in the context of the arbitrators' duty to apply the law chosen by the parties.

IV. Importance of due process

50. Throughout the arbitral process the tribunal must be mindful to render an enforceable award.[47] This objective is contained in many arbitration rules. For example, Article 35 of the ICC Rules requires the tribunal to *"make every effort to make sure that the Award is enforceable in law";* Article 32.2 of LCIA Rules states that the tribunal *"make every reasonable effort to ensure that an award is legally enforceable"*.[48] This is expected by the parties.

51. A fundamental requirement for enforceability of an award is adherence by the tribunal of "due process" in its widest form. Not only must parties have an opportunity to put their case and answer the issues raised by the other party and the tribunal, but also the tribunal must not exceed its authority in the terms of the arbitration agreement and decide on an issue not raised or discussed with the parties.[49] Furthermore, the tribunal should endeavour to adopt methods and a procedure that minimises the risk that an award will be challenged or rendered unenforceable.

52. This necessitates three basic elements. First, the tribunal must apply the law expressly chosen by the parties, and in the absence of such choice the law which the tribunal deems applicable.[50] This includes not only the system of law but the particular rules as well. Second, the parties must know the method which the tribunal is to follow in its analysis of law (or any other aspect of the case) so that they can address these issues accordingly. Arbitrators should not reach conclusions of law or fact, nor decide issues, without giving the parties an opportunity to address them. Third, the procedure being followed should be transparent: the parties should be aware of how the tribunal expects evidence and law to be presented and if the tribunal may to use its own initiatives in finding facts and law.

53. When a tribunal conducts its own research and is considering the extent to which it can apply legal rules or arguments not raised by the parties, it should be careful not to step outside of its mandate as defined by the arbitration agreement.[51] Failure to apply applicable legal rules (mandatory and permissive) that were not raised by the parties may also open the way for challenge. Thus there is a risk of an award being challenged if a tribunal either does not apply the law argued by the parties, or if it applies law that was not raised by the parties. The tribunal is thus caught between *Charybdis* and *Scylla*,[52] or more colloquially, between a rock and a hard place. It is therefore important wherever practicable that the tribunal obtain the parties' agreement, or in absence of agreement give a clear direction how it intends to proceed to ascertain the content of the applicable law. As stated by Professor William Park:

> *"Providing an opportunity for litigants to comment on the law remains vital both to the arbitrator getting it right and to the parties' sense of being treated justly."*[53] .

54. An example of this problem was demonstrated in the English High Court in *B v A.*[54] A dispute arose in the context of a share purchase agreement of shares in a Spanish company. The contract was written in English but governed by Spanish law. The arbitration was under the ICC Rules and its seat was in London. Two of the arbitrators were from common law backgrounds; the other was Spanish. The award was made by majority – the two common lawyers. The dissenting (Spanish) arbitrator suggested that the majority arbitrators did not feel comfortable with Spanish law and had decided the matter in an arbitrary fashion.

55. The award was challenged on the grounds *inter alia* that the Tribunal failed to decide in accordance with Spanish law, the law chosen by the parties.[55] The High Court dismissed the challenge on the basis that the failure to apply the chosen law contrary to section 46 of the Arbitration Act was not a serious irregularity. For the challenge to have succeeded, appellant would have had to show that the tribunal made a *"conscious disregard of the provisions of the chosen law"*.[56] In fact the Court found the majority had based their decision on their understanding of Spanish law and that the dissenting arbitrator's contentions that they did so erroneously was irrelevant and not grounds to challenge.[57]

56. By corollary, the Quebec Superior Court[58] annulled an award that imposed a remedy that neither party had sought and on the basis of reasons that had neither been submitted for determination nor addressed by the parties. The case concerned a joint venture agreement which had broken down and, based on the facts pleaded, concerned the right of one party to invoke the buy-out arrangements due to the other party's breaches. The Tribunal found the relationship between the parties to have broken down completely and ordered the dissolution of the joint venture invoking the valuation and buyout provisions in the joint venture agreement. The Court set aside the Award on the grounds that *"the Valuation and Buyout Remedy was improperly fashioned according to the Tribunal's own perception as to what was fair and equitable, rather than by respecting the scope of the mandate consented and agreed to by the parties"* and more particularly *"(i) violated the* ***audi alteram partem*** *rule; (ii) dealt with a dispute which was not contemplated by the parties and decided matters beyond the scope of the Terms of Reference"*.[59]

57. Although there would appear to be differences as to the extent that some national courts would uphold an award on a legal point not argued by or discussed with the parties,[60] it is generally advisable that tribunals should not decide issues without the prior debate with the parties. Rather, arbitrators should ask parties to address purely legal issues which were not discussed during the proceedings and which the parties could not have been aware the tribunal might consider applying. As suggested by Poudret & Besson *"arbitrators should rather show more caution (rather than be more audacious) than the courts before substituting their legal arguments for those of the parties"*.[61] This approach was adopted by the sole arbitrator in an ICSID case in 2005 where he stated:

> *In respect of international arbitration taking place in Sweden, it is sometimes suggested that the principle iura novit curia applies, but the parties should be notified of new legal sources introduced by the arbitrator, so that they have the possibility to comment on them.*[62]

58. This has been upheld by the courts in England[63] and France[64]. By contrast, in Switzerland arbitrators have an *ex officio* obligation but should not surprise the parties by applying a legal rule which they could not have foreseen.[65] In Sweden and Finland a similar approach is taken.[66] German courts have also taken an expansive view on the *iura novit curia*

doctrine by arbitral tribunals. In a case where an arbitrator had been independently assisted by a legal advisor with his deliberations, the *Bundesgerichthof* held that the "*arbitrators had heard the parties on their legal views; it was not necessary to hear the parties on the legal view of the jurists.*"[67]

59. On a practical level, to avoid misunderstandings between parties and arbitrators from different cultures, legal systems and jurisdictions, the expectations of the parties and the intentions of the tribunal should be openly discussed and circumscribed at an early stage. This could be done in the arbitration agreement (as discussed above this is not an issue parties would normally consider at the time the contract is negotiated), or in a procedural order of the tribunal dealing with the presentation of law and other issues. Professor Kaufmann-Kohler[68] pragmatically suggests wording in the following terms:

> *The parties shall establish the content of the law applicable to the merits. The arbitral tribunal shall have the power, but not the obligation, to conduct its own research to establish such content. If it makes use of such power, the tribunal shall give the parties an opportunity to comment on the results of the tribunal's research. If the content of the applicable law is not established with respect to a specific issue, the arbitral tribunal is empowered to apply to such issue any rule of law it deems appropriate.*

V. Conclusion

60. There is no "*uniform, homogeneous practice*"[69] with regard to proof of law. Whilst there are national rules for determining the content of "foreign" law in national courts, they are neither homogeneous nor complimentary. Even within civil law and common law systems, their application differs. Accordingly, an international tribunal has the freedom and flexibility to select a method to determine the applicable rules to reach the correct decision in each case. In all such situations, the tribunal must follow a method that is reasonable, objective, fair and transparent.

61. This means that, except in rare cases and absent agreement by the parties, no one system should be preferred. Much will depend on the circumstances of the case, the legal issues in dispute and the composition of the tribunal. The method followed by the tribunal can be developed specifically, and may be a variation or hybrid of the "know the law" and expert approaches.

62. If experts are relied on, the questions referred to them and the documentation they are asked to review, should be uniform. The tribunal could consider either having its own expert in addition to those of the parties – though this will have additional cost implications. Alternatively, the tribunal could suggest just one expert be appointed and instructed by the tribunal but with input from both parties. The expert then could be examined or challenged by both parties and the tribunal. This could lead to a more objective opinion and reduce cost but does reduce the control of the parties. Another practical option, frequently followed by tribunals, is to examine the experts jointly (conferencing), or even in the form of a "teach in" by the experts of the tribunal. Where appropriate the tribunal should be taken to original sources, e.g., legislative texts, regulations, by-laws and court decisions, to understand how these rules should be applied.

63. Where parties are to argue the law, again it should be done by bringing the relevant sources to the attention of the tribunal. There is an imbalance where one party argues the law and the other relies on expert evidence. Arguing the law will often involve oral presentations before the tribunal. In this respect, a tribunal will be expected to know and understand the law even if this includes doing its own research as to the content of the law

– and to reach its conclusions on the basis of the knowledge acquired and on its understanding of what it finds to be the relevant rules.

64. Hybrid processes may include submissions of law by the parties, expert reports and the tribunal doing its own research. This may be overkill, complicate the issues and increase the costs. However, the key is to bring the relevant legal rules to the tribunal and for the application of those rules to be understood by the tribunal. If the tribunal is not satisfied with the law as presented by the parties, it could instruct an expert to assist with its understanding. Any instructions to an expert should be open and transparent so the parties are aware of what has been requested and what is advised.

65. However a tribunal decides to deal with this issue, due process requires that the parties are aware of the method to be followed. There should be no surprises and no arguments that a party was denied the opportunity to present or defend its case. This is an issue that, where possible, tribunals should discuss with the parties at an early stage, and could also be included in a procedural order or direction given to the parties.

66. There is an emerging international consensus amongst commentators that a hybrid approach to proof of content of law issues is preferable in international arbitration. At first instance, in most cases, the parties should establish the content of the applicable law. International arbitrators do not always "know the law". Where uncertain as to the applicable rules, or if it considers that an important legal issue arises relevant to the outcome of the case and/or which the parties have not (or not adequately) addressed, the tribunal may do its own research, or ask questions and seek clarifications from the parties.

67. A tribunal is free to undertake its own research on points of law not argued by the parties, or beyond the scope of the parties submissions. However, it should do so openly and provide the parties with the opportunity to comment on any matter that may materially affect the tribunal's decision. This approach supports the principle that each party be allowed to present its case, minimises the tribunal's risk of error and reduces risk of challenge to the award. It also allows the tribunal to "*rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been)*".[70]

68. The use of a hybrid method to prove the applicable rules of law accords with the transnational nature of international arbitration. It allows the parties and the tribunal to accommodate differences between the backgrounds and expectations of the parties and the tribunal members, and ensures that the parties are clear about the procedure followed by the arbitral tribunal. Ultimately, if it goes off on a "*frolic*" of its own,[71] the tribunal risks stepping outside its mandate and the award being challenged. That outcome is neither helpful nor desirable.

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1 Barrister, 20 Essex Street, London; Professor and Head, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London

2 Available at www.arbitrationonline.org, last visited 28 October 2010

3 Ibid, p 11. Other specified laws are Swiss and French, respectively 8% and 6%

4 ICC Bulletin, Volume 21 (1) 2010, at p 12

5 Ibid

6 Of course even where there is a chosen governing law it will often be necessary for arbitrators to determine issues that may be subject to another law, e.g.. capacity of a party, validity of a peripheral contract, an agency or distribution agreement under another regime and issues of mandatory law

[7] See for example: Lew, Julian D.M., *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, Oceana Sijthoff, (1978); Grigera Naón, *Choice of Law Problems in International Commercial Arbitration (1992);* Hanotiau, *What Law Governs the Issue of Arbitrability?*, 12 Arb. Int'l 391 (1996); Lew, Julian D.M, *The Law Applicable to the Form and Substance of the Arbitration Clause* in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series, 1998 Paris Volume 9 (Kluwer Law International 1999) pp. 114 – 145; Blessing, *Choice of Substantive Law in International Arbitration*,14(2) J. Int'l Arb. 39 (1997); Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9 (2001); Giuditta Cordero Moss. "International Arbitration and the Quest for the Applicable Law" *Global Jurist* 8.3 (2008)

[8] See for example: Germany ZPO § 1051(2) *"Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject matter of the State is most closely connected"* Article 187(1) of the Swiss Private International Law Act provides, *"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the action is most closely connected";* UNCITRAL Model Law, Article 28(2) *"Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable";* New Zealand Arbitration Act, First Schedule, 28(2), *"the arbitral tribunal shall apply the law determined by the conflict of laws rules which it deems applicable";* England Arbitration Act 1996 § 46(3) that: *"if or to the extent that there is no … choice or agreement… the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.*" Article 1496 of the French New Code of Civil Procedure provides that the arbitral tribunal may resolve the dispute *"in accordance with the rules of law it considers appropriate*."; UNCITRAL Rules Article 33(1) *"the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.";* Article 17(1) of the ICC Rules *"The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate*; Similarly see LCIA Arbitration Rules 22(3); WIPO Arbitration Rules 59(a); Stockholm Arbitration Institute Rules Article 22(1)

[9] As discussed below, a few exceptions are found in the English Arbitration Act, Articles 34(1) and 34(2)(g); See also Danish Arbitration Act 27(2); Dutch Code of Civil Procedure Article 1044 and LCIA Arbitration Rules; Article 22.1(c)

[10] Ten years ago I wrote an article, *"Proof of Applicable Law in International Commercial Arbitration"*, in *Festschrift für Otto Sandrock* (2000) p 581, where I intended to provoke discussion of this relatively neglected topic. Over the past ten years there have been several valuable contributions to this topic including: Filip De Ly, Mark Friedman and Luca Radicati Di Brozolo for the *International Law Association International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Arbitration*" in 26(2) Arbitration International 191-220 (2010); Gabrielle Kaufmann-Kohler, *The Arbitrator and the Law: Does He/She know it? And a few more questions*, 21 Arbitration International 631-638 (2005); Gabrielle Kaufmann-Kohler, *The Governing Law: Fact or Law? – A Transnational Rule on Establishing its Contents, Best Practices in International Arbitration*, ASA Special Series No 26 (July 2006), p 79-85; Kurkela, M, *"Jura novit curia" and the Burden of Education in International Arbitration – a Nordic Perspective'* (2003) *ASA Bulletin* 486-500; Prof. Dr. Rainer Hausmann, *Pleading and Proof of Foreign Law – a Comparative Analysis"*, The European Legal Forum, Issue 1-2008, I-1-I13; Laurent Levy, *"Jura Novit Curia? The Arbitrator's discretion in the application of the governing law;* http://kluwerarbitrationblog.com/blog/2009/03/20/jura-novit-curia-the-arbitrator%E2%80%99s-discretion-in-the-application-of-the-governing-law/, last visited 29 September 2010; William W Park. *"Arbitrators and Accuracy"* in Journal of International Dispute Settlement, Volume 1, No 1, February 2010, 25-53

[11] ICC Arbitration Rules, § 17; WIPO Arbitration Rules, § 59; Stockholm Arbitration Institute, § 22; Singapore International Arbitration Centre, § 27; UNCITRAL Arbitration Rules, § 33.

[12] See for example, ICC Rules, § 17(2); UNCITRAL Rules, § 33(3); WIPO Rules, § 59(a). This is the argument that the rights and obligations of the parties should be applied directly. The applicable law is only relevant if the contract terms are silent or ambiguous or contrary to some mandatory law that cannot be excluded or countermanded

[13] WIPO Rules, § 59(a); Stockholm Arbitration Institute, § 22(2)

14 For example, international commercial law, general principles of law, lex mercatoria, Sha'aria law, Jewish law

15 For example, under German procedural law foreign law is treated as law and not as fact. See Prof. Dr. Rainer Hausmann, *Pleading and Proof of Foreign Law – a Comparative Analysis"*, The European Legal Forum, Issue 1-2008, I-1-I13, available at http://www.simons-law.com/library/pdf/e/878.pdf, last visited 8 October 2010

16 For example, see Kurkela, M, *"Jura novit curia" and the Burden of Education in International Arbitration – a Nordic Perspective'* (2003) *ASA Bulletin* 486 for a discussion of the position in Sweden and Finland

17 Law Reforming the Italian system of Private International Law of 31 May 1995

18 Hausmann, op cit fn 10, at page I-5

19 Article 13 French New Code de Procedure Civil

20 *Dicey, Morris & Collins*, The Conflict of Laws, Sweet & Maxwell, 2006, 14th edition, § 9-001. See also Adrian Briggs, *Agreements on Jurisdiction and Choice of Law*, Oxford, 2008, § 2.21-2.29

21 *Ascherberg, Hopwood and Crew Limited v Casa Musicale Sonzogno* [1971] 1 WLR 1128 (CA); [1971] 3 All ER 38; *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3612, § 38

22 *Mostyn v Fabrigas* (1774), 1 Cowper's King's Bench Reports (Cowp.) 161, 174 (Lord Mansfield).

23 1966 Advisory Committee Notes, US Federal Rules of Civil Procedure, Rule 44.1

24 *Bodum USA Inc v La Cafetiere Inc*, United States Court of Appeals, 7th Circuit, 2 September 2010, 2010 U.S. App. LEXIS 18374, page 17

25 Ibid, page 21

26 Ibid, , page 21

27 Ibid, , page 23

28 Ibid, Wood J, page 38

29 *"Proof of foreign law after Four Decades with Rule 44.1 FRCP and CPLR 4511* http://www.abcny.org/pdf/report/International_Commercial_Dispute.pdf, see pages 4, 6 and 8.

30 Committee on International Commercial Dispute Resolution Association of the Bar of the City of New York, op cit, page 5

31 For a contradictory view as to national jurisdiction control see, Rau, Alan Scott, *Understanding (and Misunderstanding) 'Primary Jurisdiction'*, available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633555, last visited 21 October 2010, page 17

32 This is not the normal position taken by English Courts. See §§ 18-21 above

33 See suggestion of Professor Kaufmann-Kohler at § 59

34 Law No 9.307 of 23 September 1996

35 Ley 60/2003 de 23 de diciembre, de arbitraje

36 *Hussman (Europe) Ltd v Al Ameen Dev & Trade Co* [2000] EWHC 210 (Comm), § 42

37 *Dicey, Morris & Collins*, § 9-002

38 Born, G, *International Commercial Arbitration*, Kluwer Law International, 2009, p 1678, fn 18

39 See § 53 ; New York Convention, Article V(1)(b) and V(1)(c); also Filip De Ly, Mark Friedman and Luca Radicati Di Brozolo, op cit fn 10, in 26 Arbitration International 193 (2010), at p 213

40 See Swiss Federal Tribunal, 30 September 2003, 4P.100/2003, 22 ASA Bulletin (2004) No. 22, p. 574 and 579

41 Swiss Federal Tribunal, D Doo v Bank C, 27 April 2005, (2005) ASA Bulletin 719

42 See by comparison Swiss Federal Tribunal, 9 February 2009, 4A_400/2008. The Federal Tribunal quashed a Court of Arbitration for Sport award on the basis that the arbitrators had referred to provision of law that could not have been contemplated and was not relied on by the parties. The Tribunal also failed to give the parties an opportunity to comment on the applicability of the provision. See Laurent Levy, op cit fn 10

43 Laurent Levy, op cit This view is echoed in, William W Park, op cit fn 10, at page 44

44 Lauren Levy, ibid

45 *See* Gabrielle Kaufmann-Kohler, op. cit., fn 10, at p 631, and 637, where she stated *"counsel would be ill-advised to submit an opinion of Swiss law to a Swiss contract law professor in which one of his colleagues purports to teach him contract interpretation."*

46 Klaus Peter Berger, *Private dispute resolution in international business: Negotiation, Mediation, Arbitration, Volume II, Handbook*, Kluwer Law International, 2009, 476-477

47 Queen Mary University London / Pricewaterhouse Coopers, *"International Arbitration: Corporate Attitudes and Practices 2006"*, p 6, *"enforceability of awards was ranked as the single most*

important advantage [of international arbitration] *by the highest number of respondents."* http://www.arbitrationonline.org/docs/IAstudy_2006.pdf, last visited 28 September 2010

48 See also, Article 47 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce: *"In all matters not expressly provided for in these Rules, the SCC, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that all awards are legally enforceable."* Artice 62(e) WIPO Rules: *"The Tribunal may consult the Center with regard to matters of form, particularly to ensure the enforceability of the award"*

49 New York Convention Article V(1)(b) and V(1)(c)

50 This is well recognised by almost all the choice of law provisions in the institutional and other international arbitration rules, and many national laws, see e.g. UNCITRAL Model Law Article 28 and § 187 Swiss Private International Law Act

51 Filip De Ly, Mark Friedman and Luca Radicati Di Brozolo, op cit fn 10, at p 213. See also New York Convention Article V(1)(c); UNCITRAL Model Law 34(2)(iii) and (iv); Section 68(2)(b) and (c) English Arbitration Act 1996

52 See Kalnina, Ieva, "*Iura Novit Curia: Scylla and Charybdis of International Arbitration?*", in 8 Baltic Yearbook of Int'l Law 2008. In Greek mythology these were two sea monsters that guarded opposite sides of the narrow passage through which Odysseus had to sail in his wanderings. Scylla had six snaky heads and reached out to seize and devour six of Odysseus' companions. Charybdis, was the personification of a whirlpool, who drank down and belched forth the waters three times a day. The shipwrecked Odysseus saved himself by clinging to a tree on the shore until his raft floated to the surface. See http://www.britannica.com/ re Scylla and Charybdis

53 William W Park,op cit fn 10, at p 44

54 *B v A*, [2010] EWHC 1862. See note of Nicholas Fletcher to ITA Board of Reporters, Kluwer Law International, http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1033006.

55 Under sections 67 (procedural irregularity) and 68 (excess of jurisdiction) of the English Arbitration Act 1996

56 Op cit, at § 25

57 The Court also held that an error of law was not held to involve an excess of power under S.68(2) of the English Arbitration Act

58 *Louis Dreyfus S.A.S. v Holding Tusculum B.V.* 2008 QCCS 5903, available at http://www.mcgill.ca/arbitration/othercases/

59 Ibid at §§ 74 - 75

60 See discussion in J.F Poudret & S Besson, *Comparative Law of International Commercial Arbitration* (2nd Edition), Sweet & Maxwell, 2007, §§ 551-552 and §§ 801-803

61 Ibid § 551, p 476

62 *Iurii Bogdanove, Agurdino-Invest Ltd and Agurdino-Chima JSC v Republic of Moldova*, SCC, Arbitral Award, 22 September 2005, § 2.2.1

63 *Modern Engineering v Miskin* [1981] 1 Lloyd's Rep. 135 (CA)

64 Rev. arb. 1995, p 448 Rev. arb 1995, p 597; *Cora v Casion, Les Cahiers de l'Arbitrage* No. 2004/2/1

65 Switzerland see Swiss Federal Tribunal Decision of 30 September 2003, 4P.100/2003 22 ASA Bulletin (2004) No 22, p 574;

66 Kurkela, *"Jura novit curia" and the Burden of Education in International Arbitration – a Nordic perspective*, ASA Bul. 2003, 486-500, 499-500

67 Franz T Schwarz, and Christian W Konrad, , *The Vienna Rules: A Commentary on International Arbitration in Austria*, § 20-044 - § 20-046; See *BGH, 22 May 1957*, V ZR 236/56, ZZP 71 (1958) 427

68 Gabrielle Kaufmann-Kohler, *The Governing Law*, op. cit. fn 10 , at p 6; See also Kaufmann-Kohler, *The Arbitrator and the Law*, op. cit. fn 10, at p 635

69 Ibid, p 634.

70 *Klockner v Cameroon*, Decision on annulment, 3 May 1985, 2 ICSID Reports 95, § 91

71 *Louis Dreyfus S.A.S v Holding Tuscullum B.V.*, op. cit. fn 58, at § 102

The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions

by GABRIELLE KAUFMANN-KOHLER*

I. PRELIMINARY COMMENTS

REFLECTING BACK on the cases in which I have been involved as an arbitrator, and certainly forgetting some of them, I realized that I have resolved disputes under German, French, English, Polish, Hungarian, Portuguese, Greek, Turkish, Lebanese, Egyptian, Tunisian, Moroccan, Sudanese, Liberian, Korean, Thai, Argentinean, Colombian, Venezuelan, Illinois, New York ... and Swiss law. Do I know these laws? Except for New York law, which I learned many years ago and would not pretend to know now, and Swiss law, which I practise, although not that often as you see, the answer is clearly no. So how did I apply a law unknown to me? By ignoring it? By focusing on the facts and the equities? How did I become educated in the law? How did counsel teach me?

These are the questions that I would like to address with you now. I would like to do it in four steps:

- first, I will define the topic and put it into the proper perspective;
- secondly, I will draw a parallel with the position before national courts, because arbitration practitioners often approach this issue by reference to the practice in their courts;
- thirdly, I will review the rules and the practice in international arbitration; and
- fourthly and lastly, I will consider case management (*i.e.* the arbitrator's perspective) and advocacy (*i.e.* counsel's perspective).

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* Professor, University of Geneva; Partner, Schellenberg Wittmer, Geneva; and President, Swiss Arbitration Association. Luncheon address, Fifteenth Annual International Commercial Arbitration Workshop: Arbitral Advocacy, held at Dallas, Texas on 17 June 2004, presented by the Institute for Transnational Arbitration of the Center for American and International Law.

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II. DEFINING THE TOPIC

The topic is the status of the substantive law governing the dispute before the arbitrators.[1] Is it a fact to be proven by the parties or is it law to be investigated by the arbitrators? The topic is not about the law that governs the arbitration procedure, nor about the law that governs the arbitration agreement, nor is it about which substantive law applies. We assume that this choice has been made by the parties or the arbitrators. With this choice having been made, the focus is on how to identify and establish the contents of the chosen law.

I remember a deliberation many years ago. My co-arbitrator suggested dismissing a claim because, he said, 'they have not proven the law'. I was young and inexperienced, and surprised: 'But they do not have to prove the law!', I replied. And that is when I realized that we were working on very different assumptions.

'Working on different assumptions'. Let us take a step back for a moment. Over the last few decades, we have witnessed a powerful wave of harmonization of arbitration laws in the world, the 'globalization of arbitration', if you prefer.[2] This movement started with the New York Convention, continued with the UNCITRAL Arbitration Rules, the UNCITRAL Model Law, institutional rules, and many national statutes, with one notable exception, which is the US Federal Arbitration Act. Who knows – maybe one day it will follow suit. Within this harmonization movement, one principle dominates: party autonomy. Autonomy allows the parties to shape the proceedings before the arbitrator according to their needs. If they do not use their freedom, the arbitrator will substitute for them and set the rules.[3] Party autonomy and the default powers of the arbitrators have proved to be effective tools in creating a standard arbitral procedure – a transnational or global arbitral procedure.[4] The

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1 On this topic, *see in particular* Julian D. M. Lew, 'Proof of Applicable Law' in Klaus Peter Berger, Werner F. Ebke, Siegfriend Elsing, Bernhard Großfeld and Gunther Kühne (eds), *International Commercial Arbitration, Festschrift für Otto Sandrock zum 70 Geburtstag* (Heidelberg, 2000), pp. 581–601; Gabrielle Kaufmann-Kohler, '*Iura novit arbiter*: Est-ce bien raisonnable?' in Anne Héritier Lachat and Laurent Hirsch (eds), *De Lege Ferenda: Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch* (Editions Slatkine, Geneva, 2004), pp. 71–78; Gabrielle Kaufmann-Kohler, 'Globalization of Arbitral Procedure' in (2003) 36 *Vanderbilt Journal of Transnational Law* 1313; Julian D. M. Lew, Loukas A. Stelis and Stefan M. Kroell, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003), pp. 440–445.

2 Those who have read Amy Chua's *World on Fire* (Arrow Books, 2004) know about the dangers of a certain type of globalization, but that is a different topic.

3 *See*, instead of many other provisions, art. 19 of the UNCITRAL Model Law on International Commercial Arbitration.

4 On this topic, *see in particular* Axel Baum, 'Reconciling Anglo-Saxon and Civil Law Procedure: The Path to a Procedural Lex Arbitrationis' in *Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel* (Cologne/Berlin/Bonn/Munich, 2001), pp. 21–30; Christian Boris, 'The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process' in Stefan N. Frommel and Barry A.K. Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration* (The Hague, 1999), pp. 1–18; Peter S. Caldwell, 'Arbitration Procedures: Harmonization of Basic Notions: Differing Approaches' in *Globalization and Harmonization of the Basic Notions in International Arbitration* (IFCAI Conference, Hong Kong International Arbitration Centre, 1996), pp. 101–103; Siegfried H. Elsing and John M. Townsend, 'Bridging the Common Law: Civil Law Divide in Arbitration' in (2002) 18(1) *Arbitration International* 59; Andreas Lowenfeld, 'International Arbitration as an Omelette: What Goes into the Mix' in Frommel and Rider, *supra*, pp. 19–30; Jan Paulsson, 'Arbitration Procedures: Harmonization of Basic Notions: Differing Approaches' in *Globalization and Harmonization of the Basic Notions in International Arbitration*, *supra*, pp. 76–87; Kaufmann-Kohler, *supra* n. 1.

remarkable achievement of such a transnational procedure is that it merges divergent civil procedure traditions. This is no surprise. International arbitration is a place where actors from different backgrounds, arbitrators and counsel, meet, work, and must reach a result together, *i.e.* they must resolve the dispute. As a consequence, they have no choice but to agree on common methods to achieve this result. Examples of such mergers were discussed this morning: limited discovery, witness statements in lieu of direct examination, and there are others.

Within this transnational procedure, there are very few areas where no consensus is established nowadays. The status of substantive law is precisely one of these areas.[5] Although one may observe a transnational practice gradually emerging, it has not yet been clearly articulated.

III. PRACTICE IN NATIONAL COURTS

Many arbitration practitioners approach the status of the law governing the merits by reference to the rules applicable in their home courts. With due respect, such an approach makes little sense. The situation in national courts and that in international arbitration are very different. National courts have a *lex fori* and any other law is foreign. Arbitral tribunals have no *lex fori* and, hence, the very concept of foreign law is misplaced.

Whatever the merits of equating national courts and international arbitration, since the assimilation is often made, we cannot dispense with looking at the application of foreign law in national courts. It varies significantly. Simply put, there are two main theories. Some jurisdictions regard foreign law as a fact which must be proven by the parties. If it is not proven, then the *lex fori* applies as a substitute. The best example of this approach is English law, where the contents of foreign law are generally established by expert witnesses and the court chooses which expert evidence it prefers.[6] Unlike many civil law jurisdictions, French law shares this approach.[7]

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5 Other differences relate, for instance, to the role of the arbitrator in bringing about a settlement (*see* on this topic Klaus Peter Berger, *International Economic Arbitration* (Deventer, Boston, 1993), pp. 582–588) or the question whether the proceedings are adversarial rather than inquisitorial (*see* on this topic Marcus S. Jacob, 'The Adversarial v. Inquisitorial Principles of Dispute Resolution Within the Context of International Commercial Arbitration' in (2001) 16(12) *Mealey's International Arbitration Report* 32).

6 This may be viewed as an oversimplification. Indeed, in English courts, foreign law is a fact of a very special nature; *see* Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, Oxford, 1998).

7 After various changes in French case law (*see e.g. Bisbal*, Cour de cassation, 12 May 1959, *Revue critique de droit international privé* (1960), 62–66; *Companie algérienne de Crédit et de Banque* v. *Chemouny*, Cour de cassation, 2 March 1960, *Revue critique de droit international privé* (1960), 97; *A* v. *T*, Cour de cassation, 25 November 1986, *Revue critique de droit international privé* (1987), 383; *Reyes Perez* v. *Barcelo Mercader*, Cour de cassation, 25 May 1987, *Journal du droit international* (1987), 927; *Rebouh et Schule*, Paris Cour de cassation, 11 and 18 October 1988, *Journal du droit international* (1989), 349), this principle was finally established in the *Coveco* case (Cour de cassation, 4 December 1990, *Revue critique de droit international privé* (1991), 558, commentary by Niboyet-Hoegy).

By contrast, Swiss or German law treats foreign law as law; the court can or must research foreign law *ex officio*.[8]

In between these two extremes, one finds US law, specifically Rule 44.1 of the Federal Rules of Civil Procedure (FRCP). Originally, the United States followed the English approach,[9] which I understand is still close to the hearts of many US judges and litigators. As a result, Rule 44.1 provides a balanced solution:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

In other words, foreign law is law and the court has broad authority to conduct its own research, but no duty to do so. Admittedly, different circuits apply this provision differently[10] and failure to prove foreign law may result in the application of the forum's law by default.[11] But this is not my concern here. My point is that the contents of Rule 44.1 can provide helpful guidance for arbitration practice.[12]

IV. ARBITRATION LAW AND PRACTICE

This brings us to the issue of arbitration law and practice. Guidance is practically non-existent in national arbitration laws. There are neither statutory rules nor

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[8] For Swiss law, *see* art. 16 of the Swiss Private International Law Act 1987. For German law, *see* Jan Kropholler, *Internationales Privatrecht* (5th edn, Tübingen, 2004), pp. 625–630. For a comparison of the major European systems on this topic, *see* Trevor C. Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared' in (1996) 45(2) *International and Comparative Law Quarterly* 271.

[9] Before Rule 44.1 was enacted, foreign law was considered by US federal courts as a matter of fact and review of the determination of foreign law by the appellate courts was subject to the 'clearly erroneous' standard (*see e.g. Reissner* v. *Rogers*, 276 F.2d 506 (D.C. Cir.), *cert. denied*, 364 U.S. 816 (1960)). On foreign law in US courts in general, *see* Louise Ellen Teitz, *Transnational Litigation* (Michie Law Publishers, Charlottesville, 1996), pp. 205–232 and supplement 1999, pp. 39–40.

[10] For an analysis of Rule. 44.1 Federal Rules of Civil Procedure and its application by US courts, *see* Louise E. Teitz, 'From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in U.S. Courts' in (2003) 34(1) *Journal of Maritime Law and Commerce* 97.

[11] Review on appeal, however, remains possible, as Rule 44.1 subjects foreign law issues to full review by appellate courts: *United States* v. *First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983). On the issue of appellate review under Rule 44.1, *see also* Teitz, *supra* n. 10 at pp. 115–118.

[12] *See also* Rule 4511 N.Y.Civ.Prac.L. and Rules on judicial notice of law. According to Rule 4511(b), 'every court may take judicial notice without request of ... the laws of foreign countries or their political subdivisions'. Further, under Rule 4511(c), 'whether a matter is judicially noticed or proof is taken, every matter specified in this section shall be determined by the judge or referee, and included in his findings or charged to the jury. Such findings or charge shall be *subject to review on appeal as a finding or charge on a matter of law*'. Finally, Rule 4511(d) provides that, 'in considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the *court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research*. Whether or not judicial notice is taken, a printed copy of a statute or other written law or a proclamation, edict, decree or ordinance by an executive contained in a book or publication, purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force, is prima facie evidence of such law and the unwritten or common law of a jurisdiction may be proved by witness or printed reports of cases of the courts of the jurisdiction' (emphasis added).

case law. Indeed, matters involving the application of substantive law by the arbitrators largely escape any control by the courts, be it at the annulment or the enforcement stage,[13] except perhaps under the US standard of manifest disregard of the law, which, as we all know, is very rarely applied.

There is, however, one interesting rule in the English Arbitration Act 1996, which signals a departure from the strict view of foreign law as a fact. Section 34 of this Act provides as follows:

> 34(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.
> (2) Procedural and evidential matters include ...
> (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

So much for arbitration laws. And what about arbitration practice? It may be that others have clearer views. For my part, the picture is blurred. I do not identify a uniform, homogeneous practice. Sometimes parties do not address the law at all, because the case is about facts and possibly contract interpretation. Sometimes they argue the law and simply file supporting legal authorities. Sometimes they add legal opinions and sometimes they also offer oral expert testimony. Do they believe that the arbitrator is bound by that evidence? Is it evidence at all? And does the arbitrator feel bound?

I remember an arbitration in which Algerian substantive law governed. The dispute turned on the interpretation and adaptation of the price indexation clause in a long-term gas supply contract. The parties had filed some legal authorities, statutory provisions and commentaries about contract interpretation. That was all, and it was sufficient because the resolution hinged on facts and contract interpretation, until we reached the claim for late interest, specifically compound interest. Could it be allowed under Algerian law? Would it be regarded as a violation of public policy at the time of enforcement, which may have to be sought in Algeria? The tribunal had no input from the parties. Following my civil law instincts, I started researching Algerian contract law and then encountered two difficulties. First, I did not really know whether I was supposed or expected to do so (in any event, I would have asked the parties' comments on the results of my research). Secondly and foremost, the relevant materials were in Arabic, to which I had no access without hiring a translator, which I would not have done

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[13] With respect to annulment, in lieu of many others, *see* art. 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration under which there is no scope for review of the merits of the award, except within the narrow bounds of public policy. In connection with enforcement, *see* with the same approach in Art. V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is confirmed by case law. *See e.g. Norsolor S.A.* v. *Pabalk Ticaret Ltd*, Austrian Supreme Court, 18 November 1982, (1984) IX *Yearbook Commercial Arbitration* 159; *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH* v. *Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd.*, English Court of Appeal, 24 March 1987, (1988) XIII *Yearbook Commercial Arbitration* 522; *Société Compañía Valenciana de Cementos Portland* v. *Société Primary Coal Inc.*, French Cour de cassation, 22 October 1991, *Revue de l'arbitrage* 3 (1992), 457.

without consulting the parties. To make a long story short, I gave up and asked the parties for brief legal submissions limited to compound interest under Algerian law.

I mention this story to show that, unless the substantive law is that of a trustworthy arbitrator, the arbitral Tribunal may have no reliable access to the necessary legal materials. Admittedly, the arbitral Tribunal could appoint a local lawyer as an expert. This would, however, most often be excessively cumbersome.

V. CASE MANAGEMENT AND ADVOCACY

At present, there exists no well-settled arbitration practice. If it were to come into existence, what form would such practice take? From an arbitrator's perspective, I am inclined to take inspiration from Rule 44.1 FRCP.[14] Similarly, I am struck by the 1929 opinion of the Permanent Court of International Justice, the predecessor of the ICJ, in the *Brazilian Federal Loans* case, in which I read:

> although the Court does not consider itself bound to know the local law of the states appearing before it, at the same time it does not consider such law simply a question of fact to be proved by evidence produced by the parties. This is important for it leaves the Court free, perhaps even obligated, to resolve through its own researches any uncertainty concerning such a law, if the parties fail to produce adequate proof.[15]

On this basis, whenever the parties may have different understandings about the need to prove the law, it makes sense to address the issue at the initial procedural hearing. Indeed, efficient case management in a transcultural environment requires transparency and predictability. If counsel agrees, one may then provide a rule along the following lines, subject of course to any adjustments required to take into account the needs of the case and the culture of the parties or of counsel:

> The Parties shall establish the contents of the law applicable to the merits. The Arbitral Tribunal shall have the power, but not the obligation, to make its own inquiries to establish such contents. If the contents of the applicable law are not established, the Arbitral Tribunal is empowered to apply any rules of law which it deems appropriate.

I believe that this is a fair restatement of the rule that is progressively emerging, or is already in use, but simply without being sufficiently articulated up to the present.

What about the advocate's perspective? What should his or her strategy be? How does he/she best educate the arbitrator? The answer is typically a lawyer's answer: it all depends. On what does it depend?

Before going into this issue, a threshold question needs to be addressed: should a party appoint an arbitrator who knows the applicable law? Not necessarily.

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[14] The same suggestion is already found in Lew, *supra* n. 1 at p. 599.

[15] (1929) PICJ, SER. A no. 21; also quoted in Lew, *supra* n. 1 at p. 600.

Other factors may prevail: professionalism, case management skills, experience, availability, knowledge of the trade or the industry. Knowledge of the applicable law may, however, play a more prominent role when the outcome turns on a very technical legal issue.

After the appointment, on what considerations does the advocate's strategy depend? Three factors must be taken into account:

- Does the arbitration involve a lot of complex legal issues?
- Does a member of the tribunal have knowledge of the governing law? If so, who? The Chair? One of the co-arbitrators? The one you have appointed or the other one? If it is the other one, can he or she be expected to give competent and reliable input on the applicable law to the Chair?
- Do the arbitrators come from legal cultures where the law must be proven, or will they consider that they have control over the law (*iura novit arbiter*), or will they be used to a mixed approach like the one adopted in the procedural rule set forth earlier?

Counsel's choice will then depend on the combination of these factors. My purpose is not to give a cookbook recipe; it would be useless, because it would necessarily be oversimplistic. Let me just highlight a few thoughts:

- First, if there are a number of complex legal issues and the Chair comes from a legal culture where the law must be proven, it is advisable to file an opinion by a legal expert and, depending on the case, offer his or her oral testimony as well.
- Further, if no one on the Tribunal, or possibly only the co-arbitrators, but not the Chair, have expertise in the applicable law, it will often be advisable to tender legal evidence.
- But one should not file a legal opinion in an arbitration where the Chair comes from a country in which he or she expects to have control over the law and is an authority in the field. For instance, do not submit an opinion to a Swiss contract law professor in which one of his colleagues purports to teach him about how to construe a contract. He may resent being given lessons and be negatively influenced, or simply ignore the opinion. If proof of the law is sometimes insufficient, it can also be overdone. As always, the best rule is to use reasonable judgement.
- By contrast, when the case raises a very technical issue of law which is not settled, it may make sense to produce legal evidence even if the arbitrators know the legal system at issue, provided it is given by someone whose authority they are likely to recognize.
- Moreover, whether you offer legal evidence or not, you should make sure that the arbitrators have easy access to the necessary legal materials, court decisions, excerpts from treatises, cases, together with translations – good translations; legal translation is an art in of itself, which does require attention because it can make a significant difference.

- Finally, whenever you have doubts on the expectations of the arbitrator about proof of the substantive law, it is best to raise them at the initial procedural hearing.

These few thoughts are tentative and personal. Nonetheless, I hope that they may contribute to better case management and advocacy, and thereby to increased efficiency of international arbitration.

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Dossier of the ICC Institute of World Business Law: The Application of Substantive Law by International Arbitrators

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2014

The Predictability Paradox - Arbitrators and Applicable Law

English

The Predictability Paradox - Arbitrators and Applicable Law

1. WHEN CONTRACT TERMS COLLIDE

A. Starting Points for Authority

More than a half century ago, a Hungarian psychoanalyst suggested terms to distinguish between thrill seekers and those who cling to the predictable: the 'philobat' who enjoys departing from the safe and predictable, and the 'ocnophile' who clings to stability.[1] The latter category includes the risk averse (or just plain prudent) individuals who accept the prospect of being up only one dollar (rather than two) in order to attenuate the possibility of having nothing at all.[2]

Much of the impulse to arbitrate international disputes might be explained as a response to spectres of uncertainty, whether lying in the 'hometown justice' of another country's judicial system, or the perceived volatility of a civil jury in a faraway land. In the face of such hesitations, arbitration has been pressed into service to create more level litigation playing fields and to reduce the risk of random results.[3] The inclination toward certainty and reliability might also explain differences in how arbitrators and judges approach application of national law.[4] Although perceptions exist in some quarters that arbitrators may be less reliable than judges in applying the law, the opposite may be true.

This gap between reality and perception arises in part because of oft-repeated contentions that arbitrators 'split the baby' through awards not justified in law.[5] Certain strains of literature assert, without any real substantiation, that arbitrators render unprincipled decisions in order to attract business through reappointment.[6] In fact, no empirical data permits a conclusion on the matter, at least not from variations in records of 'win rates' to the extent they can be determined or the size of damages in arbitration as opposed to court litigation.[7]

Just as significantly, the greater reliability often found in arbitral awards, as contrasted with court judgments, derives from different notions of 'law' in commercial transactions. The calculus of duty is simply not the same as between judge and

arbitrator. Bearing obligations to the citizenry as a whole, judges may seek to implement societal values that sometimes trump private agreements. Although responsible judges will master existing authority before taking the law in new directions, many traditions allow appellate judges to overrule precedent. In some legal systems, judicial policy predispositions have led political scientists to engage in intricate charting of ideology in court judgments.[8]

No similar social engineering usually falls to arbitrators. As creatures of the parties' consent, arbitrators must show special fidelity to shared expectations expressed in contract or treaty, fixing their eyes on existing norms rather than proposals for the law as it should be.

This 'predictability paradox' often demonstrates itself when relatively clear and specific contract language competes with more general provisions of national law. In such instances, arbitrators in international cases may show a heightened sensitivity toward the predictability of contract terms. Although sensitive to public values, rejecting complicity with illicit schemes and abusive procedures, arbitrators fix their eyes more on existing legal norms, asking what the parties had a right to expect. When interpreting the law, arbitrators may be more inclined to take statutes and cases as they are, rather than considering public policies that justify shaping or stretching norms to meet new social or economic challenges.

On occasion, the nature of the judicial office may include a perceived institutional duty to embrace public interests of the forum, or a political inclination to develop the law in light of evolving national concerns of a social or economic nature.[9] In a dispute over the price of oil, a judge in a fuel-importing jurisdiction like Massachusetts could be expected to consider payments by local residents during the bitter cold New England winters.[10] By contrast, arguments for lower fuel costs might be received with greater skepticism by judges from oil producing countries like Venezuela.

Of course, personal sympathies can play a role for both arbitrators and judges.[11] For the disciplined arbitrator, however, whether from Boston or from Caracas, the duty toward the contracting parties and the correct interpretation of their agreement will tend to manifest itself in a heightened fidelity to the parties' shared *ex ante* expectations, and thus predictable vindication of contract rights.[12]

Such variations in the approaches of arbitrator and judge tend to be linked to their respective sources of authority. The genesis of judicial power normally lies in the political collectivity that appoints the judge and pays his or her salary.

By contrast, the arbitrator's legitimacy starts with an agreement to waive recourse to otherwise competent national courts.[13] At least as to the merits of a dispute, arbitration clauses will normally be construed as a renunciation of judicial decision-making. Such waivers are usually created either by private contracts or through government-to-government treaties. [14]

To some extent, this paradox rests on contrasting notions of predictability, opposing contract provisions against notions of the 'right' as perceived in the forum community. The arbitrator may look to enhance shared ex ante expectations of the parties themselves, applying the law on an 'as is' basis. By contrast, appellate judge might explore principles that push law into new directions, so as to promote certainty from the perspective of emerging policy.[15]

In an international context, bias and fairness often appear as opposite sides of the same coin. The party for which a rule creates commercial disadvantage will welcome a softening of that rule's rigour by a judge in its home forum. By contrast, the foreign side might perceive failure to enforce the bargain as simply xenophobic prejudice.

Imagine, for example, that a gas supply agreement between an Algerian state agency and a Boston importer operates to the disadvantage of the American buyer. A court judgment refusing to enforce certain aspects of the contractual arrangements might appear as promoting community interests in Massachusetts. From the perspective of the Algerian seller, however, the judicial decision would likely seem to be simply a way to ignore the parties' freely accepted agreement to enhance post-dispute local interests.[16]

B. Exculpatory Clauses and Arbitral Jurisdiction: An Illustrative Scenario

As between judge and arbitrator, different results arise most pointedly when express terms of an agreement appear to conflict with mandates of the contractually chosen law. For example, an international sales contract contains explicit language providing that neither side shall be liable in damages for negligence, including gross negligence. The contract's clear exculpatory language has been reinforced by an unequivocal arbitration clause stating that the arbitrator has no authority to award damages for negligence of any kind. However, the contract also provides for its interpretation according to the law of a third-country legal system not that of either party, which invalidates any purported contractual exclusion of responsibility for gross negligence.

What should happen if one side claims damages for gross negligence? A judge in Geneva or Boston would normally interpret such exculpatory language under the law of Switzerland or Massachusetts, each of which invalidates such exculpatory clauses.[17] Absent a choice-of-law rule directing a different result, courts would be hard pressed not to disregard the damages limits given that the state creating their authority outlawed the restrictions.

By contrast, an arbitrator might accord more deference the contract terms as indicative of party-imposed limitations on arbitral jurisdiction. Specific stipulations usually trump more general principles.[18] The exclusion of jurisdiction with respect to negligence damages would at first blush seem narrower and more specific than a general reference to an applicable law. Thus the arbitrator might decide that the litigants intended the chosen law (Massachusetts or Switzerland) to fill gaps, but not to contradict explicit contract restrictions on arbitral authority. The arbitrator's authority to apply an applicable law comes into play by virtue of the parties' agreement, rather than the mandates of a forum imposing itself *sua sponte*.[19] Moreover, an award that disregards the exclusion of liability could result in annulment for excess of jurisdiction.[20]

Of course, good arbitrators avoid any simplistic vision of the parties' intent that gives *a priori* precedence to either substantive contract terms or a choice of otherwise applicable legal principles. In some instances, seeming inconsistencies may, on deeper reflection, reveal themselves as false conflicts.[21] The devil remains very much in the details of each case.

For international cases, the lodestar of party intent can prove particularly elusive. A contract between Finns and Turks might be drafted in English, not the mother tongue of either side's business managers. The agreement might then be subject to the law of Switzerland simply for 'neutrality' reasons, although the transaction had no connection with the Helvetic Confederation. The choice of law clause may have been inserted about 2:18am, at the end of long negotiations when the main business points of price and delivery had been agreed, leaving drafting teams with little time to study what the Swiss law might say about a potentially controverted matter.[22]

Finally, the matter of arbitration language injects another significant difference between the arbitrator and the national judge in an international context. In addition to the words used in presenting argument and evidence, language can also affect the procedural framework of a case. For example, testimony might be heard in French, but in an arbitration built on the procedural language of American practice dominated by

document production unknown in the French legal system. Moreover, words such as 'witness' and '*témoin*' may prove false friends if evidence is presented by a party's employee, lacking capacity to testify under French legal concepts.[23]

C. Tools for Interpretation

In many instances of course judicial and arbitral interpretation will run along similar lines, most notably when law serves to assist contract construction by providing hermeneutic tools. Divergence between judge and arbitrator will be less likely when the law serves merely to provide interpretative or exegetical principles.

Imagine for example that a manufacturer seeks to end a distributorship on the basis that products were late getting to customers. The distributor contends that since contract inception, a two-week delivery practice been deemed reasonable, with recent insistence on shorter periods serving as mere pretext for unauthorized termination.

At least in some contexts, New York law provides that post-contract behaviour may serve to inform understanding in the meaning of contract terms. For example, when a sales contract involves repeated occasions for performance, with knowledge of the nature of the performance and the opportunity for objections, any such course of performance "accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement."[24]

Regardless of where they might be sitting, conscientious arbitrators, construing a contract pursuant to New York law, would normally take account of a course of performance, just as would New York judges. The chosen law serves as an instrument for exegesis of the contract terms, not as a source of independent duties.

2. KNOWING THE LAW

A. Precedent and Policy

Application of the law by arbitrators and judges often occurs in the shadow of divergent ways that law may be known,[25] proved,[26] or in some instances presumed.[27] In theory no law will be 'foreign' to an international tribunal. In practice, however, the applicable law may be unfamiliar to some members of the tribunal, who may need to be instructed by experts.[28]

Normally, the process for such instruction might take the form of testimony from learned professors or practitioners, presented by each side. In some instances, the arbitrators will engage in direct study of legal authorities and theories. This does not mean that an arbitrator's conclusions should contain surprises from such self-instruction. Providing an opportunity for the litigants to comment on the law remains vital both to the arbitrator getting it right and to the parties' sense of being treated justly. [29]

Notions of precedent play themselves out differently in arbitration as contrasted with court litigation. Within a single national jurisdiction, a measure of uniformity can be imposed on courts from the top down. One case furnishes authority for decisions in similar fact patterns with similar questions of law. Although in theory Continental and 'common law' traditions take divergent views of precedent, with the former giving lower courts considerable autonomy to interpret legal texts *de novo*,[30] in practice Continental judges remain mindful of higher court decisions.[31]

By contrast, absent *res judicata* or issue preclusion arising for the same parties and the same claims or issues,[32] arbitrators do not usually deem themselves bound by rulings of other tribunals in the way judges feel constrained by decisions of superior courts in a unified and hierarchical national system.

This does not mean that prior awards will be ignored. To the contrary, decisions of other arbitral tribunals are often taken into account as constituting a corpus of principles representing the litigants' shared expectations. While not given the status of precedent in a narrow common law sense, awards of respected arbitrators may bolster support for results in other cases,[33] providing information about what the relevant community considers the right approach to similar problems.[34] For litigants, this information can serve as a tool of persuasion. For business managers and government planners, it provides one way to predict how future disputes will be resolved. And for the arbitrators, prior rulings can justify awards to the rest of the world and enhance the prospect that similar cases will be treated similarly.[35]

Finally, the relationship between questions of law and fact remains slippery in any context,[36] and may prove a challenge to judges and arbitrators alike. Controverted facts can remain stubbornly particular, requiring recourse to witnesses and exhibits, while the law by its nature possesses a generality that permits instruction by reading statutes and cases.[37]

B. Procedural Norms

In some instances, arbitrators must interpret and apply national law provisions imposing constraints on procedural matters, rather than substantive norms of contract construction. In that context, the duty of fidelity to the parties' agreement may compete with the obligation to comply with mandatory procedures of the arbitral seat. Or the arbitrators may interpret national arbitration law in a way at odds with the view of the local judiciary.[38]

The first dilemma (potential conflict between contract and procedural law) exemplifies itself in provisions English arbitration law invalidates pre-dispute agreements to allocate arbitration costs 'in any event.'[39] In advance of the dispute, parties may not by contract forbid an arbitrator from allocating costs on the basis of who won and who lost. The provision casts a wide net, catching even reasonable arrangements among sophisticated business managers to split arbitrator compensation on a 50/50 basis and to require each side to cover its own legal expenses.

In such an instance, where the contract terms fix cost principles, what is to be done by a conscientious arbitrator? Aiming to respect the parties' agreement, an arbitrator would let the costs lie where they fall. Yet to do so might run the risk of award annulment if proceedings are seated in London.

To complicate matters, disregard of the parties' *ex ante* expectations may appear as excess of authority to a New York court called to enforce an award of legal costs inconsistent with the terms of the agreement and the applicable law, putting the arbitrators between Scylla and Charybdis when the award must be enforced in a jurisdiction that values respect for the parties' choices.[40]

The second problem (possible tension between arbitral and judicial interpretations of procedural mandates) finds illustration in the vexing subject of "class arbitration" and supplies another dimension in the slippery task of interpreting national procedural law. The United States Supreme Court addressed the matter in an action arising from price-fixing allegations against ship owners brought by customers who chartered vessels commonly known as 'Parcel Tankers' to transport food oils and chemicals.[41]

In connection with the customers' request for a single arbitration proceeding ('class arbitration' borrowing language from American court procedures[42]), the arbitrators in a partial award interpreted both the contract and the Federal Arbitration Act to permit class arbitration. Ultimately a majority of the US Supreme Court held that the arbitrators had exceeded their authority. Rightly or wrong, the Court, divided sharply

along political lines, found that the arbitral tribunal's interpretation of the parties' agreement followed personal policy views rather than the proper contours of the applicable arbitration law.[43]

3. ADJUSTING THE CONTRACT

A. Good Faith, 'Abus de Droit', 'Treu und Glauben'

One little-explored area in which to examine the divergence between judge and arbitrator relates to provisions of national law that permit adjustment of the contract,[44] most notably on a theory such as good faith and abuse of rights (as in Switzerland)[45] or notions such as *Treu und Glauben* (in Germany),[46] *force majeure* and *imprévision* (in France).[47] National legal systems speak of other notions such as impracticability, frustration and impossibility (in common law systems),[48] *excessiva onerosità* (in Italy)[49] and/or *Wegfall der Geschäfsgrundlage*.[50]

Sometimes a duty to renegotiate might arguably exist under principles of international trade law (sometimes called *lex mercatoria*) in the case of substantial upheaval (*bouleversement*) in the economic equilibrium between the two sides.[51] Such principles may be found in narrow usages within a specific industry, or broader trade usages that have been incorporated into the UNIDROIT Principles promulgated by the Rome-based "International Institute for the Unification of Private Law,"[52] which attempt to suggest how commercial parties should react to dramatic and unforeseen circumstances that interfere with the performance of contract duties, either through excuse of performance, adaptation of the contract obligation, or a duty to renegotiate, failing which the contract terminates.[53]

Judicial and arbitral attitudes need not diverge in applying such principles of good faith and abuse of rights. In some instances, different outcomes will result from a divergence in the decision-maker's individual evaluation of the way changed circumstances should be addressed, regardless of whether the decision-maker is a judge or an arbitrator.

Such differences should not seem odd, given that they occur equally within a single legal system, particularly through legal principles allowing adjustment of contract through 'filling the gaps' on matters the parties did not initially consider. A case decided in 1935 by the highest court in Switzerland involved hydroelectric power sold

by the commune of Zermatt to the Gornergrat Railroad.[54] In 1895, a long-term concession for hydroelectric power had been granted to the railroad by the local municipality, or *Gemeinde*.

Decades later, a question arose as to what should be done with surplus power, a matter left open when the contract was concluded. The Swiss federal and cantonal courts came to the conclusion that a judge could in essence create a new contract term, thereby permitting sale outside the territory of the municipality. However, the federal court disagreed sharply with the cantonal court on the specificity to be used in filling the gap, insisting on coming up with calculations based on kilowatt hours.

Legal provisions that excuse performance or mandate adjustment of terms overlap with, but remain distinct from, provisions that permit arbitrators to disregard the strict rigours of otherwise applicable law on explicit authorization from the parties.[55] Notions such as *amiable composition* describe a process whereby arbitrators temper legal rules whose application violates what seems right in the circumstances, for example due to substantial completion of a project, or unexpected exchange rate modification.[56] Rather than aiming at legal accuracy, the arbitrator reaches toward general notions of 'right' encrusted with emotional overtones and sometimes in tension with court decisions, statutes or strict contract terms.

A long-standing debate surrounds whether *amiable composition* amounts to the same thing as decision-making *ex aequo et bono*, according to the 'right and good'.[57] While the notions are often used interchangeably, they may not be coextensive. Arbitrators who decide *ex aequo et bono* might begin and end with a private sense of justice, going directly to a personal view of the right result, while in *amiable composition* the arbitrators would start at rules of law, departing only if needed to achieve a just result.[58] The difference is significant, given that there is nothing inherently unjust about most norms of commercial law.[59]

B. Modification Pursuant to Contract: Gas Price Adjustment

An intriguing comparison between judge and arbitrator might be found in adjustment of agreements pursuant to explicit contract terms, rather than a legal rule such as those cited above related to good faith or abuse of rights. National law would enter the picture through the side door of an overarching applicable law clause, providing for contract interpretation according to principles found in the legal system of some

'third country' not that of either side to the contract, perceived as neutral between the parties (a traditional role for Swiss law) or perhaps especially developed in the substance of the contract (such as English law for maritime matter).

Such arrangements can be found in price adjustment arbitrations related to long-term natural gas supply.[60] The gas supply agreements attempt to provide a mechanism to address dramatic economic upheaval by permitting price adjustment for substantially changed circumstances.[61] The contract might allow arbitrators to create a new price formula in light of changes affecting the value of gas obtained by a 'prudent' gas company so as to let the buyer market the gas 'economically.'[62]

Such adjustment clauses attempt to give contours to the 'when, why and how' of adjustment. The contract provisions aim to provide more specificity than the notion of *pacta sunt servanda* ('agreements are to be kept')[63] borrowed from public international law, but interpreted in conjunction with the corollary principle *clausula rebus sic stantibus*, to the effect that the agreement is binding 'so long as things stand as they are.'[64]

On closer reflection, however, such price adjustment clauses may prove more malleable than initially expected, particularly if the buyer's profit margin is considered.[65] Does marketing 'economically' mean to sell in a way that is 'stingy' and cheap? Or to market in a way that is economically sound? Either meaning might fit.

Such price adjustment contracts will be subject to some applicable law, such as the law of England, Switzerland or New York. Perhaps that law will have something to say about how the controverted words should be interpreted. In many instances, however, the choice of law clause, for an international arbitrator, will proves less useful than hoped.

To explore why the law has its limits, one might recollect the old Latin maxim *noscitur a sociis* ('a word is known by the company it keeps'). Context dictates meaning, with words taking a different sense from divergent sentences. Our feet run. Our noses run. One might see a run on the bank.[66]

So the problem with national law as an interpretative tool (whether statute or case law) is that controverted terms arise in a domestic context different from the international circumstances facing the arbitrator. What is a 'prudent' gas company?

The 'prudent' standard in national law might derive from cases regarding utility rates,[67] determining fiduciary obligations for trustees, or making damage calculations in light of a duty to mitigate.[68]

The quintessentially national context of most law can make national standards less than ideal for interpreting international agreements. For better or for worse, however, the arbitrator cannot just give up and say, "This is too hard for me!" Often, a search for the one good approach may need to be replaced by an identification of wrong paths to avoid. However, as Rudyard Kipling might have written, that is a story for another day.

4. MORE SHADES OF GRAY: CHOICE OF LAW AND TRANSNATIONAL NORMS

Choice of law problems pose special challenges for arbitral interpretation. National judges understandably take their starting point in the private international law principles of the forum. However, an international arbitrator will often need to look elsewhere, since questions of applicable law often arise precisely because there is no obvious indication of which legal system (or systems) should govern the controverted question.

The task becomes particularly vexing in deciding whether a non-signatory should be bound by an arbitration agreement on the basis of some contract theory.69 When doubt has been raised about who agreed to arbitrate, arbitrators can face a 'chicken and egg' conundrum. The side arguing that an agreement exists might urge application of the governing law designated by the contract itself, even though that law was clearly not intended to govern relationships with strangers. In some instances, the right answer may depend on whether a signatory to an arbitration agreement seeks to enforce it against a non-signatory defendant, or whether an arguable outsider (the non-signatory) moves to compel arbitration against a signatory who has clearly agreed to arbitrate with a corporate affiliate of the claimant.[70]

If a claimant wants to join to the arbitration an unwilling respondent on the basis of having agreed to arbitrate through a *de facto* or ostensible agency, the national judge will look to his or her *lex fori* for principles that suggest either when an agency might be found, or when a foreign law or agency should be taken into account.[71] By contrast, a thoughtful arbitrator might find it difficult to determine agency by looking to the applicable law designated by the contract, or even the arbitral *situs*.

If indeed the unwilling non-signatory respondent proves to be a stranger to the contract, then that person would not have agreed to either arbitration or the contract's governing law. In such circumstances, an arbitrator who starts with the contract's designated law risks presuming the conclusion, essentially pre-judging the question by taking the non-signatory as connected enough to come within the contractually-designated law, when as a matter of logic that is the precise point open to debate.[72] Temping as it may be to simplify the decision-making process by looking to the contract, since that approach would treat the non-signatory *a priori* as having consented to application of the contract before that determination was in fact made.

The point often escapes some of the sharpest thinkers, usually because of a tendency to assume that legal systems converge in their rules on agency, which of course represents another form of presuming the conclusion. If legal systems do not differ, then of course the choice of law problem does not arise. However, the need for some extra-contractual starting point becomes more vivid on positing a real conflict, with sharply differing legal systems. Imagine that chosen law of the contract, let us say the law of Ruritania, provides that wives and girlfriends will be bound by contracts concluded by their husbands and lovers. If the man in the relationship concludes a loan subject to the law of Ruritania, does that mean the woman will be bound to pay the debt, as well as to submit to arbitration on the matter? The question, of course, should be rhetorical.

In consequence, arbitrators may base decisions about such matters on 'transnational norms' which become applicable through the practice of arbitral proceedings as well as so-called 'general principles of law.'[73] Although such transnational norms might well derive from what French scholars term '*un ordre juridique arbitral autonome*,'[74] the arbitrator often seeks to apply transnational norms not for reasons of ideology, but simply as a practical starting point for analysis in the absence of clearly applicable national law.

CONCLUSION

Do arbitrators apply national law differently from judges? The answer, unsatisfying to ideologues, and those hesitant to embrace uncertainty, must be 'sometimes.'

Although generalizations remain risky, judges and arbitrators diverge not so much due to any personality change that overcomes an individual wearing judicial robes, but rather from variations in the respective starting points for decision-making authority. Different departure points may yield different results, particularly with respect to

contract terms that might appear at odds with applicable law. Judges normally take power from the political collectivity that makes their appointments and pays their salaries,[75] whereas the arbitrator's authority lies in an agreement to waive jurisdiction of otherwise competent courts.

In an international contract, the primacy of the parties' agreement may lead arbitrators to conclude that the litigants intended to invoke only part of a national legal system. By contrast, a judge may feel inclined to apply more broadly the norms of his or her own state, perhaps tweaked by an impulse to shape those norms to reflect the forum's changing policy concerns.

Thus arbitrators may sometimes show greater fidelity to the established rule of a chosen law, foregoing any policy-making function similar to that sometimes asserted by common law judges. In adjusting international contracts, arbitrators face special tensions in their search for equilibrium between rival notions of predictability, often expressed in imprecise terms like 'commercial reality' or 'strict letter of the law' which like the humble chameleon take different colours depending on the backdrop. The ultimate stakes lie in arbitration's ability to fill its promise in promoting the type of economic cooperation enhanced by reliable vindication of legitimate expectations. In the search for balance, common sense will likely pay far more dividends than ideology.

1
Michael Balint, Thrills and Regressions (1959). Balint coined the first term as a variant of acrobat, one who walks away from the safe earth, and the second from the Greek root ocno in the verb "to cling" or "to hesitate". Id. at 25. Popularized explorations of the thesis appeared in Daniel Goleman, 'Saying Goodbye Speaks Volumes', New York Times (3 April 1984); Daniel Goleman, 'Leaving', International Herald Tribune, 7-8 April 1984, at 18.

2
To illustrate the point, a group of students might be asked whether they would work as research assistant for the professor. If the majority raises their hands to signify interest, a quite different response would be expected to a counter-proposal that payment be deferred to the end of the academic year when a coin toss would determine whether they received, in the alternative, double compensation or no payment at all.

3

Those engaged in international transactions tend to think in relative terms, with a rule deemed reliable if it reduces the likelihood of alternate outcomes, not because it operates with perfect foreseeability. Any legal system may, on some issues, work to one side's disadvantage in a particular case. However, an agreement to 'play by the rules' of a relatively evolved system of law in a neutral forum will normally maximize both parties' ex ante expectation of fair treatment. See William W. Park, 'Neutrality, Predictability and Economic Cooperation', Journal of International Arbitration, 12 (No. 4), 1995, page 99; Arbitration of International Business Disputes (2d Ed. 2012), chapter III-B-2, Ch.II-A-2; 'Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion (The 2002 Freshfields Lecture)', Arbitration International, 19, 2003, page 279.

4

For a general overview of how arbitrators' interpretation of contract overlaps with their construction of applicable law, see Laurent Lévy & Fabrice Robert-Tissot, L'interprétation arbitrale, 2013 (no. 4) Rev. de l'arbitrage 861. The authors compare commercial, sport and investor-state arbitration. Their conclusions suggest, inter alia, that for international commercial transactions, arbitrators tend to put more emphasis on the terms of the contract itself than on applicable law.

5

The imagery of baby-splitting seems to originate in the Biblical child custody dispute decided in ancient Jerusalem by King Solomon. When one woman accused another of stealing her baby, the King called for a sword so the child might be divided in two, with one half for each woman. Of course, the metaphor hides the character of Solomon's decision as an interim award, followed by grant of custody to the real mother whose compassion led to abandonment of her claim in hopes of saving her son. 1 Kings 3:23–28.

6

See, e.g., Richard A. Posner, How Judges Think (2008), at 127–128, stating that courts and juries are "more likely to adhere to the law and less likely than arbitrators to 'split the difference' between the two sides thereby lowering damages." As authority for this sweeping assertion, Judge Posner simply quotes a California state case, Armendariz v. Foundation Health Psychare Services, 6 P.3d 669, 693 (Cal. 2000).

7

See, e.g., Daphna Kapeliuk, 'The Repeat Appointment Factor,' 96 Cornell Law Review, 47 (2010), analyzing 131 ICSID cases implicating almost 200 arbitrators, refuting the oft-bandied suggestion that arbitrators either act in a biased way (to please appointers)

or render decisions giving each party a partial victory to increase user satisfaction. The author suggests that an arbitrator's incentive to maintain a reputation for independence and credibility trumps any temptation to act in an inappropriate way. See also Theodore Eisenberg & Elizabeth Hill, Arbitration & Litigation of Employment Claims: An Empirical Comparison, 58 Disp. Res. J. 44 (ABA, Nov 2003-Jan 2004), looking at state and federal court trials as compared with AAA arbitrations.

8

See, e.g., Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (Cambridge Univ. Press, 2002). The so-called 'Martin-Quinn Scores' use a scale with negative numbers translating to liberalism and positive numbers translating to conservatism. Thus Justice Douglas, considered a very liberal judge, received an average ideological score of minus 4, while a score of positive 4.30 was accorded the conservative Justice Rehnquist. See generally, Andrew Martin, Kevin Quinn, Lee Epstein, 'The Median Justice on the U.S. Supreme Court', North Carolina Law Review, 83, 2005, page 1275; Lee Epstein, Andrew Martin, Kevin Quinn & Jeffrey Segal, 'Ideological Drift among Supreme Court Justices: Who, When and How Important', Northwestern University Law Review, 101, 2007, page 1483; Lee Epstein, Tonja Jacobi, 'Super Medians', Stanford Law Review, 61, 2008, page 37, 99.

9

Contemplating competing loyalties of both judges and arbitrators, one recalls without comment the lines in the Sermon on the Mount: "No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other." Matthew 6:24

10

On occasion, it has been argued that public interests come into play more for investor-state arbitration than for commercial disputes. On reflection, however, contract disputes affect the world's aggregate social and economic welfare no less than investment treaty controversies. If the financial crisis of 2008 demonstrates anything, it teaches that private choices have public consequences. To some extent, the debate may be about terminology. See, e.g., 'Theory and Reality of the Arbitrator', World Arbitration & Mediation Review, 7, 2013, pages 629-649, including proceedings of the 25th Annual Institution for Transnational Arbitration in Dallas in June 2013. In response to suggestions that both commercial and investor-state arbitration affect public interest, Professor Brigitte Stern replied that commercial cases have "an impact on public interest" whereas "investment arbitration is completely different because the public interest is part of an element of the award." Id. at 642.

11

See, e.g., Edna Sussman, 'Arbitrator Decision-Making: Unconscious Psychological Influences and What You can Do About Them', American Review of International Arbitration, 24, 2013, at page 487.

12

For a broader treatment of what has been called arbitration's 'ambivalence toward law' see Jan Paulsson, The Idea of Arbitration (2013) at 13-18.

13

As suggested by Professor Pierre Mayer, constraints on the international arbitrator derive from "the will of the parties, the jurisdictional nature of the arbitral function, and in modern legal systems only minimally from mandates at the arbitral seat." Pierre Mayer, 'La liberté de l'arbitre', Revue de l'arbitrage, 2, 2013, page 340. In the original, "[Les contraintes sur l'arbitre] tiennent à la volonté des parties, à la nature juridictionnelle de sa fonction et, dans les législations modernes, seulement dans une faible mesure à certains impératifs émanant de l'Etat du siège."

14

This does not mean, of course that courts fail to play a role in monitoring the arbitration process, particularly in connection with the contours of arbitral authority. See, e.g., George Bermann, 'The 'Gateway Problem' in International Commercial Arbitration', Yale Journal of International Law, 37, 2012, at 1; William W. Park, Jurisdiction to Determine Jurisdiction, 13 ICCA Congress Series 55 (Permanent Court of Arbitration, The Hague, 2007). Moreover, some legal systems maintain a right of appeal on the legal merits, as for example Section 69 of the 1996 English Arbitration Act.

15

For example, applicable law might say that fraud in sales contract gives a buyer the right to rescind, but not to seek damages that could in essence be characterized as a price renegotiation. A judge might consider the rule outmoded, and give buyers new rights, whereas the arbitrator might be expected to stick to the law 'as is' rather than as it should be.

16

See, e.g., Sonatrach v. Distrigas, 80 Bankr. 606 (D. Mass. 1987). In reversing a lower court decision which, at the request of the Massachusetts importer, had denied enforcement of an arbitration agreement invoked by the Algerian seller, the Federal District Court for Massachusetts opinioned, "It is important and necessary for the

United States to hold its domiciliaries to their bargains and not allow them to escape their commercial obligations by ducking into statutory safe harbors." Id. at 614.

17

Swiss Code des Obligations (Book V, Code Civil), Art. 100(1): "Est nulle toute stipulation tendant à libérer d'avance le débiteur de la responsabilité qu'il encourrait en cas de dol ou de faute grave." (Any agreement purporting to exclude in advance liability for wilful blindness or gross negligence is void.) See also Zavras v. Capeway Rovers Motorcycle Club, 687 N.E.2d 1263, 1265 (Mass. App. Ct. 1997). A rider was injured while competing in a motorcycle race, crashing at a jump without knowing that a previous accident had created a pileup in the landing zone. The motorcycle club allegedly employed a flagman who failed properly to warn of the pile-up. Although the rider agreed in writing to hold the club blameless for any loss or injury, the court found gross negligence cannot be waived.

18

For a broader musing on the benefits of specific as contrasted with general rules, see Antonin Scalia, The Rule of Law as the Law of Rules, 56 U. Chicago Law Rev. 1175 (1989), contrasting rules of law with personal discretion to do justice, the latter having been exemplified in the fair and even-handed decisions dispensed by King Louis IX of France sitting under his proverbial oak tree in the summer after having heard mass.

19

Such an illustration assumes of course that the contract terms do not run afoul of mandatory norms at the place of performance, often called 'lois de police' by Continental scholars. See Pierre Mayer, 'L'arbitre international et la hiérarchie des norms', Revue de l'arbitrage, 2, 2011, page 361. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 n.19 (U.S. 1985), the Supreme Court stated "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [it] would have little hesitation in condemning the agreement as against public policy."

20

One can only speculate about the fate of separate negligence claims brought in court following an arbitrator's decision that such damages lie outside arbitral competence.

21

In many instances, of course, waivers remain compatible with applicable law. For

example, the law of New York provides that a contracting party may explicitly disclaim reliance on any statements or nondisclosures, albeit with an exception related to "facts allegedly misrepresented [that lie] peculiarly within the seller's knowledge." See Manu. Hanover Trust v. Yanakas, 7 F.3d 310 (2d. Cir. 1993); DIMON Inc. v. Folium, Inc., 48 F. Supp. 2d 359, 368 (S.D.N.Y. 1999); MBIA Ins. Corp. v. Royal Bank of Can., 28 Misc. 3d 1225(A), 1225A (N.Y. Sup. Ct. 2010). An arbitrator considering a fraud defence with respect to a contract governed by New York law would normally take into account not only the waivers, but also arguments about the 'peculiar knowledge' of the seller.

22

The construction exercise becomes more complex if the parties choose to import only part of a third country law. For example, English and Belgian companies might stipulate to contract interpretation under Book V of the Swiss Civil Code, the 'Code of Obligations' governing commercial matters. Difficult questions arise if arbitrators applying that choice of laws clause receive an application to adapt contract terms pursuant to Book I of the Civil Code, containing the well-known Article 2 on good faith and abuse of rights. Depending on context, an argument can be made that explicit choice of Book V alone serves to exclude other parts of Swiss law.

23

See Yves Derains, 'Langue et langages de l'arbitrage', Mélanges en l'Honneur de Pierre Tercier 789 (P. Guach, F. Werro, & P. Pichonnaz, eds., 2008). Compare Pierre A Karrer, 'Arbitration and Language: Look for Purpose', 11 Croatian Arbitration Yearbook 7 (Zagreb 2004), addressing matters such as the language use for taking evidence and the risks of mistranslation. See also Nicolas C. Ulmer, 'Language Truth and Arbitral Accuracy', Journal of International Arbitration, 28, 2011, at page 285. For a somewhat broader take on the interaction of language and interpretation of legal texts, see Larry Alexander & Saikrishna Prakash, 'Is That English You're Speaking? Why Intention Free Interpretation is an Impossibility', San Diego Law Review, 41, 2004, at page 967.

24

See UCC Section 2-208(1) as enacted in New York.

25

See Gabrielle Kaufmann-Kohler, 'Iura Novit Arbiter: Est-ce bien raisonnable? Réflexions sur le statut du droit de fond devant l'arbitre international', in De Lege Ferenda: Etudes pour le professeur Alain Hirsch 71 (A. Héritier Lachat & L. Hirsch, eds., 2004); Gabrielle Kaufmann-Kohler, 'The Arbitrator and the Law', Arbitration International, 21, 2005, page 631; Julian D. M. Lew, 'Proof of Applicable Law in International Commercial

Arbitration', in Festschrift für Otto Sandrock 581 (K. P. Berger, W. F. Ebke, S. Elsing, B. Grossfeld, & G. Kühne, eds., 2000).

26

Although judges are often presumed to know the law under the principle of jura novit curia, the position in England, where foreign law will normally be proved as fact (Rule 18, Dicey, Morris & Collins, The Conflict of Laws (Lawrence Collins, Gen. Ed., 14th ed. 2006), Chapter 9 pages 255 et seq.) while in the United States Rule 44.1 of the U.S. Federal Rules of Civil Procedure provides that courts in determining foreign law "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Similar state law principles include New York CPLR § 4511 and Massachusetts GL Ch. 233, § 70, directing courts to take judicial notice of foreign law.

27

Instances where eminent judges and arbitrators simply presume a conclusion are not hard to find. See Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, International & Comparative Law Quarterly, 1, 1952, page 247, where Lord Asquith of Bishopstone admitted that the applicable system of law was prima facie that of Abu Dhabi, then added, "But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments." See generally, Ibrahim Fadlallah, 'Arbitration Facing Conflicts of Culture', Arbitration International, 25, 2009, page 303.

28

In a dispute between a Chinese state entity and an investor from the United States, with the contract subject to the law of China, the American party might appoint as arbitrator a New York trained lawyer who would sit with a Chinese jurist appointed by the state entity, and a third-country national as chair.

29

The rule that parties must have a chance to comment on applicable law was explored inter alia by the highest court in France in Commercial Caribbean Niquel v. La Société Overseas Mining Investments, Arrêt No. 785, 29 June 2011, Court de Cassation, Première chambre civile, rejecting challenge to the decision of the Cour d'appel de Paris, ch. 1, 25 March 2010, discussed in Seranglini, La Semaine Juridique Ed. G., No. 23, 7 juin 2010. The case addresses an award based on a damages theory of 'lost change'

rather than 'lost profits' in mining ventures. See generally, William W. Park, Arbitration of International Business Disputes (2d Ed. 2012), chapter 1 (at 8-10).

30

Article 5 of French Code civil forbids judges from purporting to make general rules: Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises. A similar principle applies in Germany. See Klaus-Peter Berger, 'To What Extent Should Arbitrators Respect Domestic Law? The German Experience Regarding the Law on Standard Terms', forthcoming in Arbitration International, 30, 2014, looking inter alia at application of German case law relating to limitation of liability ('cap') clause in standard form agreements.

31

See generally, Denis Tallon, 'Précedent', in Dictionnaire de la Culture Juridique 1185-1187 (2003).

32

While res judicata prevents the same parties from re-litigating the same cause of action after it has already been adjudicated in an earlier lawsuit, notions of issue preclusion come into play when a second but different lawsuit implicates questions decided in a prior action, the re-litigation of which questions is then barred. French doctrines of force de chose jugée and German concepts of rechtskräftiges Urteil play roles similar to those of res judicata in the common law tradition.

33

One authority has suggested that for international arbitration precedent exists as "decisional authority that may reasonably serve to justify the arbitrators' decision to the principal audience for that decision." Barton Legum, 'Definitions of Precedent in International Arbitration', in Precedent in International Arbitration (E. Gaillard & Y. Banifatemi, eds. 2008) 5, 14.

34

For an illustration of the delicate ambivalence arbitrators feel about prior awards, see AES Corporation v. the Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶ 30 (Jul. 13, 2005), which asserts that each arbitral tribunal "remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem..." Following a semicolon, the sentence then adds that decisions "dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its

own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution." Id., page 11.

35

For investor-state treaty disputes, jurisdictional questions such as 'most-favoured nation' prove fertile sources for de facto precedent. See Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration', Fordham International Law Journal, 30, 2007; Jeffrey P. Commission, 'Precedent in Investment Treaty Arbitration', Journal of International Arbitration, 24(2), 2007, page 129. Precedent is also common in 'trade arbitration' (maritime, commodities and reinsurance). See Michael Marks Cohen, Letter, 10 (No. 2) Int'l Arb Q. L. Rev 113 (Summer 2009).

36

In Vargas v. Insurance Co. of North America, 651 F.2d 838 (2d Cir. 1981), an aviation policy covered accidents "within the United States of America." The insured died while traveling between two points of the United States (New York and Puerto Rico), invoking a canon of construction requiring ambiguities to be resolved against the drafters (contra proferentem) that has since been excluded in many liability policies. See also Gerald Leonard, 'Rape, Murder, and Formalism: What Happens When We Define Mistake of Law?' University of Colorado Law Review, 72, 2001, page 507, commenting on the English rape case Regina v. Morgan where a defendant's incorrect belief that a woman consented would be a defence, but not an incorrect understanding of the law.

37

In a sense, we cannot say what the law is for a given dispute until first knowing what law is in general. One working definition articulates law as an authoritative dispute resolution process that includes principles for substantive conduct as well as procedures for deciding cases. Francophone jurists distinguish between 'loi' and 'droit' both of which are 'law' for the Anglophone. A tyrant's statute ('loi') might be law in the sense of an enactment, while contrary to authoritative norms ('droit') recognized from a more legitimate vantage point. English King George III may have made such a distinction for laws of his rebellious American colonies, as did the colonists for some British taxes before 1776.

38

In some instances the relevant legal provision might lie on the border of procedure and substance, to be called into question only in the event of perceived ambiguity in contract terms. See, e.g., the exclusionary rule interpreted by the British House of

Lords (as it then was) barring evidence of the parties' subjective intentions that predates an agreement. See Investors Compensation Scheme v. West Bromwich Building Society, [1998] 1 All ER 98, [1998] 1 WLR 896, [1997] UKHL 28, [1998] WLR 896; Chartbrook v. Persimmon Homes [2009] UKHL 38, paragraphs 41-42 as per Lord Hoffmann. Compare Article 1341 of the French Code civil which prohibits witness testimony to modify clear terms of a contract in the event of property conveyances made by notarial deed. For related French provisions on contract interpretation, see Code civil Articles 1156 (la commune intention des parties) and 1157 (effet utile).

39

Section 60, Arbitration Act of 1996: "An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen." Section 61 goes on to set forth the general principle that "costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs." This standard, however, is made subject to the parties' agreement otherwise, which in context with Section 60 would be an agreement after the dispute has arisen. The rule's most understandable application would be as an anti-abuse mechanism to prevent clauses that would require weaker parties to pay all costs, thus discouraging otherwise legitimate claims.

40

The scenario of London arbitral situs with New York substantive law occurs frequently in contracts between American policyholders and British insurers, the so-called 'Bermuda Form' arbitrations discussed in Richard Jacobs, Lorelie S. Masters & Paul Stanley, Liability Insurance in International Arbitration (2004; 2d Ed. 2011).

41

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

42

Under Rule 23 of the Federal Rules of Civil Procedure, a small number of plaintiffs is "certified" to represent a larger class of plaintiffs who have substantially similar claims, whether or not all members of the class participate in the matter.

43

Some commentators consider that the Court, in its zeal to send a signal on the problematic nature of class arbitration, conflated the monitoring of arbitral jurisdiction (for courts) and deciding substantive merits of the parties' dispute (for the

arbitrators), giving the right answer to the wrong question. The relevant inquiry facing the Court was not, “What did the parties agree in general?” but the more limited issue, “What did the parties agree to arbitrate?” See William W. Park, ‘La jurisprudence américaine en matière de class arbitration: entre débat politique et technique juridique’, Revue de l’arbitrage, 3, 2012, page 507.

44

For a comprehensive tour d’horizon of contract adjustment, see Joachim G. Frick, Arbitration and Complex International Contracts (Zürich 2001), Part III (at 145-226), addressing in particular the matter of ‘gap filling’ in complex agreements, adaptation clauses, the duty to renegotiate, an arbitrator’s power to adjust contract terms, notions of ‘changed circumstances’ and lex mercatoria derived from arbitral awards. See also Nagla Nassan, Sanctity of Contract Revisited: A Study in the Theory and Practice of Long Term International Commercial Transactions (1995).

45

Article 2 of Swiss Code civil. Compare to Article 1134(3) of French Code civil, which speaks of abuse of contracts (conventions) rather than rights (droits), derived from the notion that contracts must be executed in good faith.

46

German Civil Code (ZPO) in Section 162(2) provides inter alia, “If the satisfaction of a condition is brought about in bad faith by the party to whose advantage it would be, the condition is deemed not to have been satisfied.” (“Wird der Eintritt der Bedingung von der Partei, zu deren Vorteil er gereicht, wider Treu und Glauben herbeigeführt, so gilt der Eintritt als nicht erfolgt.”) See also Article 242, concerning the obligator’s duty to perform obligations according to the requirements of good faith, taking into account custom and practice.

47

See, e.g., French Code civil Article 1148 (force majeure as a defence to performance) and Article 1134(3), discussed supra, concerning the duty to execute contracts in good faith.

48

See, e.g., Uniform Commercial Code Article 2-615 (relieving performance made impracticable by an occurrence whose non-occurrence was a basic assumption of the contract) and Chitty on Contracts (31st Ed. 2012), Chapter 23 (Discharge by Frustration).

49
Italian Codice Civile, Articles 1467-68.

50
See, e.g., German Bürgerliches Gesetzbuch Article 275 (no claim for performance of an act which is impossible (unmöglich). Analogously, Article 79 of the Convention on International Sales of Goods dispenses with liability when failure of performance was due to "an impediment beyond [the non-performing party's] control" which could not reasonably be expected to have taken into account at the time of contract conclusion. International lawyers often speak of rebus sic stantibus. See Article 62, Vienna Convention on Law of Treaties, which addresses "Fundamental Change of Circumstances" and makes provision of a change whose effect is to "radically transform the extent of the obligations still to be performed under the treaty." See generally, Detlev Vagts, 'Rebus Revisited: Changed Circumstances in Treaty Law', Columbia Journal of Transnational Law, 43, 2005, page 459.

51
These principles may be invoked both on the basis of industry custom, for example as provided in French Code civil Article 1135 and commercial usage ('des usages du commerce') in Article 1511 of the French Code de procédure civile as applied to international arbitration. Compare Articles 1135 and 1511 with Article 21 of the International Chamber of Commerce Arbitration Rules (2012 Version), stipulating that the tribunal "shall take account of ... any relevant trade usages."

52
Principles of International Commercial Contracts, issued first in 1994, then re-issued with modifications in 2004 and 2010. See also Commission on European Contract Law ('Lando Principles') chaired by Danish law Professor Ole Lando, presented in full in 1998.

53
The UNIDROIT Principles contain a section on 'Hardship' defined to exist when events fundamentally alters the equilibrium of the contract because the cost of performance has increased or the value received has diminished. The concept of hardship includes (inter alia) events that could not reasonably have been taken into account at the time of conclusion of the contract and whose risk was not assumed by the party. In the event of hardship the party may request renegotiation. On failure to reach an agreement a court may either (i) terminate the contract or (ii) "adapt the contract with a view to restoring its equilibrium." See UNIDROIT Principles, Articles 6.2.2 and 6.2.3.

54
Gornergratbahn-Gesellschaft gegen Munizipal- und Burgergemeinde Zermatt, decision of 21 March 1935 in ATF 61 I 65-79. Review by the Tribunal fédéral (Bundesgericht) of a decision by the cantonal court in Valais concerning the 99-year concession. Thanks to Michael Schneider for background on this case.

55
See, e.g., French Code de Procédure Civile, Article 1512, authorizing amiable composition in international arbitration if provided by the parties' agreement. For international contracts, references to amiable composition may assume less precise contours than provided under French law, a bit as 'due process' has come to be used in arbitration without necessarily drawing its significance from U.S. law. French Code de Procédure Civile Article 1478 contains similar principles authorizing decision in amiable composition for domestic arbitration.

56
See Eric Loquin, L'amiable composition en droit comparé et international: Contribution à l'étude du non-droit dans l'arbitrage commercial (1980). See also, W. L. Craig, W. W. Park & J. Paulsson, ICC Arbitration (3rd Ed., 2000), §§3.05 at 110-114.

57
The Arbitration Rules of the International Chamber of Commerce (in Article 21(3) of the 2012 Rules) mention both amiable composition and ex aequo et bono, saying that a tribunal may (if authorized) "assume the powers of an amiable compositeur" or "decide ex aequo et bono." The French version follows similar structure, with the disjunctive "or" leaving two distinct notions, as in "law or equity." The disjunctive "or" may suggest the notions remain separate, or may simply suggest different ways to express similar concepts. The Rules permit amiable composition and ex aequo et bono decision-making only if agreed by the parties. In accord with that principle, see Richard M. Mosk, 'Arbitrators Should Apply the Law', Los Angeles Daily Journal (19 April 2011) urging ex aequo decisions only with the express consent of the parties.

58
Compare Philippe Fouchard, Emmanuel Gaillard, & Berthold Goldman, Traité de l'arbitrage commercial international (1996), Section 1502 at 836-37. The authors seem to admit the option either to proceed directly to justice or first to consider the applicable law. Nevertheless, they suggest that such a nuance lacks significance ("une telle distinction ... paraît artificielle") because the arbitrators can always do what they think justice requires.

59

The meaning and availability of such principles remain distinct from the question of whether it would be wise for contracting parties to agree to such flexibility. With respect to the substance of many economic transactions, such as a seller's right to be paid or the insured's right to be reimbursed, the slim objective content of notions such as fairness may make the concept problematic. Legal rules permit individuals, companies and governments to evaluate risks and make choices. Imagine an arbitrator hearing claims against a banker who wrongfully refused to return the entirety of a customer's funds. "My deposit was $1,500," says the customer. "Ah, yes," replies the banker. "But such dreary historical facts must yield to moral concerns for balance, symmetry and charity. We have rounded your account down to $1,000 and transferred the balance to a most deserving charity."

60

For a general description of the process, see, e.g., Ben Holland & Phillip Spencer Ashley, 'Natural Gas Price Reviews: Past, Present and Future', Journal of Energy, Natural Resources & Environmental Law, 30 (No. 1), 2012, page 29; Marwan M. A. Musleh, 'Pacta Sunt Servanda in Gas Price Reviews', presentation at International Bar Association, Boston, 9 October 2013. See also Richard Power, Gas price reviews: is arbitration the problem? Global Arbitration Review 8 March 2014. Admitting the difficulty of any safe conclusion without seeing the agreements at issue in recent price adjustment arbitrations, the author nevertheless speculates that arbitrators may be abandoning proper contract construction, departing from links to oil prices in favour of gas spot prices.

61

The adjustment clause might provide with a provision saying that arbitrators can review the Price Formula (usually a complex equation based on some index of energy values, already fixed in the agreement) to see whether that formula "needs to be revised to reflect significant changes in the buyer's energy market which affect the value of gas in the buyer's end user market, as such value can be obtained by a prudent and efficient gas company." If the formula does need to be revised, its modification might be mandated so as to "allow the Buyer to market the gas economically" (or "commercially" in some instances) under the assumption of "sound marketing practices by prudent and efficient operations on the part of Buyer."

62

For an instance when such a decision was challenged for excess of powers under

Section 10 of the Federal Arbitration Act, see Gas Natural Aprovisionamientos v. Atlantic LNG of Trinidad Tobago, 2008 WL 4344525 (S.D.N.Y. 2008).

63

The essence of the concept appears in Justinian's Code II.3.29 (chapter De Pactis): sancimus nemini licere adversus pacta sua venire et contrahentem decipere ("we shall not allow anyone to contravene his agreements and thereby disappoint (deceive) his contractor").

64

See, e.g., Ian Brownlie, Principles of Public International Law (6th ed. 2003), at 591-92. The corollary, of course, is that treaties are binding "so long as things stand as they are" (the so-called clausula rebus sic stantibus). See generally, J. L. Brierly, The Law of Nations (1963), 317-345; F. A. Mann, Studies in International Law (1973), 327-359.

65

Thus some observers challenge the utility of the notions pact sunt servanda (contracts to be performed) and its corollary rebus sic stantibus (assuming things remain the same), suggesting that they are too broad and general to be helpful in practice.

66

Linguists sometimes describe phenomenon by word 'polysemy'. If someone says "I get it" this might mean "I understand" or "I receive it" or "I buy it" or "I catch a disease."

67

Texas Public Utility Commission, Application of El Paso Electric Company for Authority to Change Rates, 10 Tex. P.U.C. Bull. 1071, 1984 WL 274081 (Tex- .P.U.C.) (Dec. 7, 1984)

68

For example, New York courts have said that an injured party who makes an effort to avoid or reduce damages may be allowed to recover related expenses if the effort was made, inter alia, prudently and efficiently. Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publishing Ass'n, 122 N.E. 463 (Mar. 4, 1919). Even in oil and gas leases, the word 'prudent' might change from one context to another, whether the operator's drilling decisions, production operations, or marketing. See, e.g., Gary B. Conine, 'The Prudent Operator Standard: Applications beyond the Oil and Gas Lease', Natural Resources Journal, 41, 2001, page 23.

69

One well-known American case presented a litany of five theories for binding non-signatories: (i) incorporation by reference; (ii) assumption; (ii) agency; (iv) veil-piercing/alter ego; and (v) estoppel. Under the facts of the case, the court rejected each theory as insufficient to bind Thomson to the arbitration agreement of its subsidiary. See Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir 1995). For a recent discussion of the agency theory in American jurisprudence, see Covington v. Aban Offshore Ltd., 650 F.3d 556 (5th Cir. Tex. 2011). See generally William W. Park, 'Non-signatories and International Contracts: An Arbitrator's Dilemma', in Multiple Party Actions in International Arbitration 3 (PCA, 2009); William W. Park, 'Rules and Standards in Private International Law', Arbitration, 73, 2007, page 441.

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See also Fluor Daniel Intercontinental, Inc. v. GE., No. 98-Civ. 7181 (WHP), 1999 WL 637236 (S.D.N.Y. 1999) where estoppel permitted a non-signatory respondent to benefit from an arbitration clause signed by a subsidiary.

71

Compare the French and British decisions in Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan: [2010] UKSC 46 and Cour d'appel [CA] de Paris, Case No. 09-28533, Feb. 17, 2011. Article V(1) (a) of the New York Convention states that a recognition and enforcement of the award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or of the country where the award was made."

72

Of course, the arbitrator might be quite sensitive to the law of the arbitral seat (and/or the place of enforcement) given the natural inclination to safeguard the award from annulment or non-recognition.

73

See Rhône Méditerranée v. Achille Lauro, 712 F. 2d 50 (3d Cir. 1983), validating an arbitration clause that contravened a provision of Italian law calling for an odd number of arbitrators even if the clause made provision for an umpire tie breaker. The court held that a commitment to arbitrate would be deemed "null and void" under the New York Convention only if defective by reason of "an internationally recognized defence such as duress, mistake, fraud, or waiver" or when contrary to some fundamental policy of the forum state.

74

Emmanuel Gaillard, Aspects philosophiques de l’abitrage international (2008).

75

Even when judges look to court-selection clauses as the source of adjudicatory jurisdiction, such provisions must be given effect through the lens of the forum’s procedural law.

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Arbitrators and Accuracy

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An arbitrator's primary duty remains the delivery of an accurate award, resting on a reasonably ascertainable picture of reality. Litigants wanting only quick or cheap solutions can roll dice, and have no need of lawyers. Evidentiary tools in arbitration should balance sensitivity towards cost and delay against the parties' interest in due process and correct decisions. If arbitration loses its moorings as a truth-seeking process, nostalgia for a golden age of simplicity will yield to a clarion call for reinvention of an adjudicatory process aimed at discovering what happened, finding relevant legal norms and properly construing contract language. Though not so jealous as to exclude all rivals, truth does insist on being first among equals.

1. *A View from the Hilltop*

Often called the first European novel, *Don Quijote de la Mancha* weaves together the idealistic quests of a slightly delusional Spanish gentleman who saw himself as a knight errant long after the age of chivalry had ended. A Moorish enchanter had recorded the Don's adventures, defeats and victories. At one point in the story, the Don objects to narratives of his defeats, arguing that heroes deserve praise, not scorn. After all, he adds, Virgil embellished the piety of Aeneas just as Homer enhanced the wisdom of Odysseus. In response, a young scholar suggests two different ways to view the world. A poet can say things as they ought to have been, whereas the historian must write things as they were.[1]

Like historians, arbitrators normally focus on things as they were, seeking the most reliable account of the controverted events giving rise to the claims. In deciding disputes accurately, arbitrators promote the type of promise-keeping that underpins the positive economic teamwork that marries public and private welfare.

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[1] Sansón the scholar says, 'It is one thing to write like a poet, another like a historian. A poet can say or sing things not as they were, but as they should have been. The historian should write them down not as they should have been, but as they were, without adding or omitting anything.' ('Pero uno es escribir como poeta, y otro como historiador: el poeta puede contar o cantar las cosas, no como fueron, sino como debían ser; y el historiador las ha de escribir, no como debían ser, sino como fueron, sin añadir ni quitar a la verdad cosa alguna.') Miguel de Cervantes, Don Quijote de la Mancha, Segunda Parte Del Ingenioso Caballero, Capítulo III (1605 and 1615), Edición del IV Centenario (2004). Ibid at 569.

Often underrated or misjudged, truth has dispatched more than one mind beneath the intellectual storm waves of a giant analytic sea, and anyone venturing to explore its contours must do so with fear and trembling.[2] Yet truth-seeking lies at the core of what arbitration is about, and cannot long be avoided in any serious discussion of the subject.

Several levels of inquiry present themselves. A panoramic perspective from 6,000 meters (20,000 feet for American alpinists) might examine reality in an abstract way. With varying degrees of sincerity, thinkers since antiquity have asked, 'What is truth?'[3]

By contrast, lawyers in the litigation trenches consider ways that rival versions of truth influence the judges, juries and arbitrators who decide cases. This vista includes the art of advocacy and tools to persuade decision-makers that one view of the case has more merit than another. In the common law tradition such communications implicate rules of evidence intended, albeit in part, to enhance the prospect of reaching a correct conclusion.

Finally, a view from the hilltop (somewhere between the trenches and the Alpine peaks) looks at how goals other than truth-seeking enter the equation. Examining documents and listening to witness testimony will cost time and money. At some point, the additional enlightenment to be gleaned from more information will be offset by the value of finality and economy. The present essay explores this last line of inquiry, looking at how truth-seeking balances against sensitivity to speed and economy in arbitration.

Accuracy in arbitration means something other than absolute truth as it might exist in the eyes of an omniscient God. In examining the competing views of reality proposed by each side, arbitrators aim to get as near as reasonably possible to a correct picture of those disputed events, words, and legal norms that bear consequences for the litigants' claims and defences. They recognize that some answers are better than others, even if perfection proves elusive.[4]

[2] The 19th century Danish philosopher Søren Kierkegaard popularized the expression in *Frygt og Bæven*, the title of which was lifted from a line in Philippians 2:12 where Paul encourages his readers to 'work out your salvation with fear and trembling'.

[3] Among the more well-known examples, Pontius Pilate posed the question at the trial of Jesus, but without bothering to stay for an answer. John, Ch. 18. A quip about 'jesting Pilate' served the English jurist Francis Bacon in opening his essay, *Of Truth* (1601). In *The Antichrist*, Friedrich Nietzsche called that question the only one of value in the New Testament. More recently, Andrew Lloyd Webber and Tim Rice worked the question into the rock opera, *Jesus Christ Superstar*, and country singer Johnny Cash used it as the title of a 1970 hit single. The discipline of epistemology explores truth in 'correspondence theory' (asking whether a statement corresponds to reality) and 'coherence theory' (asking whether one statement is coherent with others). See George Pitcher (ed.) Truth (1964).

[4] In this connection, not all questions pose the same epistemological challenges. Determining why a marriage failed is not the same as deciding whether goods arrived, an employee received her salary, or a landlord refunded a tenant's security deposit. Moreover, the apparent relativity of truth often derives simply from imprecision in language or from different angles of perception, as when Australians say that winter starts in June while Bostonians assert that the season arrives in December. Although contradictory on their face, each statement bears some relationship to the realm of reasonably ascertainable reality.

Such truth-seeking relies principally on documents, human recollection, and expert opinion. For complex commercial and investment cases, the process does not necessarily come quickly or cheaply. Of all the goals that compete with adjudicatory truth-seeking, few have been more challenging than speed and economy. Indeed, time and cost often appear as the enemy, interfering with efficient arbitration.

On more mature reflection, however, time may prove the friend and patron of good arbitration rather than its enemy.[5] Although justice delayed can mean justice denied, a sense that truth matters remains vital to a perception that justice is being done. Arbitration becomes a lottery of inconsistent and unpredictable results without some investment of the time and money required for a rigorous search for facts and law in which litigants receive a meaningful opportunity to present their cases. Success in arbitration is not measured by a stop watch alone.

Much of the criticism of arbitration's cost and delay thus tells only half the story, often with subtexts portending a cure worse than the disease. An arbitrator's main duty lies not in dictating a peace treaty, but in delivery of an accurate award that rests on a reasonable view of what happened and what the law says. Finding that reality in a fair manner does not always run quickly or smoothly.

Although good case management values speed and economy, it does so with respect for the parties' interest in correct decisions. The parties have no less interest in correct decisions than in efficient proceedings.[6] An arbitrator who makes the effort to listen before deciding will enhance both the prospect of accuracy and satisfaction of the litigants' taste for fairness. In the long run, little satisfaction will come from awards that are quick and cheap at the price of being systematically wrong.

To fulfil its promise of enhancing economic cooperation, arbitration must aim at an optimum counterpoise between truth-seeing and efficiency. Just as a restaurant can fail to provide an agreeable dining experience either by serving bad food or by making customers wait too long for their meal, arbitrators fall short of their duty by neglecting procedures that promote correct awards, just as much as by failing to calibrate the expenditure of time and money.

If arbitration loses its moorings as a truth-seeking process, nostalgia for a cheerful golden age of quick results will yield to calls for reinvention of an adjudicatory process aimed at actually getting the facts and the law. Though

[5] One ancient adage holds that truth is the daughter of time: Veritas filia temporis. A second century Roman grammarian attributes the saying to an unnamed predecessor: 'Alius quidam veterum poetarum, cuius nomen mihi nunc memoriae non est, Veritatem Temporis filiam esse dixit.' (Another ancient poet, whose name I have forgotten, said that Truth was the daughter of Time.) Aulus Gellius, Noctes Atticae, XII.11.7.

[6] One study found litigants rated a 'fair and just result' in arbitration above other considerations including cost, finality, speed, and privacy. See Richard W Naimark and Stephanie E Keer, 'International Private Commercial Arbitration: Expectations & Perceptions of Attorneys & Business People' (May 2002) 30 Int'l Bus Lawyer 203. The eight ranked variables included speed, privacy, receipt of monetary award, fair and just result, cost-efficiency, finality, arbitrator expertise and continuing relationship with opposing party.

not so jealous as to exclude all rivals, truth does insist on remaining first among equals, as the principal objective of the arbitral process.

2. *Rivals of Award Accuracy*

A. *An Era of Disenchantment*

On a small street in downtown Boston stands a shoe repair shop with a proactive approach to customer complaints. In the window, an equilateral triangle links three options: fast service, low price, high quality. 'Pick any two', patrons are advised.

The price of such trade-offs may be missing from much of the current nostalgia for a bygone golden age of cheap and cheerful arbitration. Much is said about the business community's disenchantment with arbitration.[7] The critics devote less energy grappling with how to achieve efficiency without sacrificing accuracy, or addressing the dissatisfaction that would follow a shift away from truth-seeking as arbitration's principal aim. It has become commonplace to lamenting that the arbitral process now resembles the inheritance dispute satirized in *Bleak House*, described as 'so complicated that no man alive knows what it means'.[8] Reportedly, some lawyers call international a 'monster,'[9] while others ridicule detailed rules.[10] A 'scorched earth' policy is said to taint many proceedings.[11] Commentators urge a model

[7] See generally the series of articles presented in Volume 2, No 5, of World Arb & Med Rev, with an excellent introduction by Christopher R Drahozal, 'Disenchanted? Business Satisfaction with International Arbitration' Ibid 1. For a thoughtful Continental view on arbitration's rival objectives, see Matthieu de Boisséson, 'New Tensions Between Arbitrators and Parties in the Conduct of the Arbitral Procedure' (2007) Intl Arb Law Rep 177. At the 2008 Congress of the International Council for Commercial Arbitration, in connection with a discussion of reasoned awards, no less an eminence than Fali Nariman spoke of the loss of arbitration's emphasis on decision of the individual case. ICCA Congress, Dublin, 10 June 2008, Working Group B, Current Developments. In response, another leading light, James Carter, asked whether there was really any consensus about what was golden in the bygone Golden Age. See '*Quo Vadis Arbitration?*, Recent Developments in International Arbitration' in Catherine Kessedjian and William W Park (eds), *Fifty years of the New York Convention*, 633ff, ICCA Congress Series No. 14, Proceedings of June 2008 Dublin Conference (2009). Dr Nariman suggested, 'The dark side [of arbitration's evolution] is that we are sacrificing the main goal of arbitration-which has always been intended as a resolution of disputes.' Mr Carter commented that many users of arbitration are 'always operating on the basis of the last bad thing that happened to them'. Ibid, 635.

[8] Charles Dickens, *Bleak House* (1853). Litigation costs in *Jarndyce v Jarndyce* ultimately consumed the entire estate, with despair causing one legatee to blow his brains out at a Chancery Lane coffee house, while another expired in hopeless dejection.

[9] 'World-beating Arbitration Hub Envisaged, Legal Affairs' (23 October 2009) *Australian Financial Review* 20, quoting Toby Landau, a London QC who had just delivered the Clayton Utz Lecture in Sydney.

[10] See Serge Lazareff, *Avant-propos: Le bloc-notes de Serge Lazareff*, 124 Gazette du Palais: Cahiers de l'arbitrage 3 (No. 338/339, 3 and 4 December 2004). Likening procedural guidelines to a loathsome skin disease (*le prurit réglementaire*), Me Lazareff posits lawyers consulting a hypothetical Code of Arbitral Conduct that stipulates the number of bathroom breaks allowed as a function of hearing time.

[11] See discussion in Klaus Peter Berger, 'The Need for Speed in International Arbitration' (2008) 25 J Intl Arb 595, commenting on the new DIS Supplementary Rules for Expedited Proceedings. Professor Berger goes on to note that arbitration may well be more suited than court proceedings to the resolution of complex cross-border business disputes, but that the complexity can add time and cost.

that is 'simpler, quicker and more basic'[12] to replace the unfortunate 'legalism' and 'judicialisation' that have allegedly infected arbitration.[13]

Users of international arbitration are said to be unhappy with a costly and slow process that too often ignores in-house counsel,[14] and has become infected with 'Americanized' pre-hearing discovery.[15] General criticisms, both in the United States[16] and Europe,[17] tell of 'company-wide bans on arbitration clauses,'[18] related to the business community's 'growing chorus of discontent' with the process.[19] One commentator urges that arbitration must be repaired 'by whatever means necessary.'[20] Another suggests that empirical studies showing business satisfaction with arbitration[21] have been reached only by turning a 'blind eye to reality.'[22] Even good friends of arbitration suggest that it

[12]Alan Redfern, 'Stemming the Tide of Judicialisation of International Arbitration' (2008) 2 World Arb & Med Rev 21, 37.

[13] Gerald F Phillips, 'Is Creeping Legalisms Infecting Arbitration?' (AAA, February–April 2003) 58 Dispute. Res J 37.

[14] See eg Jean-Claude Najar, 'A Pro Domo Pleading: Of In-House Counsel, and their Necessary Participation in International Commercial Arbitration' (2008) 25 J Int'l Arb 623. A fine survey of in-house perspectives was presented by Carla Powers Herron (Shell Group, Houston, Group Counsel for Litigation) to the Institute for Transnational Arbitration, Dallas, 17 June 2009, (forthcoming 2010) 3 World Arb & Med Rev.

[15] Roger Alford, 'The American Influence on International Arbitration' (2003) 19 Ohio State J Disp Resolution 69; Bernard Audit, 'L'Américanisation du droit' (2001) 45 Arch philosophie du droit 7.

[16] The Academic Director of the Straus Institute for Dispute Resolution at Pepperdine University, wrote that 'criticism of American arbitration is at a crescendo' due to extensive discovery and highly contentious advocacy. Thomas J Stipanowich, 'Arbitration and Choice: Taking Charge of the New Litigation' (2009) 7 DePaul Bus & Com L J 383. Other articles in the same symposium (Vol 7, No 3), titled 'Winds of Change: Solutions to Causes of Dissatisfaction with Arbitration,' include Stephen L Hayford, 'Building a More Perfect Beat: Re-thinking the Arbitration Agreement' 437; L Tyrone Holt, 'Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill Effects' 455; Robert A Holtzman, 'The Role of Arbitrator Ethics' 481; and Curtis E von Kann, 'A Report on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek' 499.

[17] See Paul Hobeck and others, '*Time for Woolf Reforms in International Construction Arbitration*' (2008) Intl ALR 84, asserting that 'a growing chorus of critics has begun to question the role of arbitration in plant construction' and suggesting an equivalent of the 1999 civil procedure reforms in England, including more intensive ('front loaded') pleadings at an earlier stage and more aggressive case management by arbitrators.

[18] Michael McIlwrath, 'Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices' (2008) 2 World Arb & Med Rev 111.

[19] Peter Morton, 'Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?' (forthcoming 2009) 25 Arb Int'l. The author admits that the desired rapidity will require the 'buy-in' of all parties. Some observers may see the noun at the middle of that phrase ('all') as holding the key to why quick proceedings can be problematic.

[20]Jean-Claude Najar, 'Inside Out: A User's Perspective on Challenges in International Arbitration' (forthcoming 2009) 25 Arb Int'l.

[21]One widely discussed study, co-sponsored by a major accounting firm and a London university, suggested that 86% of the participating corporate counsel are 'satisfied' with international arbitration. See *International Arbitration: A Study into Corporate Attitudes and Practices* (2008), PriceWaterhouse Coopers & School of International Arbitration (Queen Mary, University of London) (2008), with commentary by Loukas Mistelis and Crina Mihaela Baltag, 'Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations', 2 World Arb & Med Rev 83. The full statistical report is available at 20(1) ICC Bulletin (2009).

[22] Michael McIlwrath, *Ignoring the Elephant in the Room: International Arbitraion: Corporate Attitudes and Practices*, (2008) 2 World Arb & Med Rev 111, at 113, focusing particular concern on the methodology of the PriceWaterhouseCoopers study. Mr McIlwrath also facilitated discussion of similar ideas in the CPR-sponsored 'IDN' (International Dispute Resolution) podcast of 21 November 2008, where he interviewed Mr Volker Mahnken, senior counsel of Siemens AG, with respect to his views on the perceived dissatisfaction among consumers of international construction arbitration services.

is 'generally admitted' that arbitration has become more and more expensive.[23]

Suggested remedies include interim or advance rulings on costs,[24] or a 'town elder' model harking back to simpler days.[25] Others propose expedited proceedings,[26] a single arbitrator rather than a three-member tribunal,[27] splitting proceedings into discreet stages (jurisdiction, liability and damages),[28] or more attention to dispute resolution in contract drafting.[29] Institutional guidelines outline ways to accommodate the rival elements inherent in the proper conduct of business arbitration.[30] And some courts have expanded arbitrators' authority to award costs against a party whose bad faith conduct caused delay.[31]

B. *The 'Peace Treaty' Subtext*

On their face, many comments on arbitration's cost take the ring of general exhortations to try diplomacy before claims are filed or to demonstrate proportionality in document production orders. Most thoughtful professionals can only applaud consideration of such cost-saving measures. Indeed,

[23] Two eminent Swiss scholars recently wrote, 'Alors que l'arbitrage a été longtemps considéré comme un mode économique de règlement des litiges commerciaux, il est aujourd'hui généralement admis qu'il devient de plus en plus dispendieux'. See Jean-François Poudret and Sébastien Besson, In Edgar Philippin and others (eds) *Nature et efficacité des décisions prises par l'arbitre en cours de procédure au sujet des frais de l'arbitrage*, (Mélanges en l'honneur de François Dessemontet 2009) 297.

[24] Poudret and Besson (n 23) 297; Michael Schneider, 'Lean Arbitration: Cost Control and Efficiency Through Progressive Identification of Issues and Separate Pricing of Arbitration Services' (1994) 10 Arb Int 119.

[25] See also David W Rivkin, 'Towards a New Paradigm in International Arbitration – The Town Elder Model Revisited' (2008) 24 Arb Int'l 375. Mr Rivkin suggests a return to basics in which an arbitrator would 'simply listen to both sides of the dispute and then issue his decision', asking for additional information 'only as necessary'. Ibid 375. Of course, few arbitrators see themselves as requesting 'unnecessary' information even in traditional arbitration. One concrete suggestion includes dispositive motions whereby a claim might be dismissed without hearings simply because the pleaded facts did not support a claim.

[26] Peter Morton, 'Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?' (forthcoming 2009) 25 Arb. Int'l. Compare Michael McIlwrath and Roland Schroeder, 'International Arbitration: In Dire Need of Early Resolution' (2008) 74 Arb 3.

[27] See Jennifer Kirby, 'With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated' (2009) 26 J Int'l Arb 337, arguing that three arbitrators may not add enough to the legitimacy of international arbitration to outweigh what the author of the article perceives as the added inefficiency.

[28] See Julie Bédard, 'Recession-Proof Arbitration: Of the Power of Constraint to Control Time and Costs' (Aug/Oct 2009) 64 Dispute Res J 74, 79. Of course, at many arbitration conferences one hears critics of bifurcation who claim that the case could have been decided more quickly if the issues were addressed all at once. Much depends on how intertwined the various questions appear to be.

[29] See Thomas J Stipanowich, 'Arbitration and Choice: Taking Charge of the New Litigation' (2009) 7 DePaul Bus & Com L J 3, to some extent echoing suggestions made earlier in the 2002 Freshfields Lecture. See William W Park, 'Arbitration's Protean Nature' (2003) 19 Arb Int'l 279, reprinted with a progress report in Arbitration Insights 331 & 360 (J Lew and L Mistelis, eds, 2007).

[30] See ICC Commission, *Techniques for Controlling Time and Costs in Arbitration*, ICC Publication No. 843 (2007). See also UNCITRAL Notes on Organizing Arbitral Proceedings (1996); College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* (October 2005), prepared by the American College of Commercial Arbitrators from a prior draft presented to the CCA Meeting in Washington, DC, on 30 October 2004.

[31] See *ReliaStar Life Insurance Co. of NY v EMC National Life*, 564 F. 3d 81 (2d Cir. 2009), where the tribunal awarded respondent ReliaStar all legal fees because claimant's conduct had been 'lacking in good faith.' The court refused to vacate the award, finding the arbitrators to have inherent power to sanction bad behavior, notwithstanding that the contract explicitly required each party to ear its own attorneys' fees.

arbitration's contractual nature invites procedural innovation aimed at reconciling truth-seeking with other litigation goals such as efficiency.

Some critiques, however, travel with a subtext that downgrades the type of truth-seeking that has long served to promote both predictability and fairness in economic relationships. One camp of commentators posits that commercial litigants seek principally an end to hostilities so they can get on with their business. A recent listing of arbitral virtues omits any mention of correct awards,[32] while other commentaries seem to down-play the need for arbitrator access to information.[33] The story runs that the parties want not so much an accurate decision, but simply a decision, full stop, made by someone who dictates a peace treaty rather than pronounces the true state of the world.[34]

To test the hypothesis that peace-making is what litigants want, one might imagine a corporate counsel telling her boss how a joint venture partner has breached its agreement, resulting in a hundred million Euros in lost profits. 'We have a good case on the law and the facts,' she says. Moreover, she suspects that board minutes of the joint venture entity (now controlled by the other side) prove manipulation of that company's trading practices.

When arbitration claims are filed, the proceedings went forward with great speed. The tribunal denied most pre-trial information exchange, including the joint venture's minute book. Apparently the arbitrators had heard the general counsel give a speech about the downside of too much information. The arbitrators spent their deliberations cracking jokes and playing video games, rather than studying testimony and legal authorities. The award rejected recovery and bid everyone good luck in the future.

A career adjustment for the general counsel soon followed. It seems that her boss did not want an end to hostilities at the expense of defeat, at last not when the company has a good case.[35] The rougher form of justice might do if the case were less certain.

[32] See eg, Jean-Claude Najar (n 20). After cataloguing the perceived defects of international arbitration today, the author concludes, 'By whatever means necessary, arbitration needs to be repaired, to be returned to its simple foundations—speed, cost efficiency, and user-friendliness'. In his introduction, Mr Najar defines the 'purpose' of international arbitration as 'cost efficiency, speed, and user-friendliness'. Reference to a factually accurate or legally correct award seems notably absent from the catalogue of arbitration's objectives or goals. At one arbitration symposium, a speaker garnered considerable applause by declaring that what in-house counsel want is simply for arbitrators 'to impose a solution that will get the parties out of their mess', full stop. *The Search for Truth in Arbitration*, Swiss Arbitration Symposium, Zürich, February 2009.

[33] See discussion of 'think slicing' in Thomas J Stipanowich, 'Arbitration: The New Litigation' (2010) 1 U Ill L Rev at 27–38.

[34] See discussion above of Swiss Arbitration Association proceedings of 6 February 2009. For a thoughtful consideration of the contrast between truth-seeking and peace-making, see generally, Mirjan R Damaška, 'The Faces of Justice and State Authority' (1986) at 122–3, suggesting that a legal process aimed at maximizing dispute resolution as such cannot simultaneously aspire to maximize accurate fact-finding.

[35] Indeed, one constant of international arbitration practice lies in the basic profile of individuals sought-after as arbitrators, which inevitably focuses on intelligence and integrity, both of which matter significantly if truth-seeking remains the goal. Never has a lawyer called the author to ask for recommendation of arbitrators who were dullards unable to look past smoke and mirrors designed to hide poor arguments and weak positions.

Like humanity in general, lawyers react against their last bad experience, forgetting the specters of other unattractive alternatives. On some occasions counsel chafe that victory escaped them because arbitrators refused to order production of that extra document that would have provided the critical evidence. At other times, lawyers fulminate against the injustice and burden of having to scour their files for irrelevant pieces of paper.[36]

In this connection, one irony of the current debate is that the same lips that complain of legalized arbitration often lament aberrational or 'split the difference' awards,[37] reminiscent of King Solomon's interim ruling between the proverbial Jerusalem mothers.[38] Some literature even suggests that arbitrators make unprincipled decisions to attract business,[39] although no empirical data based on either 'win rates'[40] or size of damages[41] supports such conclusions.

C. *The Arbitrator's Mission*

No one should be surprised that arbitration implicates goals other than accuracy, or that these aims require limits on testimony and discovery requests. Nothing new resides in balancing truth-seeking against values that further

[36] Likewise, a winning award might be upset by a court challenge, causing the victor's counsel to lament the lack of finality in arbitration. In another case, a disappointing award might be met with realization that full appeal on the legal merits does not generally exist in arbitration.

[37] For analysis of the real impact of 'knucklehead awards', see Christoher R Drahozal and Quentin R Wittrock, 'Is There a Flight from Arbitration?' (2008) 37 Hofstra Law Rev 71, finding little evidence that franchisors in fact use arbitration less. See also Christopher R Drahozal, 'Busting Arbitration Myths' (2008) 56 U Kansas L Rev 663; Christopher R Drahozal, 'Arbitration Costs and Forum Accessibility' (2008) 41 J Law Reform 813.

[38] In the Biblical child custody dispute, one woman accused another of stealing her baby. The king called for a sword so the child might be divided, half for each litigant. When one woman abandoned her claim in order to save the infant, Solomon recognized the real mother and granted her custody, leaving 'all Israel in awe of the king's wisdom.' See I Kings 3:23–8.

[39] See Richard Posner, 'How Judges Think' 128–29 (2008), citing *Armendariz v Foundation Health Psychare Services*, 6 P3d 669, 693 (Cal 2000), where a California court asserted that courts and juries are 'more likely to adhere to the law and less likely than arbitrators to "split the difference" between the two sides thereby lowering damages'. For similar skepticism about arbitrator accuracy, see Alon Klement and Kvika Neeman, 'Does Private Selection Improve the Accuracy of Arbitrators' Decisions', Law and Economics Workshop (University of California, Berkeley), Paper 19, Spring 2009; Alon Klement and Daphna Kapeliuk, Contractualizing Procedure (Available on SSRN, Version of 31 December 2008).

[40] A claimant awarded $100 on a $5 million claim 'wins' in the sense of receiving something. However, the respondent would likely be the happier of the two parties. One study of investment awards, finding that investors brought treaty-based claims for $343 million on the average, but collected only $10 million on the average. Susan Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86 North Carolina L Rev (2007) at 49–50, 64.

[41] Employment and consumer controversies present concerns different from those present in business-to-business cases. It may be that the cost of legal counsel for court cases precludes the less wealthy from starting litigation except if attorneys take matters on a contingency fee. See Theodore Eisenberg and Elizabeth Hill, 'Arbitration & Litigation of Employment Claims: An Empirical Comparison' (ABA, Nov 2003 to Jan 2004) 58 Disp Res J 44, looking at state and federal court trials as compared with AAA arbitrations. In non-civil rights disputes, higher paid employees (earning over $60,000 per year) generally prevailed at greater rates (64%) in arbitration than in state court (56%). For lower paid employees the win rate was $39%. However, the size of the mean award was greater in court cases, at $462 thousand for courts compared with $211 for higher paid employees in arbitration and $$30 thousand for lower paid employees in arbitration. Looking to the median (rather than mean) award, the higher paid employees actually received more in arbitration ($94 thousand) than in court litigation ($68 thousand).

public goals rather than adjudicatory precision. Classic trade-offs include professional secrecy, evidentiary exclusion rules, and the civil jury system.[42]

What remains at stake in the debate are the shades of gray in balancing truth-seeking against added time and expense. Any account of international arbitration remains inadequate if it denigrates the aspiration to accuracy, or shifts an arbitrator's aim from a correct award to splitting the baby or dictating quick peace treaties.

Particularly for international transactions, arbitration often justifies itself by reference to a more level playing fields, not speed and economy.[43] In a stubbornly heterogeneous world lacking a supra-national judiciary with mandatory jurisdiction, arbitration enhances a relative measure of adjudicatory neutrality, which in turn promotes respect for shared *ex ante* expectations at the time of a contract or investment.[44] A desire for confidentiality and expertise also play a role, as do apprehensions about xenophobia[45] and civil juries.[46]

Litigants are obviously free to choose a mode of dispute resolution that ignores accuracy based on recourse to testimony and documents. They may draw straws, flip coins, roll dice, fight a duel or consult entrails of a disemboweled chicken. If not inclined toward augury, chance or combat, the parties can give someone a blank check to decide 'in equity' without reference to law. No lawyers are needed, whether external or in-house.

Litigants might also take responsibility for their own fate by agreeing to settle. Mediation can facilitate settlement, particularly if arbitral or judicial backstops supply baselines from which to evaluate each side's positions. Yet

[42] A perceived lack of reliability in the American jury system lies behind much of the domestic arbitration movement in the United States. Legal trustworthiness, however, may not be a jury's main goal. One classic commentary on American society suggests that the function of the civil jury was public education rather than truth-seeking. Alexis de Tocqueville, De la démocratie en Amérique (1835 and 1840), Livre I, Deuxième Partie, Ch. VIII, *Du jury aux Etats-Unis considéré comme institution politique*. De Tocqueville writes, 'Je ne sais si le jury est utile à ceux qui ont des procès, mais je suis sûr qu'il est très utile à ceux qui les jugent. Je le regarde comme l'un des moyens les plus efficaces dont puisse se servir la société pour l'éducation du peuple'. ('I do not know if the jury is useful for those who have lawsuits, but I am sure it is very useful for those who decide them. I see it as one of the most efficient means by which society can educate the people.') Derived from visits to the United States in 1835 and 1840, these observations speak to early American exceptionalism. See also Oscar Chase, 'American Exceptionalism and Comparative Procedure' (2002) 50 Am J Comp L 277.

[43] Perception may be more significant than reality. One study found that in federal civil actions in the United States, foreigners actually fare better than domestic parties. See Kevin Clermont and Theodore Eisenberg, 'Xenophilia in American Courts' (1996) 109 Harv Law Rev 1122. An explanation for this counter-intuitive finding lies in the fear of litigation bias that leads foreign litigants to settle rather than continue to judgment unless they have particularly strong cases.

[44] An exaggerated articulation of this perspective (intentional, for entertainment perhaps) was presented in Jan Paulsson, 'International Arbitration is not Arbitration' (2008) 2 Stockholm Int'l Arb Rev, adapted from Brierley Memorial Lecture, Montréal, 28 May 2008, suggesting that international arbitration is to arbitration what sea elephants are to land elephants.

[45] One arbitration followed a $500 million Mississippi verdict against a Canadian company for breach of $980 thousand in burial insurance contracts and an exchange of funeral homes valued at $2.5 million. After a trial with xenophobic comments to inflame jurors and an appeal thwarted by a $625 million bond requirement, the investor alleged discrimination and unfair treatment. ICSID Case No ARB(AF)/98/3 *Loewen Group & Raymond Loewen v USA* (26 June 2003). See generally, Jonathan Harr, 'The Burial' *The New Yorker*, 1 November 1999, at 70.

[46] Concern is often expressed that civil juries show undue sympathy to the 'little guy' (consumer or employee) against the 'big guy' (manufacturer, bank or boss).

mediation, like negotiation, succeeds only if both sides agree to bury differences.[47] If each side clings to peace on its own terms, reference to what the parties (plural) want will be meaningless.

Arbitration, by contrast, imposes a binding decision when harmony proves impossible, and thus implicates a more rigorous process for finding facts and law based on weighing testimony and documents. When differences are deep and complex, the process takes time.

In some instances, the parties may tailor the procedural calculus to reflect protocols different from those by which national law balances speed and economy against the interest in accuracy. However, in disputes with a serious impact on corporate or national welfare, intelligent litigants usually craft their rules with deference to the adage that one person's delay is another's due process.[48]

An agreement to end hostilities may cost less than arbitration, just as a train trip from London to Paris is cheaper and quicker than a flight from London to Hong Kong. However, if the parties cannot agree to the shorter trip, they may have no option but to accompany each other on the longer and more costly voyage. In such instance, both will want a pilot who cares about taking the best route to the correct destination.[49]

3. *Tools for Fact-Finding*

A. *The Impact of Legal Culture*

Although differences in national procedure do exist,[50] most modern legal systems show a core reliance on witness testimony, documentary exhibits and expert opinion.[51] However, this does not mean that they agree on how to use

[47] Noting that a decision to arbitrate shifts responsibility to a third party, Judge Schwebel speculates that mediation is rare for investor-state disputes because bureaucracies tend to shift rather than assume responsibility. Stepehn M Schwebel, 'Is Mediation of Foreign Investment Disputes Plausible?'(Fall 2007) 22 (No. 2) ICSID Review/Foreign Investment Law J 237.

[48] The phrase has been attributed to James Landis (former Dean of Harvard Law School) in his Address to the Administrative Law Section, American Bar Association in St Louis (7 August 1961); typescript in Harvard Law School Library. See Morton Horwitz, 'The Transformation of American Law' 1870–1960 (1992) 244.

[49] A more controversial analogy might compare mediation to a dinner date and arbitration to a marriage. The casual date carries no commitment, with the couple free to go separate ways if the chemistry lacks, just as disputants can ignore a mediator's suggestion. In contrast, deeper consequences attach to wedding vows and arbitration agreements, notwithstanding that subsequent annulment requests are possible in each case. Of course, arbitral awards usually look more like divorce decrees than marriage certificates but both carry a degree of somber finality.

[50] See eg Siegfried H Elsing and John M Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration' (2002) 18 Arb Int'l 59; Pierre A Karrer, 'The Civil Law and Common Law Divide' (ABA, February/April 2008) 63 Dispute Resolution J 72; Andreas F Lowenfeld, 'The Two-Way Mirror: International Arbitration as Comparative Procedure' (1985) 7 Mich J Int'l Legal Stud 163; Luc Demeyere, 'Different Aproaches to Procedures under Common Law and Civil Law' (Nov/Dec 2008) 6 Schieds VZ 279 (Zeitschrift für Schiedsverfahren).

[51] See 'Truth and its Rivals: Evidence Reform and the Goals of Evidence Law' (1998) 49 Hastings LJ, in particular Richard D Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, Ibid 545; Richard M Mosk, 'The Role of Facts in International Dispute Resolution' (2004) 304 *Recueil des cours* (Hague Academy of

these truth-seeking tools. Variations often derive from wrinkles of historical accident or different cost-benefit analysis in weighing truth-seeking against other considerations.[52] Even radical differences in practice sometimes present themselves as divergent paths to the same end.[53]

Under the Anglo-American model, lawyers do the heavy lifting in gathering and marshalling elements of proof, as well as questioning witnesses. Truth reveals itself in the crucible of vigorous exchanges among those with competing perspectives. This so-called 'adversarial' system contrasts with the 'inquisitorial' paradigm in which judges or arbitrators take a more proactive role in finding out what happened.

Much international arbitration implicates some combination of the two approaches.[54] Fact-finding is enhanced by self-interested litigants motivated to ferret out information. Notwithstanding that work falls on those with incentives to ignore some aspects of the story, it would be hard to imagine anyone other than counsel marshalling evidence for arbitration on a global basis.

Yet a more inquisitorial style may commend itself during oral hearings, after party briefs memorialize points of law and evidence. Rather than sitting passively while lawyers perform, arbitrators who engage in robust and direct dialogue with witnesses and counsel can stimulate the mental juices that help connect analytic dots, at least if they avoid seeming to have pre-judged the case, or revealing a failure to read the papers.

What starts as a culture clash might, after adjudicatory skirmishing, end up as legal cross-pollination, evolving into common litigation practice among

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International Law); John Crook, 'Fact-Finding in the Fog: Determining the Facts of Upheavals and Wars in Inter-State Disputes' in Catherine Rogers and Roger Alford (eds) *The Future of Investment Arbitration* (2009); Terrence Anderson and others, *Analysis of Evidence* (2nd edn 2005) 289–314 (principles of proof and their exceptions).

[52] Such variations should not be surprising, given that different approaches to fact-finding appear even within relatively homogeneous legal systems. See Neil S Hecht and William M Pinzler, 'Rebutting Presumptions' (1978) 58 BU Law Rev 527, comparing presumptions that control permissibility of inferences. A legal presumption (stamped letters put into mailboxes arrive in due course) might be rebutted by the alleged recipient's testimony that he never received the letter. And a logical inference tracking the presumption about letters and mailboxes might support a finding that the letter arrived. See Rule 301, US Federal Rules of Evidence, distinguishing between burden of coming forward with evidence and burden of persuasion.

[53] In Islamic law, the 'debt verse' in *Qur'an,* ch. 2:282 provides, 'If there are not two men [as witnesses in a debt dispute] let there be a man and two women .... If one of those women should mistake, the other of them will cause her to recollect.' Some scholars suggest that the rule, understandably perceived today as suggesting inferiority in female testimony, derives from concern for testimonial accuracy in 7th century Arabia, when women were not involved in financial affairs. See generally, Asghar Ali Engineer, *Rights of Women in Islam* (2nd edn 2004) 73–83; Ronak Husni and Daniel L Newman, *Muslim Women in Law & Society* (2007) 37–9; Urfan Khaliq, 'Beyond the Veil?: An Analysis of Provisions of Women's Convention in the Law as Stipulated in Shari'ah' (1995–96) 2 Buff J Int'l L 1, 27–8.

[54] In some instances, the procedural framework takes on the nature of a juridical language. Juxtaposing two ways to say 'language' in French, Yves Derains makes this point forcefully in P Guach and others (eds) *Langue et langages de l'arbitrage* (Mélanges en l'Honneur de Pierre Tercier 2008) 789. French might be the tongue (*la langue*) for communication in an arbitration built on a procedural language (*le language*) drawn from American practice, such as party-dominated document production and a trial with testimony presented all at once. Words such as 'witness' and '*témoin*' may prove false friends if evidence is presented by a party's employee, who might lack the capacity to testify under French legal notions of what it means to present testimony.

arbitration practitioners.[55] Much of such intellectual cross-pollination implicates legal practitioners and scholars who serve as worker bees, buzzing from symposium to symposium and from case to case, sharing views on how to resolve disputes, or set standards for testimony, document production and ethics. Notable examples include the work of UNCITRAL on both arbitration rules and a Model Arbitration Law,[56] as well as the International Bar Association instruments on conflicts-of-interest[57] and evidence,[58] and the American College of Commercial Arbitrators compendium of 'Best Practices' for arbitral proceedings.[59] Built on arbitral lore memorialized in treatises and learned papers, the 'soft law' of procedure operates in tandem with the firmer norms imposed by statutes, treaties and institutional rules.

Although nothing prevents litigants from overriding these principles, they usually produce far-reaching effects for the simple reason that post-dispute party agreement proves difficult or impossible. Rightly or wrongly, the guidelines enter the canon of sacred instruments to be cited *faute de mieux*, to fill gaps in institutional rules and national statutes.[60]

Cross-pollination is not always a happy matter, however. In particular, Continental lawyers are often frustrated with wrangling over privilege, pre-hearing oral depositions, and objections to evidence.[61] Not all American

[55] For a divergent perspective that castes cross-fertilization in economic matters as cultural domination by norm-setting experts from developed countries, see Catherine Kessedjian, 'Culture et droit, L'influence de la culture sur le droit international et ses développements' in Paul Meerts (ed.) *Culture and International Law* (2008): 'Qui dit concurrence, dit un vainqueur et un vaincu: donc une domination.' ('So, whoever says competition says victor and vanquished: thus domination.').

[56] The United Nations Commission on International Trade Law promulgated its Arbitration Rules appeared in 1976, while the Model Law on International Commercial Arbitration dates from 1985, and was amended in 2006.

[57] International Bar Association Guidelines on Conflicts of Interest in International Commercial Arbitration, approved by the IBA Council on 22 May 2004, published in 9 (No. 2) Arbitration & ADR (IBA) 7 (October 2004). The IBA Guidelines present concrete enumerations of fact patterns that may give rise to justifiable doubts on arbitrator independence or impartiality, and thus disqualify arbitrators. The non-waivable red list includes a financial interest in the outcome of the case, while other fact patterns (such as a relationship with counsel) may be ignored by mutual consent. The orange list covers past service as counsel for a party, which the parties are deemed to have accepted if no objection is made after timely disclosure. The green list enumerates cases such as membership in the same professional organization that require no disclosure. See also Markham Ball, 'Probity Deconstructed – How Helpful, Really are the New IBA Guidelines on Conflicts of Interest in International Arbitration' (November 2004) 15 World Arb & Med Rev 333; Jan Paulsson, 'Ethics and Codes of Conduct for a Multi-Disciplinary Institute' (2004) 70 Arbitration 193, 198–9.

[58] See IBA Working Party, 'Commentary on the New IBA Rules of Evidence in International Commercial Arbitration' (2000) Bus Law Int'l 14. See also Michael Bühler and Carroll Dorgan, 'Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration' (2000) 17 J Int'l Arb 3.

[59] College of Commercial Arbitrators, Guide to Best Practices in Commercial Arbitration (October 2005).

[60] See William W Park, 'Three Studies in Change', (2006) 45 Arb Int'l Bus Disputes; William W Park, 'Arbitration's Protean Nature' (2003) 19 Arb Int'l 279.

[61] Not all Continental lawyers, however, necessarily disapprove of American practices. In a provocative article exploring why civil law arbitrators sometimes apply common law procedures, an eminent Zürich attorney suggested reasons to appreciate Anglo-American litigation techniques such as cross examination and document production. See Markus Wirth, ‚Ihr Zeuge, Herr Rechtsanwalt! Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden' (January to February 2003) 1 Schieds VZ (Zeitschrift für Schiedsverfahren/German Arbitration Journal). One Continental lawyer offers three explanations for the differences between procedure in common law and civil law: (i) the role of oral evidence in common law; (ii) the

legal traditions have spurned controversy, however. International arbitration now generally admits the practice, long favoured in the United States,[62] of lawyers preparing witnesses by discussing the case in pre-hearing interviews.[63] Indeed, the Swiss Rules of International Arbitration now explicitly bless the practice.[64]

Just as international arbitration has been 'Americanized,' arbitration in the United States has to some extent begun to reflect the European emphasis on written testimony and reasoned awards.[65] Perhaps the most striking examples can be found in the new American standard for arbitrator ethics.[66] Traditionally, party-nominated arbitrators in the United States were considered

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inductive nature of legal reasoning in common law, and (iii) pre-trial discovery in the common law. See Luc Demeyere, 'Different Approaches to Procedures under Common Law and Civil Law' (November/December 2008) 6 Schieds VZ 279 (Zeitschrift für Schiedsverfahren/ German Arbitration Journal).

[62] American lawyers would be considered lacking in diligence if they failed to rehearse their witnesses about the type of questions to be asked, seen as a way to keep the witness from being misled or surprised, arguably making the testimony more accurate. See eg In re Stratosphere Corp. Sec. Litig., 182 FRD 614, 621 (D Nev 1998). See *Wigmore on Evidence* (3rd edn) §788; Thomas A Mauet, *Pretrial* (4th ed., 1999).

[63] See generally George von Segesser, 'Witness Preparation' (2002) 20 ASA Bull 222. The normal Swiss practice would be to the contrary. See eg art 13, Geneva *Us et coutumes de l'ordres des avocats*: 'L'avocat doit s'interdire de discuter avec un témoin de sa déposition future et de l'influencer de quelque manière que ce soit.' (The attorney must abstain from discussing with a witness his future testimony and from influencing him in any way.) German lawyers are likewise prohibited from interviewing witnesses out of court except in special circumstances. See John H Langbein, 'The German Advantage in Civil Procedure' (1985) 52 Chicago L Rev 823 at 834; John H Langbein, 'Trashing the German Advantage' (1988) 82 Nw L Rev 763.

[64] Swiss Rules of International Arbitration, adopted in 2004 by the Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano and Zürich. Article 25(6), provide that it shall 'not be improper for a party, its officers, employees, legal advisors or counsel to interview witnesses, potential witnesses or expert witnesses.' This rule tracks art 4(3) of the 1999 International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules of Evidence). See also Nathalie Voser, 'Best Practices: What Has Been Achieved and What Remains to Be Done' in Markus Wirth (ed.) *Best Practices in International Arbitration 1, ASA Bulletin, Special Series No. 26* (2006). Dr Voser writes, 'It is traditionally a violation of ethical rules for an attorney to contact a witness beyond establishing whether or not a person should be nominated as witness.' Ibid at 2. Nevertheless, she concludes that in the interest of equal treatment, it is generally accepted today that lawyers will have previous contact with their witnesses before arbitration begins, at least 'to a certain extent.'

[65] The American Arbitration Association traditionally discouraged reasoned awards, on the assumption that reasons provided a hook on which an unhappy loser might challenge an award. As late as 1987, the President of the American Arbitration Association suggested to arbitrators that '[w]ritten opinions can be dangerous because they identify targets for the losing party to attack'. Robert Coulson, *Business Arbitration: What You Need to Know* (3rd edn 1987) 29. By contrast, reasoned awards have been the norm for international arbitration. The mandate for reasoned awards can be found not only in the rules of international institutions (eg ICSID Convention art 52(1)(e), ICC Rules art 25(2) and LCIA Rules art 26(1)), but also in the public law tradition elaborated a century ago, reflected in art 52 of the 1899 Convention for the Pacific Settlement of International Disputes and art 79 of the 1907 Convention for the Pacific Settlement of International Disputes. See Dev Krishan, *Reasoning in International Adjudication* (forthcoming 2010). Even in the United States, however, the absence of reasons has not always been an unalloyed good. In one case, a federal court stated that an arbitrator's failure to give reasons might reinforce suspicions of 'manifest disregard of the law'. *Halligan v Piper Jaffray*, 148 F 3d 197 (2nd Cir. 1998), cert. denied 119 S. Ct. 1286 (1999).

[66] See generally Ben Sheppard, 'A New Era of Arbitrator Ethics in the United States' (2005) 21 Arb Int'l 91; Paul D Friedland and John M Townsend, 'Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association' (November 2003 to January 2004) 58 Disp Res J 8. Paul D Friedland and John M Townsend, 'Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association' (November 2003 to January 2004) 58 Disp Res J 8; David Branson, 'American Party-Appointed Partisan Arbitrators – Not The Three Monkeys' (2004) 30 U Dayton Law Rev 1.

partisan and thus permitted *ex parte* communications with their appointers.[67] Ultimately, however, American arbitration came into line with global standards,[68] imposing a presumption of independence for all arbitrators, regardless of how they were selected.[69]

B. *Conflict, Convergence and Proportionality*

Seeking an illustration of how cultural baselines affect truth-seeking, it would be difficult to find one better than the oft-maligned American style of discovery.[70] Likewise, one would be hard-pressed to suggest a more forceful example of procedural cross-pollination than the compromise reached in guidelines that balance risks and benefits of document requests.

In many countries, lawyers simply provide opposing counsel with advance copies of exhibits on which they intend to rely. Such exchange aims to avoid undue surprise. Conversely, practice in the United States[71] and England[72] has evolved to require parties to produce, either spontaneously or upon request, broad categories of dispute-related material that may be adverse to their

[67] In domestic (rather than international) arbitration, it was presumed that arbitrators nominated by one of the parties were partisan unless explicitly agreed otherwise. See Canon VII, 1977 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes.

[68] The general alignment of American and global standards does not mean that all peculiarities in ethical practices cease to exist, either among institutions or among states. See eg *Crédit Suisse First Boston Corp. v Grunwald*, 400 F 3d 1119 (9th Cir. 2005), involving the broad and controversial California Ethical Standards for Neutral Arbitrators. In the case at bar, arising under the rules of the National Association of Securities Dealers, the California standards were found to be preempted by the 1934 Securities Exchange Act.

[69] Under the 2004 Arbitral Code of Ethics, adopted jointly by the American Bar Association and the American Arbitration Association, a party-nominated arbitrator may be non-neutral only if so provided by the parties' agreement, the arbitration rules or applicable law. See Preamble ('Note on Neutrality') and Canon X, 2004 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes. Moreover, the American Arbitration Association domestic commercial arbitration rules, effective July 2003, established a presumption of neutrality for all arbitrators. Rule 18 (applicable unless there has been agreement otherwise) prohibits *ex parte* communication with an arbitrator except (i) to advise a party-nominated candidate of the nature of the controversy or (ii) to discuss selection of a presiding arbitrator. Rule 12(b) requires party-nominated arbitrators to meet general standards of impartiality and independence absent agreement otherwise.

[70] See eg Robert H Smit and Tyler B Robinson, 'E-Disclosure in International Arbitration' (2008) 24 Arb Int'l 105; Klaus Sachs, 'Use of Documents and Document Discovery: 'Fishing Expeditions' versus Transparency and Burden of Proof' (2003) 1 Schieds VZ (Zeitschrift für Schiedsverfahren/German Arbitration J) 193. See also Gabrielle Kaufmann-Kohler and Philippe Bärtsch, 'Discovery in International Arbitration: How Much is Too Much?' (2004) 2 SchiedsVZ (Zeitschrift für Schiedsverfahren/German Arbitration J) 13; Peter Griffin, 'Recent Trends in the Conduct of International Arbitration: Discovery Procedures and Witness Hearings' (2000) 17 J Int'l Arb 19; George A Lehner, 'The Discovery Process in International Arbitration' (January 2001) 16 Mealeys Int'l Arb Rep 1. For comparative studies of the alleged costs and benefits of discovery, see Julius Levine, Discovery (1982) (England and the United States); Arielle Elan Visson, *Droit à la production de pièces et discovery* (1997) (England and Switzerland).

[71] See Federal Rules of Civil Procedure, Rules 26–37 and 45, in particular Rule 26(b)(1). Sanctions for non-compliance (Rule 37) include preclusion of introduction of the evidence, striking pleadings and fines for contempt. For litigation in the United States, as well as some American arbitration, case preparation also implicates oral pre-trail depositions of the other side's witnesses. See generally, Thomas Mauet, Pretrial (4th ed. 1999); John Beckerman, 'Confronting Civil Discovery's Fatal Flaws' (2000) 84 Minn L Rev 505.

[72] See Part 31, Disclosure and Inspection of Documents, 1998 English Civil Procedure Rules, which requires automatic production of certain categories of documents including (in Section 31(6)(1) of the CPR) both documents on which a party relies and 'documents which adversely affect [its] own case or support another party's case'.

own case.[73] Like a vacuum cleaner, document production often sucks up bits of paper that may yield information reasonably calculated to lead to the discovery of admissible evidence.[74]

In this regard, American lawyers often appear to their foreign colleagues as asserting a right to shoot first and aim later, asking how they are to prove a claim without the other side's documents. Continental lawyers reply that evidence should be collected before claims are filed, unless of course they themselves want information to benefit a client, at which point American legal imperialism becomes the 'emerging trend' in arbitration.

A rule that requires the other side to produce documents adverse to its case provides a perspective of the relative strengths and weaknesses of each side's position. This may lead to settlement, sharper definition of issues, and of course enhanced chances that the arbitrator will learn what truly happened.[75]

Document production comes at greater expense, however. Some equilibrium must exist between accuracy furthered by document production and the need for sensitivity to its cost in time and money. On a net basis, more exchange is not necessarily better.

In international arbitration, the different cultural starting points have produced an accommodation in which truth-seeking will be tempered against the objectives of speed and economy. The 1999 International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules of Evidence) adopt a compromise that might be seen as 'rifle shot' rather than 'scatter gun' approach. Requests must identify either a single document or a narrow and specific category of documents, coupled with a description of their relevance and materiality to the outcome of the case.[76] The American Arbitration Association has memorialized an analogous approach with information exchange guidelines that apply in all international cases administered by its affiliate, the International Centre for Dispute Resolution.[77]

[73] While discovery requests usually implicate the opposing party, they may also aim at non-parties with information relevant to the dispute. See Alan Scott Rau, 'Evidence and Discovery in American Arbitration: The Problem of Third Parties', (2008) 19 Am Rev Int'l Arb 1.

[74] The origins of this approach derive from the so-called 'Peruvian Guano Test' which fixed the universe of potentially discoverable documents to include whatever might lead to a 'train of inquiry' to advance the party's own case or damage the case of the adversary. *Compagnie Financière du Pacifique v Peruvian Guano Co.*, 11 QBD 55 (1882). The so-called Woof Reforms that came into effect in 1999 curtail some of the entitlement to documents simply because they lead to a 'train of inquiry' toward evidence.

[75] For arguments in favor of American discovery practices in arbitration, see Pedro J Martinez-Fraga, 'The American Influence on International Commercial Arbitration' (2009); Paul B Klaas, 'Depositions: An Apologia' (forthcoming) 25 Arb Int'l.

[76] IBA Rules of Evidence (1999 Version), s 3(a) and (b).

[77] See American Arbitration Association (International Centre for Dispute Resolution), Guidelines for Information Exchanges in International Arbitration, issued 8 May 2008, making clear that arbitrators have 'the authority, the responsibility and in certain jurisdictions, the mandatory duty' to manage proceedings so as provide simpler and less expensive justice. See generally, John Beechey, 'The ICDR Guidelines for Information Exchange in International Arbitration' (August/October 2008) Disp Res J 85. In January 2009, the CPR (formerly Center for Public Resources) issued its own list of precepts for information exchange, which apply to all commercial arbitration, not just international cases. CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration

Admittedly, assumptions about what discovery is 'normal' will affect the cost/benefit calculation in determining what is relevant or material. Yet the wind has definitely blown away from both the minimalist and the expansionist approaches, with notions of proportionality informing choices on when burdens of production bear a reasonable relationship to the degree of expected enlightenment.

C. *The Role of Complexity*

The more complicated a dispute, the more challenging the task of fixing the right case management tools. If Jill claims that Jack sold her a defective automobile, the calculus of truth-seeking rests on testimony from individuals who helped Jill get the car started. But few international disputes pose a single issue with such pristine purity.

So let us imagine a more realistic scenario. The owner of an American fishing fleet claims for lost profits and injury to crew members due to explosion of ship engines purchased from a European manufacturer. As the arbitrator begins to decorticate the controversy, one obvious issue is whether engine failure resulted from poor European workmanship or sloppy American maintenance. What law should determine whether the tribunal has jurisdiction to hear claims for bodily injury? Should hearings be bifurcated to address the jurisdictional question first? Does contractual limitation of liability cover some claims but not others? What theory determines quantum of damages? How does the arbitrator respond to disagreement on whether briefs should be simultaneous or sequential? How much pretrial document production should be ordered? Should oral depositions be directed for crew members, or subpoenas issued to third parties with information on maintenance? Do claims of attorney-client privilege shield some communications from production? Does privilege depend on whether the document was created in the United States (where communications with in-house counsel may be privileged) or in Switzerland (where such communications are not)? Should experts in areas such as engineering, accounting or damages be heard examined together or separately?[78]

In such arbitrations, proper case management requires closer sensitivity to the counterpoise between finding the truth about liability and damages, and avoiding undue cost and delay. The framework for truth-seeking in arbitration must be flexible enough to adapt to a myriad number of problems. Since things that go without saying often will go better having been said, it may be well at

[78] Almost any job description might become the subject of expert testimony. In one case involving power plant construction in a developing country, each side called military officers and social workers (including a padre who testified for both sides) to opine on how the contractor should have reacted to guerilla activity that was interfering with work site progress.

this point to mark the point by listing a few real world situations that illustrate why arbitral truth-seeking is not always a simple matter.

- An owner accuses a building contractor of deviating from good practice in 48 matters, ranging from silicon in the cement mix to termite protection for cables. What truth lies there in these claims? Do they give rise to the contracter's liability?
- In a corporate acquisition, the seller allegedly misrepresented the transferred entity's income by causing repairs to be capitalized over several years, instead of taken as expenses during the year incurred, thus arguably overstating the entity's Earnings Before Interest Taxes Depreciation and Amortization. Was the accounting irregular, and if so do buyer have a right to rescind?
- Pursuant to a long-term supply contract, one side says that the other must adjust the price to account for changed circumstances. Learned professors differ about what the applicable law requires. Which legal expert's report is more accurate?
- The purchaser of a bank, after taking possession, claims that the loan portfolio is not of the quality promised, and that deposits were less than expected. Is a rebate justified due to impairment of the assets and/or liabilities?
- An insurance company fails to reimburse a manufacturer for third party liabilities incurred in American tort litigation, suggesting that the company 'knew or expected' that the insured product would cause injury. What did the policy-holder know?
- A host state expropriates assets of an American oil company. What is the value of the confiscated property? How should quantum of loss be calculated?
- A buyer of natural gas argues that events of *force majeure* allow an escape from purchase obligations. What legal standard determines duty to perform?

In arbitrations with an international element, controversy also can arise over the procedurally right way to decide these complex matters.[79] Even if parties agree in the abstract on what standards apply (for example, adopting the IBA Rules of Evidence), varying ideas of what is 'reasonable' may divide those of different backgrounds on matters such as the relationship between oral and

[79] For an overview of such questions, see The Civil Litigation Process (Janet Walker ed. 6th ed. 2005); William W Park, 'Three Studies in Change' (2006) Arb Int'l Bus Dis 3. See also *2009 Austrian Arbitration Yearbook* 482 (C Klausegger and others, eds, 2009), including Michael Kramer and others, *Equal Treatment in Multi-Party Arbitrations and Specific Issue of Appointment of Arbitrators*, Ibid 149; Laurence Shore and Delyan Dimitrov, *The Public Interest in Private Dispute Resolution*, Ibid 163; Michael Molitoris and Amelie Abt, *Oral Hearigns and the Taking of Evidence in International Arbitration* Ibid 175; Klaus Oblin, *Hearsay and International Arbitration*, Ibid 201; Stavros Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict has to be Negative*, Ibid 237.

written testimony,[80] document production,[81] electronic discovery[82] or available remedies and damage calculations.[83]

4. *The Truth about Law*

A. *Jura Novit Curia*

Many trees have been felled to make paper for articles on how to find facts, looking at topics from presentation of testimony to the role of depositions and discovery. Less attention has been paid to the arbitrator's truth-seeking function with respect to legal norms.[84]

This gap is surprising on several counts. First, arbitral awards are not usually subject to review for legal error in the same way that lower court judgments are scrutinized in a hierarchical national legal system. The New York Arbitration Convention lists nothing like mistake of law as a ground for non-recognition. And the ICSID Convention contains no right to seek annulment for substantive legal error as such.[85] Thus arbitrators bear a heavy burden to 'get it right' on the law, since their mistakes cannot be corrected in an appellate chain.[86]

Second, the starting point for determining the applicable law may be problematic for arbitrators. National courts seek authority in choice-of-law principles of their own jurisdiction. By contrast, the genesis of adjudicatory power for international arbitration derives not from any single legal system, but from the parties' decision that a dispute *not* be decided by national courts.

[80] *Arbitration and Oral Evidence* (L Lévy and VV Veeder, eds, 2005), Dossiers ICC Institute World Business Law, ICC Pub 689.

[81] Document Production in International Arbitration, 2006 Supplement, ICC Bulletin, ICC Pub. 676E.

[82] Robert H Smit and Tyler B Robinson, 'E-Disclosure in International Arbitration' (2008) 24 Arbitration 105; *Electronic Disclosure in International Arbitration* (David Howell, ed., 2008); David J Howelll, Electronic Disclosure in International Arbitration (2009).

[83] See John Y Gotanda, 'Damages in Private International Law' (2007) 326 Recueil des Cours 73; Mark Kantor, *Valuation for Arbitration* (2008); William W Park, 'Framing the Case on Quantum' Damages Int'l Arb, 2 World Arb & Med Rev 59 (2009); *Interest, Auxiliary and Alternative Remedies in International Arbitration* (Filip De Ly and Laurent Lévy, eds 2008), Dossiers ICC Institute World Business Law, ICC Pub. 684; *Evaluation of Damages in International Arbitration* (Yves Derains and Richard H Kreindler, eds 2006), Dossiers ICC Institute World Business Law2006 ICC Pub. 668.

[84] The International Law Association performed yeoman service on the topic in its *Report on Ascertaining the Content of the Applicable Law in International Commercial Arbitration*, 73rd Conference, Rio de Janeiro (August 2008) 851–82 (Filip De Ly, Chair; Mark Feldman & Luca Radicati di Brozolo, Rapporteurs; Janet Walker, Observer) ('ILA Report on Applicable Law').

[85] New York Convention Article V; ICSID Convention Article 52. Although allegations of 'excess of authority' sometimes mask claims of mistake, most reviewing panels remain sensitive to the distinction. On second-guessing arbitrators, see generally, William W Park, 'Why Courts Review Arbitral Awards', in Briner and others (eds) *Liber Amicorum Karl-Heinz Böckstiegel* (2001) 595; *Jurisdiction to Determine Jurisdiction*, in 13 ICCA Congress Series 55 (PCA, The Hague, 2007). On analogous issues in public law arbitration, see W Michael Reisman, Nullity and Revision (1971). For investor-state arbitration, see Thomas W Walsh, *Substative Review of ICSID Awards*, (2006) 24 Berkeley J Int L 444.

[86] Some statutes provide waivable appeal on points of law (eg 1996 English Arbitration Act, §69), but as the exception rather than the rule. In the United States, parties may not even stipulate to appeal. *Hall Street v Mattel*, 552 US —, 128 S.Ct. 1396 (2008).

Consequently, if the parties have left lacunae, arbitrators may need to examine transnational norms elaborated in other arbitrations or in cases from several jurisdictions.

Finally, arbitrators in international cases are prone to listen to testimony from legal experts offered by the parties themselves. Such a practice imposes itself if tribunals include members not trained in the contractually designed law, as well as non-jurists such as engineers, accountants or underwriters.

Even after an applicable law has been determined, the calculus of duty may differ between judge and arbitrator. Judges bear direct obligations to the appointing citizenry, and thus respond to significant societal values that may trump private choices. Although responsible judges (like good scholars) will master existing authority before taking new directions, many traditions allow appellate judges to overrule precedent.

No similar social engineering normally falls to arbitrators. As creatures of consent, arbitrators are law-appliers rather than law-makers, and must show special fidelity to the litigants' shared *ex ante* expectations as expressed in contract or treaty.[87] Although sensitive to public values,[88] rejecting complicity with illicit schemes[89] and abusive procedures,[90] arbitrators fix their eyes on existing legal norms in determining what the parties had a right to expect.[91]

Although the realms of fact and law intertwine,[92] distinction remains of profound significance. Controverted facts can remain stubbornly particular,

[87] In purely commercial arbitration, the parties' agreement sets expectations. By contrast, for investor-state arbitration expectations derive from treaty commitments to balance investor confidence and host state welfare, with private contracts playing a role through 'umbrella clauses' requiring observance of undertakings. In state-to state arbitration, expectations spring from inter-governmental accords, such as the recent Swiss-Libyan Agreement to resolve tensions from arrest of a Libyan diplomat in Geneva, which instructs arbitrators to apply 'relevant national laws, international conventions, international custom, as well as evidence of general practices accepted as law and the general principles of law and courtesy recognized by civilized nations.' Each side designates a third-country arbitrator, the two of whom chose a chair in default of which the International Court of Justice makes the selection. Agreement between Switzerland and Libyan Arab Jamahiriya, Tripoli, 20 August 2009.

[88] One recollects the dictum in *Mitsubishi Motors v Soler Chrysler-Plymouth*, 473 US 614 (1985), at 638, warning arbitrators to address 'the legitimate interest' in enforcement of public law at the place of enforcement. The contract was governed by Swiss law, but the counterclaim implicated American statutory unfair competition counterclaims.

[89] Money laundering presents special temptations. A corrupt official might contract with a foreign entity controlled by accomplices, allowing contract default to lead to an 'award' against the government followed by transfer of money into a bank account abroad. Careful arbitrators look for warning signs of fake arbitrations, including entities not in existence at contract signature. See *Gulf Petro Trading Co. v Nigerian National Petroleum Corp.*, 512 F 3d 742 (5th Cir. 2008); Thomas Walsh, 'Collateral Attacks and Secondary Jurisdiction in International Arbitration' (2009) 25 Arb Int'l 133.

[90] In one recent California case, a settlement of sexual harassment claims involved payment to the employee who accepted sham arbitration with an 'award' in the company's favor. *Nelson v American Apparel, Inc.* (Cal. App. 2d. Dist. 28 October 2008, No. B205937).

[91] While arbitrators may have less margin to manoeuvre than appellate courts to abandon substantive precedent as outmoded, in procedural matters arbitrators may possess greater options for innovation. With respect to strict rules of evidence or document production, the parties may well want less procedural formality than in court. Such reduced formalism does not mean lack of fundamental fairness, but rather that the arbitrator can provide a measure of bespoke procedural tailoring in response to the litigants' request for a more streamlined process.

[92] In *Vargas v Insurance Co. of North America*, 651 F 2d 838 (2d Cir. 1981), an aviation policy covered accidents 'within the United States of America'. The insured died while travelling between two points of the

requiring recourse to witnesses and exhibits, while the law by its nature possesses a generality that permits instruction by reading statutes and cases.[93]

This difference between law and fact plays itself out in the maxim *jura novit curia*: the judge knows the law.[94] When applied by analogy to arbitrators,[95] the principle facilitates discovery of norms to connect specific events with general theories for relief, at least if arbitrators look beyond their prejudices.[96] Of course, the fact that arbitrators may engage in direct study of legal authorities does not mean their award should contain surprises. [97] Providing an opportunity for the litigants to comment on the law remains vital both to the arbitrator getting it right and to the parties' sense of being treated justly.[98]

United States (New York and Puerto Rico), invoking a canon of construction requiring ambiguities to be resolved against the drafters (*contra proferentem*) that has since been excluded in many liability policies. See also Gerald Leonard, 'Rape, Murder, and Formalism: What Happens When We Define Mistake of Law?' (2001) 72 U Colo L Rev 507, commenting on the English rape case *Regina v Morgan* where a defendant's incorrect belief that a woman consented would be a defence, but not an incorrect understanding of the law.

[93] In a sense, we cannot say what the law is for a given dispute until first knowing what law is in general. One working definition articulates law as an authoritative dispute resolution process that includes principles for substantive conduct as well as procedures for deciding cases. Francophone jurists distinguish between '*loi*' and '*droit*' both of which are 'law' for the Anglophone. A tyrant's statute ('*loi*') might be law in the sense of an enactment, while contrary to authoritative norms ('*droit*') recognized from a more legitimate vantage point. English King George III may have made such a distinction for laws of his rebellious American colonies, as did the colonists for some British taxes before 1776.

[94] Not all systems see scope for things in precisely the same way, of course. In England, foreign law will normally be proved as fact (Rule 18, Dicey and others, *The Conflict of Laws* (Lawrence Collins, Gen. Ed., 14th edn 2006), Chapter 9 pages 255ff) while in the United States Rule 44(1) of the US Federal Rules of Civil Procedure provides that courts in determining foreign law 'may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.' For a case where the principle became relevant, see *Ecuador v ChevronTexaco Corporation*, 296 Fed. Appx. 124 (2d Cir. 2008) where an alleged arbitration commitment with a predecessor entity required consideration of Ecuadorian law. Similar state law principles include New York CPLR §4511 and Massachusetts GL Ch. 233, §70, directing courts to take judicial notice of foreign law.

[95] See Gabrielle Kaufmann-Kohler and Iura Novit Arbiter: 'Est-ce bien raisonnable? Réflexions sur le statut du droit de fond devant l'arbitre international' in A Héritier Lachat and L Hirsch (eds) *De Lege Ferenda: Etudes pour le professeur Alain Hirsch* (2004) 71; Gabrielle Kaufmann-Kohler, 'The Arbitrator and the Law' (2005) 21 Arb Int'l 631; Julian DM Lew, 'Proof of Applicable Law in International Commercial Arbitration' in KP Berger (eds) *Festschrift für Otto sandrock* (2000) 581.

[96] Instances where eminent judges and arbitrators simply presume a conclusion are not hard to find. See Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, (1952) 1 Int'l & Comp LQ 247, where Lord Asquith of Bishopstone admitted that the applicable system of law was *prima facie* that of Abu Dhabi, then added, 'But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.' See generally, Ibrahim Fadlallah, 'Arbitration Facing Conflicts of Culture' (2009) 25 Arb Int 303.

[97] See generally Hege Elizabeth Kjos, 'The Role of Arbitrators and the Parties in Ascertaining the Applicability and Content of National and International Law' in *The Interplay Between National and International Law in Investor-State Arbitration* (forthcoming) ch 5, noting authority for arbitrators' right to apply a rule of law not discerned by the parties, provided the award respects principles of *non infra petita* (no award less than what has been requested by the parties) and the parties' right to be heard.

[98] The rule that parties must have a chance to comment on applicable law was accepted by the Swiss Tribunal fédéral in *Urquijo Goitia v Da Silva Muñiz* (No 4A 400/2008, Ire Cour de droit civil, 9 February 2009). A fee claim by a soccer player's agent was rejected by the Fédération International de Football Association (FIFA) in a decision upheld by the Court of Arbitration for Sport in Lausanne. On the need for exclusive agents to show a causal link between their activity and the player's employment, the tribunal relied on a law that neither side had mentioned. The award was vacated for violation of the right to be heard, art 190(2)(d), Swiss *LDIP.*

B. *Transnational Norms*

1. *Between Substance and Procedure*

On the substantive merits of a dispute, arbitrators in commercial disputes usually apply a legal system chosen by the parties.[99] A privately negotiated commercial loan agreement will recite that it is to be construed according to the law of England, or an insurance policy might state that it shall be interpreted under New York law. By contrast, an expropriation claim will be decided under the terms of a bilateral investment treaty in addition to whatever other principles of international law might be found relevant.[100]

By contrast, for matters of pure procedure such as briefing schedules or time allocation at hearings, arbitrators are generally expected to exercise wide discretion.[101] Aside from treating the parties fairly, arbitrators usually fill procedural interstices by recourse to their experience and guidelines gleaned from general practice.[102]

With respect to a third category, questions that contain elements of both substance and procedure, arbitrators often look to transnational norms of a less flexible sort, synthesized from various cases and awards. Even if no single fixed legal system applies, the parties expect discretion to play a lesser role. Such hybrid matters, where firmer norms apply, include rates of interest, currency for awards, standards for determining arbitrator bias,[103] the propriety of

[99] If the parties fail to select an applicable law, few general rules tell arbitrators how to go about the task. Approaches include (a) conflicts principles they consider 'applicable' (English Arbitration Act §46 and UNCITRAL Model Law Article 28), (b) rules they deem 'appropriate' ('règles que [le tribunal] estime appropriées') (French NCPC Article 1496), or (c) the law 'most closely connected' with the action ('les liens les plus étroits') (Swiss LDIP Article 187).

[100] Article 42 of the ICSID Convention provides for decision pursuant to such rules of law as may be agreed by the parties, in the absence of which the tribunal must apply 'the law of the Contracting State party to the dispute. . .and such rules of international law as may be applicable'. See W Michel Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold' in Essays in Honor of Ibrahim Shihata (Fall 2000) 15 ICSID Rev/Foreign Investment L J 362; Emmanuel Gaillard, *The Extent of the Applicable Law in Investment Treaty Arbitration*, in Annulment of ICSID Awards 223 (E Gaillard and Y Banifatemi, eds, 2004). State-to-state arbitrations will normally implicate principles of public international law, which might also even be relevant to private law subjects such as insurance. See India–US Investment Incentive Agreement (19 November 1997), providing arbitration of international law claims triggered by political risk insurance payments of the US Overseas Private Investment Corporation.

[101] This is not to say that parties never provide specific guidance on procedural matters. Indeed, both French and Swiss statutes explicitly allow choice of procedural law (French NCPC, Article 1494, Swiss LDIP Article 182) as does UNCITRAL Model Article 19. Moreover, it is increasingly common to see contracts make reference to the 1999 IBA Rules of Evidence.

[102] Notions of fairness may differ, of course. In one London arbitration the arbitrator refused a right of reply to the claimant, which then challenged the award for procedural irregularity. The judge upheld the award on the basis that nothing in the arbitration's procedural framework said who got to speak last, and the English rule, giving final word to claimants bearing the burden of proof, did not apply in arbitration. After punting the question to the arbitrator, the judge also noted that international arbitration normally follows a right to make an *equal* number of submissions, which thus created an established practice that accorded with the arbitrator's ruling. *Margulead Ltd. v Exide Technologies*, High Court of Justice (QB, Commercial Court), 16 February [2004] EWHC 1019 (Comm.) (Colman, J.)

[103] See William W Park, 'The Transient and the Permanent in Arbitrator Integrity' (forthcoming) 43 San Diego Law Rev. Particularly in ICSID challenges, subject to no judicial review, the skeleton of broad treaty notions (someone who may be 'relied on to exercise independent judgment') often requires the flesh of detail, usually supplied by parties invoking specific normative standards from other sources.

dissenting opinions,[104] notions of issue preclusion, *res judicata* and *lis pendens*,[105] and even the process for determining applicable law.[106]

2. *The Arbitrator as Synthesizer*

In the juridical twilight between procedure and substance, two problems illustrate why and how arbitrators engage in legal synthesis. One relates to joinder of non-signatories, as when a parent corporation is alleged to have agreed to arbitrate through the agency of a subsidiary. The other implicates claims of lawyer/client privilege in the face of document production requests. In each instance, arbitrators who care about accuracy and fairness may need to synthesize transnational norms from several legal systems that inform their decision.

a. Non-Signatories and Implied Consent

Sometimes a claimant seeks the deeper financial resources of the respondent's parent company, even though the shareholder never signed the arbitration clause. For example, a French company might allege that the shareholder of its American counterparty had implicitly agreement to arbitrate through behaviour evidencing the agency of its subsidiary. Or, a respondent parent might invoke an arbitration clause signed by its subsidiary to avoid an alternate forum perceived as unfavourable.

When arguments for joinder rest on implied consent, the arbitrator's job of determining an applicable law to decide the matter may not be simple.[107] While judges understandably start from the law of whatever forum pays their salary, arbitrators find the genesis of their power in private decisions.

Traditional approaches include the law of the contract and the law of the arbitral situs.[108] Yet both may involve a circular exercise that presumes its conclusion when identification of who agreed to arbitrate constitutes the very

[104] Harm Peter Westermann, 'Das dissenting vote im Schiedsgerichtsverfahren' (März/April 2009) 7 Schieds VZ 102; Laurent Lévy, 'Dissenting Opinions in Switzerland' (1989) 5 Arb Int'l 35.

[105] International Law Association, Final Report on Lis Pendens and Res Judicata, with introduction by Filip De Ly and Audley Sheppard (2009) 25 Arb Int'l 1. Recommendation 2 states that the conclusive and preclusive effects of arbitral awards in further arbitral proceedings 'need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration.'

[106] Although the chosen law relates to the substantive merits of the dispute, the decision to apply a given legal system would normally take the form of a ruling on procedure. See eg §34(2)(g), 1996 English Arbitration Act. Finding applicable law might implicate multiple systems either as a matter of *dépeçage* among various issues, or because several contracts intertwine. See eg *Forsikringsaktieselskapet Vesta v JNE Butcher* [1989] AC 852 (HL).

[107] Apart from implied consent, the gateway to arbitration may also rest on disregard of a corporate veil. While this approach lends itself to easier analysis, with the starting point in the subsidiary's law of incorporation, even that rule may not always provide firm answers. In *First National City Bank v Banco Para el Comercio Exterior de Cuba (Bancec)* 462 US 611, 613 (1983), the US Supreme Court addressed Cuba's attempt to collect money from an American bank whose assets it had just confiscated, and applied equitable principles 'common to international law and federal common law' to permit the value of expropriated assets to be credited against sums due under a letter of credit.

[108] Rule 57, Dicey, Morris and Collins, *The Conflict of Laws* (Lawrence Collins, Gen. Ed., 14th edn, 2006) speaks of the 'material validity, scope and interpretation' of an arbitration agreement as being governed by its applicable law. In the absence of explicit choice, this is said to be the law most closely associated with the arbitration agreement, generally the law of the arbitral seat.

question to be decided. The contract's applicable law, and the law of the arbitral seat, will be foreign to an entity that remained a stranger to the transaction. The arbitrator thus confronts a dilemma not unlike that of the proverbial chicken and egg, and must be wary of starting with a law derived solely from one side's version of the disputed facts.

For these reasons, arbitrators often seek guidance in transnational norms articulated by scholars and in published awards. Such norms address the circumstances under which an arbitration clause might be extended to a non-signatory, for example, by virtue of the parent company's behaviour in negotiations and contract formation, or performance of related contracts which form part of a single contract scheme constituted by multiple agreements.[109] Such transnational norms often serve as the best indicator of the reasonable expectations of litigants from diverse legal cultures. They apply for want of any better way to promote fair dispute resolution in a global community where not all accept one national law.

b. Lawyer-Client Privilege

The confidentiality of lawyer–client communications serves as another illustration of why and how arbitrators synthesize legal norms in transnational cases.[110] Although professional secrecy exists in many legal systems,[111] the lawyer-client relationship takes on a special importance in disputes that implicate 'common law' procedures. If a party may be compelled to produce documents adverse to its case, privilege becomes one escape hatch from the other side's prying eyes.[112]

Problems arise even in disputes between litigants from closely connected legal cultures such as those of England and the United States.[113] English 'legal professional privilege' divides between 'legal advice privilege' and 'litigation privilege' in a way that presents analogues (not always perfect ones) to the

[109] See generally, William W Park, 'Non-signatories and International Contracts: An Arbitrator's Dilemma' in Multiple Party Actions in International Arbitration 3 (PCA 2009). Many commentaries on the subject begin with the 'group of companies' doctrine as expressed in *ICC Award No.* 4131 *of 1982* (*Dow Chemical)*. See I *Receuil des Sentences Arbitrales de la CCI: 1974-1985* (Sigvard Jarvin and Yves Derains, 1990) 146; Paris *Cour d'Appel*, 21 October 1983, 1984 Rev Arb 98.

[110] See eg Richard Mosk and Tom Ginsburg, 'Evidentiary Privileges in International Arbitration' (2001) 50 Int Com L Q 345; Norah Gallagher, 'Legal Privileges in International Arbitration' (2003) 6 Int'l Arb L Rev 45; Klaus Peter Berger, 'Evidentiary Privileges: Best Practice Standards vs. Arbitral Discretion' (2006) 22 Arb Int'l 501; Gary Born, International Commercial Arbitration 1910–14 (2009). One decision in the House of Lords (as it then was) referred to privilege as a 'fundamental human right'. *R (Morgan Grenfell Ltd.) v Special Commissioner* [2002] HL 21, para 7; [2003] 1 AC 563.

[111] In a civil law system such as Switzerland, a secrecy obligation binds the lawyer not as a matter of the law of evidence, but as a matter of professional conduct. The master of the information will normally be the lawyer rather than the client. If the document falls into the wrong hands, it could normally be considered as evidence.

[112] US Federal Rules of Civil Procedure Rule 26(b) provides, 'Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense . . . .'

[113] One finds such conflict regularly in arbitration arising from so-called 'Bermuda Form' insurance, where New York law governs policy interpretation while English principles apply to the many of the arbitration's procedural aspects. See Richard Jacobs and others, 'Liability Insurance in International Arbitration' (2004).

American notions of 'attorney-client' privilege and the 'work product' doctrine.[114] Yet battle lines form around much narrower questions such as whether privilege has been waived by implication, whether the 'common interest privilege' precludes assertion of privilege between joint clients, and whether the sender of a memo did so in her capacity as a lawyer or business manager, which in turn would implicate notions such as 'preponderant purpose' or 'principal purpose' depending on the case law.[115]

In some jurisdictions the arbitration may provide some help. For example, the English Arbitration Act says that the tribunal shall decide 'all procedural and evidential matters'[116] and imposes no preference whatsoever for English rules. This still begs the question, of course, whether privilege should be characterized as substance or procedure, or perhaps a bit of both.

An arbitrator might contemplate applying the rules of the place where a letter or memo was created, to meet expectations held by the drafters of the communication regardless of their legal culture. Such an approach gives short shrift to the understandable anticipation of equal treatment. In countries like the United States, communications with in-house counsel may well benefit from the attorney–client privilege,[117] while in Europe professional secrecy attaches to lawyers who exercise an 'independent' activity.[118] A 'place of drafting' rule would protect documents written by an in-house lawyer in New York, but not advice given by an in-house counsel in Geneva.[119] Instinctively, good arbitrators shrink from giving one side the type of stark procedural handicaps that invite award annulment.[120]

Although it does not solve all problems, the most reasonable approach to privilege lies in synthesis among several systems. The arbitrator's job will be to give fair and open-minded consideration of whatever authorities supply information about the parties' shared expectations on the notions of privilege the parties intended to apply, or would have intended had they thought

[114] *Hickman v Taylor*, 329 US 495 (1946).

[115] On the scope of legal advice privilege in England, see *Three Rivers DC v Bank of England* (No 5) [2003] EWCA Civ. 484, [2003] 3 WLR 667, and *Three Rivers DC v Bank of England* (No 10), [2003] EWCA 2565 (Comm.), appeal dismissed [2004] EWCA Civ. 218. For American analogues, see Federal Rules of Evidence, Rule 501, which leaves attorney-client privilege to the common law. See generally, In Vincent Walkowiak (ed.) *The Attorney-Client Privilege in Civil Litigation: Protecting and Defending Confidentiality* (4th edn 2008).

[116] Sections 34(1) and (2)(d), 1996 Arbitration Act, which includes in procedure a determination of what classes of documents will be disclosed.

[117] *NCK Organization Ltd v Bregman,* 542 F 2d 128, 133 (2nd Cir. 1976).

[118] For example, in Switzerland the notion of lawyer (*avocat/Rechtsanwalt*) depends on activity of an 'independent' character. Employment as an in-house counsel thus disqualifies from lawyer status. See art 231, *Code Pénal* and art 13, *Loi fédérale sur la libre circulation des avocats* (23 June 2000), establishing the obligation of professional secrecy. In general, the right to represent clients is limited to practicing lawyers and university professors.

[119] One authority suggests that in practice both parties will be able to claim privilege in accordance with whatever rules are most restrictive on the duty to disclose. See David St. John Sutton and Judith Gill, Russell on Arbitration, at sections 5–135.

[120] In judicial actions the problem will normally not arise in the same way, since courts (at least in common law traditions) generally treat privilege as within the law of evidence, and thus governed by the *lex fori* rather than the *lex causae*. See Dicey and others, *The Conflict of Laws* (Lawrence Collins, Gen. Ed., 14th edn 2006), Rule 17, §7-015 at 184.

about it. Thus in practice, arbitrators might look to judicial authorities from various common law jurisdictions, including perhaps persuasive authority from Australia, New Zealand or Canada, as well as England and the United States. Such is the essence of synthesis, which like other forms of truth-seeking will inevitably require some investment in time and effort on the part of counsel and arbitrators.

C. *Prior Awards*

The effect of prior awards in other cases also affects the way arbitrators seek legal accuracy. Absent res *judicata* or issue preclusion arising for the same parties and the same claims or issues,[121] arbitrators do not usually deem themselves bound by rulings of other tribunals, at least not in the way judges feel constrained by decisions of superior courts in a unified and hierarchical national system.[122]

This does not mean that prior awards will be ignored. To the contrary, decisions of other arbitral tribunals often get taken into account as constituting a corpus of principles representing the litigants' shared expectations. While not given the status of precedent in a narrow common law sense, awards of respected arbitrators may bolster support for results in other cases,[123] providing information about what the relevant community considers the right approach to similar problems.[124] For litigants, this information can serve as a tool of persuasion. For business managers and government planners, it provides one way to predict how future disputes will be resolved.[125] And for

[121] While *res judicata* prevents the same parties from re-litigating the same cause of action after it has already been adjudicated in an earlier lawsuit, notions of issue preclusion come into play when a second but different lawsuit implicates questions decided in a prior action, the re-litigation of which questions is then barred. French doctrines of *force de chose jugée* and German concepts of *rechtskräftiges Urteil* play roles similar to those of *res judicata* in the common law tradition.

[122] Within a single jurisdiction, a measure of uniformity can be imposed from the top down so that one case furnishes authority for decisions in similar fact patterns with similar questions of law. In theory, Continental and 'common law' traditions take different views of precedent. Article 5, French *Code civil*, forbids judges from purporting to make general rules: *Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*. In practice, however, the difference between traditions may not be so great. See generally, Denis Tallon, 'Précedent' in Dictionnaire de la culture juridique (2003) 1185–7. Still, common law emphasis on the difference between 'holding' and 'dictum' in a case may not be shared in all traditions, with some Continental jurists reading decisions of their highest courts as if they were legislative texts.

[123] One authority has suggested that for international arbitration precedent exists as 'decisional authority that may reasonably serve to justify the arbitrators' decision to the principal audience for that decision'. Barton Legum, 'Definitions of Precedent in International Arbitration' in E Gaillard and Y Banifatemi (eds) *Precedent in International Arbitration* 5, 14.

[124] For an illustration of the delicate ambivalence arbitrators feel about prior awards, see ICSID Case No ARB/02/17 *AES Corporation v the Argentine Republic*, Decision on Jurisdiction of 13 July 2005, at paragraph 30, which asserts that each arbitral tribunal 'remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem....' Following a semicolon, the sentence then adds that decisions 'dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.' Ibid 11.

[125] One ICSID ad hoc committee has suggested that arbitral tribunals bear responsibility for creating 'une jurisprudence constante' (coherent and consistent body of case law) in the field of international investment law.

the arbitrators, prior rulings can justify awards to the rest of the world and enhance the prospect that similar cases will be treated similarly.[126]

D. *Amiable Composition*

In some circumstances litigants authorize arbitrators to disregard the strict rigors of otherwise applicable law, and decide in a way that the arbitrators deem fair and equitable.[127] Drawn from French law, *amiable composition* describes a process whereby arbitrators temper legal rules whose strict application violates what seems right in the circumstances.[128] Common examples include adjustment of payment due to substantial completion of a project, price changes due to alternation in the fundamental economic balance between the parties, and adjustment of terms in the event of unexpected inflation or exchange rate modification.[129]

In stipulating to *amiable composition*, parties tell arbitrators to pursue a different sort of truth. Rather than aiming at legal accuracy, the arbitrators reach toward general notions of 'right' encrusted with emotional overtones and sometimes in tension with court decisions, statutes or strict contract terms.[130]

A long-standing debate surrounds whether *amiable composition* amounts to the same thing as decision-making *ex aequo et bono*, according to the

ICSID ARB 03/06, *MCI Power Group and New Turbine v Republic of Ecuador*, Decision on Annulment of 19 October 2009 (Ad Hoc Committee: Dominique Hascher, Hans Danelius; Peter Tonka), para 24, rejecting annulment of the award of 31 July 2007 for finding non-retroactivity of the US-Ecuador BIT. See also ICSID Case No ARB/02/6, *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, para 97.

[126] For investor–state treaty disputes, jurisdictional questions such as 'most favoured nation' prove fertile sources for *de facto* precedent. See Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 Arb Int'l 357; Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2007) 30 Fordham Int'l L J 1014; Jeffrey P Commission, 'Precedent in Investment Treaty Arbitration' (2007) 24 J Int'l Arb 129. Precedent is also common in 'trade arbitration' (maritime, commodities and reinsurance). See Michael Marks Cohen, Letter (Summer 2009) 10 Int'l Arb Q L Rev 113.

[127] See French NCPC art 1474, applicable in purely domestic arbitrations, and art 1497, applicable in international cases. For international contracts, references to *amiable composition* may assume less precise contours than provided under French law, a bit as 'due process' has come to be used in arbitration without necessarily drawing its significance from US law.

[128] See Eric Loquin, L'amiable composition en droit comparé et international: Contribution à l'étude du non-droit dans l'arbitrage commercial (1980), juxtaposing 'non-droit' (non law) and 'droit comparé' (comparative law). See also, W Laurence Craig, William W. Park & Jan Paulsson, *ICC Arbitration* (3rd edn, 2000) §§3.05 at 110–14. Only in a very limited sense does *amiable composition* overlap notions of public policy as defences to contract claims, which have long been seen as an 'unruly horse' that may carry us to unknown places. See *Richardson v Mellish* (1824) 2 Bing. 229 at 252, where a captain sued for reinstatement as master of a ship whose command the owner had given to a nephew in contravention of policies in that day against selling command of important vessels.

[129] For an empirical study of decisions *ex aequo et bono* (as discussed below, a close cousin or even sister to *amiable composition*), see Martim Della Valle, *Decisões por Equidade na Arbitragem Comercial Internacional* (Doctoral Thesis, University of São Paulo, May 2009; copy on file with author) ch 8, at 372–402; English version, *On Decisions ex Aequo et Bono in International Commercial Arbitration*, Chapter 8 'Field Research' at 188–21.

[130] See Mathieu de Boisséson, Le droit français de l'arbitrage (1990), s 371 at 315, suggesting that *equité* remains the goal (*le but*) not the means (*le moyen*) of *amiable composition*.

'right and good'.[131] While the two notions are often used interchangeably, they may not be coextensive in all minds. Arbitrators who decide *ex aequo et bono* normally begin and end with a private sense of justice, going directly to a personal view of the right result. With *amiable composition* another option would present itself, directing arbitrators to start at rules of law, but depart only if needed to achieve a just result.[132] The difference is significant, given that there is nothing inherently unjust bout most norms of commercial law.

With respect to the substance of economic transactions, such as a seller's right to be paid or the insured's right to be reimbursed, the slim objective content of notions such as fairness (if divorced from legal norms) makes the concept problematic.[133] Inherently chameleon-like, changing colour depending on background and perspective, *ad hoc* fairness that ignores legal rules risks reducing the information with which companies and governments evaluate risks and make choices. Nor will concepts of substantive fairness long satisfy the public interest in the stable economic environment that obtains when claims and defences in one case are treated like those advanced in similar disputes subject to similar norms.[134] Only an explicit mandate normally justifies an arbitrator's shift from a search for legal truth to the pursuit of subjective fairness.

5. *From Oracle to Evidence*

The Yale University seal bears an open book with two Hebrew words transliterated *Urim* and *Thummim*. Sometimes rendered 'light and truth',[135] this Biblical expression designates a truth-seeking oracle, perhaps precious

[131] The Arbitration Rules of the International Chamber of Commerce, which in art 17(3) permit *amiable composition* only if agreed by the parties, mentions both an *amiable compositieur* and *ex aequo et bono*, saying that a tribunal may (if authorized) 'assume the powers of an amiable compositeur' or 'decide ex aequo et bono.' The French version follows a similar structure. The disjunctive 'or' leaves two distinct notions, as in 'law or equity'. In some instances, however, words so joined might simply be different ways of expressing similar concepts, as when each citizen may worship according to dictates of his faith or belief system.

[132] See Philippe Fouchard and others, Traité de l'arbitrage Commercial International (1996), s 1502 at 836–7. The authors seem to admit the option either to proceed directly to justice or first to consider the applicable law. Nevertheless, they suggest that such a nuance lacks significance ('une telle distinction . . . paraît artificielle') because the arbitrators can always do what they think justice requires.

[133] By contrast, in the realm of procedure the term 'fairness' serves as short-hand for generally accepted principles, such as right to be heard and equal treatment.

[134] Imagine an arbitrator hearing claims against a banker who wrongfully refused to return the entirety of a customer's funds. 'Last month I deposited $1,500', says the customer. 'Ah, yes', replies the banker. 'But today such dreary historical facts must yield to aesthetic and moral concerns for balance, symmetry and charity. Thus we have rounded your account down to $1000 and transferred the balance to a more deserving person.'

[135] Early English translations fixed *Urim* as 'lights' and *Thummim* as 'perfections' following the original plural form. Ultimately Yale augmented its seal with the Latin, *Lux et Veritas*. The Hebrew motto seems to have been in place well before 1778, when Yale's new President, Ezra Stiles, made Hebrew a required course on the assumption that educated gentlemen should be familiar with the language of Scripture. Stiles himself had learned Hebrew while a pastor in Rhode Island, studying with Isaac Touro (namesake of the Sephardic synagogue designed by New England architect Peter Harrison) and an itinerant rabbi from Hebron named Chaim Karigal, who somehow stopped in Newport amid visits to Paris, London, Prague, Vienna, Aleppo and Curacao. For a historical tour of the Yale seal, see Dan Oren, *Joining The Club: A History of Jews and Yale* (1985; 2nd edn, 2001), Appendix I.

stones, held in the breastplate of the High Priest in ancient Israel.[136] In response to questions put in binary fashion, the oracle would give one answer or the other. For example, the Priest might ask if sin during battle lay with the troops or the king, letting the oracle show *Urim* for the king and *Thummim* for the soldiers.[137]

Shifting forward several millennia, most legal cultures have replaced oracles with testimony from individuals with knowledge of specific events or subjects,[138] usually supported by documentary exhibits. While such truth-seeking tools may not yield the perfection of oracles (and in any event still require decisions about what testimony should be deemed reliable[139]), they do help arbitrators determine which side's narrative bears a closer connection to reality. Without such tools, whose application can take time, vindication of rights would be even more unpredictable than it now is, with little reason to expect that success would fall to the legitimate claimant rather than the dishonest fraudster.

A notion of proportionality lies at the heart of intelligent truth-seeking in arbitration, accommodating the interconnected pillars of due process and efficiency. Hearing both sides enhances the prospect of award outcomes that comport with reality. Yet more testimony does not always bring enough enlightenment to justify the time and expense. And some arguments prove as helpful as water to a drowning man. In international disputes, finding the right balance implicates an accommodation among different legal cultures with

[136] The nouns together take a meaning greater than the sum of their parts, and convey a broader and more complex message than simple addition of the two components. They constitute a hendiadys (from Greek *hèn dià duoîn*, or 'one through two'), as in 'law and order', 'sound and fury', 'Sturm und Drang', 'Nacht und Nebel', 'croix et bannière' or 'chagrin et pitié'.

[137] In I Samuel 14:41–42 someone disobeyed a ban on eating during battle. King Saul asked, 'If the fault lies with me or my son, respond with *Urim*; but if with the troops, show *Thummin*'. After exonerating the troops, the oracle was consulted again and guilt fell on Jonathan who confessed to tasting honey during combat. The oracle first appears in Exodus 28:30, and again in Numbers 27:21, Deuteronomy 33:8 and I Samuel 28:6. The precise manner for its consultation has been lost. Perhaps letters would light up or protrude when the priest prayed. Some scholars suggest a process not a device. Of course, recourse to oracles did not mean absence of testimonial proof in Biblical times. See Deuteronomy 19:15 and II Corinthians 13:1.

[138] The day of the oracle has not completely disappeared. See Oscar G Chase, *Law, Culture & Ritual* (2005), providing a comparative tour of litigation that begins with the Azande people of Central Africa. During the time a small chicken swallows fluid containing a ritual poison, the chief asks about the guilt of a couple accused of adultery. 'Oracle, if they slept with each other, let the chicken die.' When the animal expires, the man and woman confess. Discussing American justice later in this work, Professor Chase suggests that the oracle may be no less idiosyncratic than the American civil jury. Ibid at 15–16, and 40–41.

[139] Most American litigators will be familiar with 'Daubert motions' to promote reliability of expert testimony, so named from *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1993). Fundamental questions about testimonial reliability are not new, however. During the Salem Witch Trials of 1692, New England farmers challenged the value of 'spectral evidence' based on testimony about a person's spirit. John Alden, son of the famous Plymouth settler of the same name, had been charged with sorcery on return from Québec, where he had gone to ransom Englishmen imprisoned by the French. After girls collapsed in torment from his specter, Alden asked rhetorically why his spirit did not so affect the judges. Doubts later caused Increase Mather, President of Harvard, to suggest that ten suspected witches should escape rather than one innocent person be condemned on spectral evidence. See Richard Francis, *Judge Sewall's Apology* (2005) at 181–2; Eve LaPlante, *Salem Witch Judge* (2007) at 136–42, 192; *Salem Witch Trials Reader* (F Hill, ed. 2000) xxii, 74, with excerpt from Robert Calef, *More Wonders of the Invisible World* (1706).

disparate base lines. Even if universally accepted standards remain elusive, however, some prove more workable than others.

In the search for creative case management tools, award accuracy remains the lodestar. Efficiency without accuracy will prove an empty prize. Until the world evolves to the point where people abandon attempts to vindicate rights, some market will exist for a mechanism that emphasizes deciding legal claims correctly by determining what happened, what was agreed and what the law provides. If simple peace-making were to become the norm, arbitration as a truth-seeking process would need to be reinvented.

Proskauer