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THE CURRENT INVESTMENT ARBITRATION REGIME: A SYSTEM OF THE PAST OR FUTURE?

by Karandeep Khanna

I. INTRODUCTION

The UNCITRAL Working Group III was set up as a forum to discuss possible reform to the investor-state dispute settlement system that exists today. The forum brings together state representatives, practitioners and leading academics in the field of international arbitration, with a view towards implementing reforms and recommending fundamental changes to the current system. This article makes the case for the current system of investment arbitration and argues that there is no need for structural change. It also offers a critique of two proposals that are being advocated. First, dismantling the system as a whole. Second, replacing the current system with a Multilateral Investment Court.

II. THE ORGANIC EVOLUTION OF THE CURRENT SYSTEM AND A COMPARISON WITH THE FRONTRUNNERS

The fundamental structure of investment arbitration (IA) as it exists today should endure as the primary mechanism for resolving disputes between foreign investors and states. The likelihood of its endurance rests fundamentally on preserving its current form and structure. It does not require a new global consensus over its replacement, despite the existence of stakeholders that are committed to this cause. The system has demonstrated a capacity for self-correction, and it is responsive to criticism—indicating that it does not have a mind of its own. At its core, it has proved itself supple and adaptable in a broad range of circumstances.

The organic evolution of a system aimed at addressing changing needs while retaining core principles is a preferable process that does not warrant structural overhaul. Evidence of this is seen in common law systems where evolution through jurisprudence spanning decades shows versatility and a tendency towards self-reflection. Certain reforms to the current IA system, for example, to improve transparency, equitable cost allocations and consolidation of multiple proceedings, show that the IA system is able to adapt. These reforms are evolutionary—and not



revolutionary in their aim to dismantle the underpinnings of the current system.

This post opposes the position of systemic reform which supports the establishment of a multilateral investment court (MIC) to replace the current system of ad hoc and institutional arbitration set up by the treaty system. It also opposes a paradigm shift that would prevent investors from bringing investment claims against states. This post, on the contrary, advocates for an incremental approach aimed at making modest reforms.

Much of the impetus behind the MIC and wholesale reform of IA is backlash from globalization and perceived encroachment on state sovereignty. Globalization is not a new phenomenon—IA was indeed born to facilitate foreign investment in a globalizing world as it continues to do so today.

Criticism arising from the negative impact of globalization should not be misinterpreted as criticism aimed at IA. While the negative impact of globalization is not debated, politicians have made the system of IA a focal point of criticism in their call to resist a foreign economic takeover. This targeting is misplaced and perhaps diverts attention from real issues. The decision of a state to permit foreign investment and the substantive obligations assumed by states under their investment treaties should be the focal point instead. IA is simply the mechanism for resolving disputes between foreign investors and states.

States determine the nature and text of treaty obligations. IA only kicks in when investors claim a potential breach of obligation. The rise of IA disputes, and states being exposed to large sums covered by taxpayer money, is not a reflection of the current system's performance. Instead, it indicates that treaty obligations were not articulated to correspond with the expectations of a state. Notwithstanding this experience and the accompanying risk, states continue to view the benefits of globalization as considerably outweighing its perceived harms and continue to facilitate foreign investment through policy and global co-operation.

Turning briefly to the system, a tribunal's jurisdiction is limited to issues arising under the treaty. A foreign investor does not become immune from independent obligations that arise from operating under the laws of the host state. For example,



a foreign investor cannot flout labor and environment laws, or commit criminal offences. It does not escape liability and remains accountable for the harm it causes within the territory it operates in.

A related concern is that IA undermines state sovereignty—a statement best described as simplistic. State sovereignty is what breathes binding force into the treaty system, and the decision to submit to the jurisdiction of an investor-state tribunal is itself an expression of that state sovereignty.

The driving force for such a decision remains unfettered. States acknowledge the need for co-operation at the international level for their own economic growth. This co-operation is facilitated through a voluntary compromise of absolute sovereign power to a degree. Consistent with this compromise is the premise of reciprocity, which could not be more evident under the current system, where nationals of both states benefit from the guarantees of an investment treaty. It is essential that any meaningful discourse on reforms to the current system takes place within this context.

To juxtapose the merits of the current system, the proposals for reform are broken down into three themes: *Optionality v. Rigidity*, *Flexibility v. Uniformity*, *Neutrality and Efficacy*.

A. *Optionality v. Rigidity*

The current system is an optional mechanism for states and foreign investors to access. States are not compelled to opt for IA. Proposals and experimentation with either systemic reform or a paradigm shift can take place without having to disturb the current system. However, states that advocate for either of the above simultaneously advocate for the replacement or abolishment of the current system.

The MIC looks for a middle ground between the current system and going before national court to resolve disputes. While the proposal does create a middle ground, it is canvassed as a “my way or the highway” solution, which compels other states to give up their existing system. But prudence would have states test the waters, making the adoption of the MIC an optional decision, before abolishing a pre-existing and robust system.



Like any contract, the terms of a treaty are based on the degree to which a state wishes to co-operate with another. The current system does not prevent systemic reformers from establishing a MIC or persuading other states to conform. If the MIC succeeds, states ought to gravitate towards it voluntarily.

Foreign investors are also not required to pursue IA. They have the option of bringing claims to the courts of the host state or any other prescribed forum. If investors were satisfied that they would be treated fairly and their perceptions were positive of the treatment before host state courts, or if they found domestic justice as convenient as IA, there would be no need for the current system. At the same time, states remain free to improve their own domestic dispute resolution mechanisms, thereby incentivizing foreign investors to engage with it.

B. *Flexibility v. Uniformity*

Consent is the cornerstone of IA. States have the greatest degree of flexibility within the current system. They precise the terms and conditions of their consent together with the treaty counterparty and delineate the standards against which their actions will be measured by a tribunal. The tribunal is generally bound by the ordinary meaning of the treaty text as stated in Article 31 of the Vienna Convention on the Law of Treaties.

States can also provide joint interpretations for any provision of a treaty, including interpretations for broad standards like fair and equitable treatment (FET) and expropriation. These joint interpretations then become binding. This dynamism permits states to re-shape a treaty, based on the development of IA law.

The MIC on the contrary, aims to unify the investment arbitration system with a view to enhance consistency, coherence, and predictability, and provide a review procedure. These are benefits that some critics would say are missing from the current system.

The systemic reformists presume that states want a uniform interpretation of treaty standards, across all treaties. Though if this were true, all states would adopt identical language in their treaties, which is simply not the case. Treaties might generally follow the same structure, but there are subtle differences between them



which critically delimitate state intent, and this intent can be decisive in disputes.

Treaty standards like FET and expropriation are generally left amorphous on purpose. The malleability of these standards and their inherent vagueness attracts foreign investment. These broadly phrased umbrellas of protection exist in their current form to protect investors, and a failure to provide protection would hamper the state's ability to attract foreign investment in the future. This has so far played out favorably in disputes, where tribunals have adopted the approach of carefully considering the facts of each case and applying the appropriate standard on that basis. The MIC on the other hand leads to a Catch-22 situation. If the uniform standard is too broad, there is a problem-solution mismatch. If it is too narrow, it defeats the purpose of incentivizing foreign investment.

A pertinent example of the current system's capacity for self-correction comes from a cluster of diverging views which arose from tribunals interpreting Article XI of the 1996 U.S.-Argentina bilateral investment treaty. Two observations are important. First, there was consensus on the fundamental issue that Article XI was not a self-judging clause because it did not contain self-judging language. Second, some of the awards under that instrument were annulled because tribunals equated Article XI with Article 25 of the International Law Commission Draft Articles on State Responsibility. The annulment committees expressly stated that this approach was contrary to the rules of interpretation, as it failed to give primacy to the treaty text—an indication of the current system striving to give effect to the intention of the states.

The MIC also seeks to adopt the doctrine of *stare decisis*, meaning that the decisions of the MIC would be binding for later cases to ensure uniformity of decisions. But the need for this is overstated. Tribunals often refer to and rely on previous decisions on the issue. If the decisions are well articulated, persuasive and not distinguishable on the facts, tribunals give them appropriate weight. To argue that tribunals might act illogically (or sporadically) simply because there is no system of precedent is misguided and lacks empirical evidence.

Furthermore, mandating such rigidity will make it difficult for tribunals to weigh



different factual scenarios. This is re-enforced by the benefit of having malleable and amorphous treaty standards, which enables tribunals to ensure that investors are protected when they ought to be.

C. *Neutrality and Efficacy*

The current system creates the option for foreign investors to access the neutral venue of ad hoc or institutional arbitration, as opposed to a court or domestic venue, which might have natural biases. The current system enables parties to choose their own decision makers, who by mandate must conduct proceedings in the interest of efficiency and effectiveness. Parties can choose these adjudicators based on their background, familiarity with the transaction or industry, or experience with the legal questions at issue, to name a few.

Under the MIC, however, parties are stripped of the ability to appoint their own arbitrators. The appointment of judges to this court is bound to involve political decision making, which in itself runs the risk of compromising neutrality, or at the very least—the perception of its neutrality.

Tribunals under the current system have the limited mandate of resolving the dispute at hand. It has no duty to resolve any other dispute. While the MIC may have multiple seats and rotating judges, it cannot match the efficiency of a decision making body with a single mandate. The MIC would still have the duty of serving others.

In conclusion, every system has its flaws and the current system is no different. A system accessed by a majority of states with different objectives is bound to lead to disagreement. Certain undesirable outcomes are likely to occur, but the past suggests that these instances are exceptions.

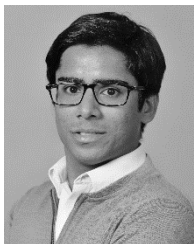
More importantly, an outcome might be viewed as undesirable by some states and acceptable by others. The specific outcome though does not bind anyone but the parties to the dispute. The system permits a state to take corrective measures by making changes to their treaty practice—each step further enhancing the predictability of the system from the standpoint of the state experiencing the negative impact. The current system is therefore not averse to change. Due to the



subjective nature of assessing these outcomes, the flexibility of the current system allows each state to act or react in a different manner, or not do either—a benefit that does not exist with the MIC.

III. CONCLUSION

The proposed reforms do not justify a systemic overhaul. As seen earlier, criticism arising out of the lack of consistency in decision-making is overstated. There is enough room in the current system for states to improve their IA experience. Their efforts should however be directed at co-operating with those who advocate incremental and organic reform, instead of building resistance and refusing to engage in meaningful discourse.



KARANDEEP KHANNA is a lawyer qualified in India who specializes in International Arbitration. He completed his LL.M in 2019 from the Georgetown University Law Center in Washington D.C. on a Georgetown Merit Scholarship. During his LL.M, he spent a semester working with the international arbitration group at Three Crowns. He is currently a legal trainee with Clifford Chance's international arbitration and litigation team in Frankfurt, where he works on both investment treaty and commercial arbitration matters.

THE ARBITRATION EXCEPTION, CHOICE OF COURT CONTRACTS, AND PROVISIONAL MEASURES UNDER REGULATION (EU) 1215/2012

by Patrick Ike Ibekwe, Ph.D.

I. INTRODUCTION

Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter “Brussels I bis” or “Recast”) was passed by the European Union (EU) Parliament and the Council of the EU on December 12, 2012, and entered into effect on January 10, 2015.¹ The Recast replaced Regulation (EC) 44/2001 (hereinafter “Brussels I”)²—although Brussels I was hailed as a success, there had remained persistent criticism of unintended consequences arising from the application of certain of its provisions, mostly in regards to provisions that exclude arbitration from the Brussels I; provisions regulating exclusive jurisdiction for national courts over certain matters; and provisions dealing with provisional or interim measures. This paper examines the Brussels I bis considering its amendments in these areas. This paper assesses how the amendments have impacted the jurisdiction of EU national courts to grant provisional measures in support of arbitration, especially a court at the arbitral seat of arbitration. This article also examines the reception to Brussels I bis since its enactment against the backdrop of the debates preceding the new law over the status of arbitration agreements under Brussels I.

Section I introduces the background issues that led to the formation of a Study Group by the European Commission (“the Commission”), which undertook the review and evaluation of Brussels I.³ Section II briefly discusses the Report of the Study

¹ The new law is officially known as Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Judgment and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Dec. 20, 2012). Regulation 1215/2012, 2012 O.J. (L 351) (EU) [hereinafter “Brussels I bis”].

² See Council Regulation 44/2001 of Dec. 22, 2000, art. 73, 2001 O.J. (L 12) (EC) [hereinafter “Brussels I”].

³ The study was undertaken at the Institute for Private International Law, University of Heidelberg, under the supervision of three experienced academics—Professors Burkhard Hess, Thomas Pfeiffer and Peter Schlosser. See BURKHARD HESS ET AL., STUDY JLS/C4/2005/03: REPORT ON THE APPLICATION OF REGULATION BRUSSELS I IN THE MEMBER STATES (Institute for Private International Law, University of Heidelberg 2007).



Group and the Commission's Green Paper and Proposal. Section III appraises the provisions of the Recast regarding the arbitration exclusion and the availability of provisional measures in support of arbitration, contrasting the positive achievement in regard to choice of court contracts against lackluster amendments concerning provisional measures. Section IV concludes with a survey of the various responses to the Recast, concluding that the area of provisional measures in aid of arbitration did not receive satisfactory attention.

II. BACKGROUND

The Brussels I regulation, which was acclaimed as one of the most important pieces of EU legislation, was unable to provide answers to several complex procedural and substantive law problems arising from its provisions on arbitration, provisional measures, and forum selection clauses.⁴ However, the international of Brussels I with arbitration, as interpreted by the Court of Justice of the European Union (CJEU), gave rise to heated debate. In fact, the Court's decisions in this regard have been viewed as generally unfriendly to international arbitration.

For context, the ongoing integration within the EU brings with it jurisdictional clashes between independent national courts, which are exacerbated by proceedings that involve arbitration. While relevant community laws, like Brussels I, sought to address these conflicts by excluding arbitration agreements from their purview, these same laws and decisions permitted national courts to grant provisional measures in support of arbitration proceedings, thereby bringing some aspects of the arbitration proceeding within their scope.

Article 1(2)(d) of Brussels I excludes arbitration from its scope of application. However, Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "NY Convention") mandates a court to refer parties before it to arbitration when the parties have agreed to

[hereinafter, "Hess Report"], http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. It should be noted that Brussels I provided for an assessment of its operation by the Commission after an initial five-year period.

⁴ See Hess Report, *supra* note 3, at 2; see also, Christa Roodt, *Conflicts of Procedure Between Courts and Arbitral Tribunals with Particular Reference to the Right of Access to Court*, 19 AFR. J. INT'L & COMP. L. 236, 238-39 (2011). Roodt highlighted its failure regarding arbitration.



arbitration, unless the court finds that the alleged arbitration agreement is null and void, inoperative, or incapable of being performed.⁵ Therefore, these two international norms presume a simple solution to a procedural question they did not provide guidance in answering. Thus, the underlying question involves a determination of issues within the arbitral tribunal's exclusive authority to decide, as well as some that are not, i.e., issues that may directly impact the substance of the agreement to arbitrate, as distinguished from those that are merely incidental to it. This issue is generally known as the "arbitrability question" among arbitration practitioners.

Further, the intention of the EU Parliament and Council to exclude arbitration from the operation of the Recast is clear. However, it is unclear whether matters incidental to arbitration are also excluded from the Recast. For instance, it is not clear which courts have the jurisdiction to decide the question of "arbitrability," or under what circumstances. Here, a distinction was required between what constituted ancillary arbitral issues, on the one hand, and what constituted preliminary matters on the other. The former was integral to arbitration proceedings and the latter was not. The former was outside the scope of Brussels I, while the latter was within it.

The implication is that while only the court of the seat of arbitration, or the designated court in respect of forum selection clauses, could entertain ancillary matters, preliminary matters could be entertained by every EU national court. The further implication is that in situations where multiple national courts are simultaneously involved regarding the above matters, a jurisdictional problem arises. Thus, arbitration is disadvantaged in the face of such jurisdictional complications. By virtue of its role and position as the highest Court of the EU, only the CJEU could bring clarity to these issues through a series of seminal cases summarized directly below.

A. CJEU Case Law on Arbitration, Jurisdiction, and Provisional Measures

⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, art. II (3), 330 U.N.T.S. 38 (1959), 21 U.S.T 2517, 7 I.L.M. 1046 [hereinafter "NY Convention"].



In *Marc Rich v. Italiana Impianti PA*, the CJEU decided that the appointment of an arbitrator was an ancillary matter that fell outside the operation of the Brussels Convention.⁶ In that case, the petitioner had earlier taken steps to initiate arbitration in London by asking an English court to appoint an arbitrator in the face of the respondent's refusal to do so. The respondent sought to pre-empt arbitration by requesting an Italian court to declare that it had no liability towards the petitioner for breach of contract. The effect of the English Court's decision was to deprive the Italian Court of the jurisdiction it would have had under the Brussels Convention, which applied to similar situations arising in regard to Article 28 of Brussels I.⁷

In *Van Uden Maritime v. Deco Line*, Van Uden brought arbitration proceedings against Deco-Line in the Netherlands.⁸ Van Uden subsequently sought provisional measures from the Dutch courts because it suspected that Deco-Line was stalling progress in the arbitration. Deco-Line argued that prior to the Dutch court action it had commenced a suit in Germany, and that the German Court thus had overriding jurisdiction. The CJEU held that notwithstanding the exclusion of arbitration from the Brussels Convention, the grant of interim relief in a dispute wherein arbitration is also implicated must be regarded as parallel and supportive of the arbitration, rather than ancillary to it.⁹ Thus, the CJEU distinguished acts that interfere with the arbitral procedure from those that support it.

The CJEU appeared to rule differently in two other cases, however. Specifically, in *Turner v. Grovit*, the Court decided that a defendant who had acted in the exact

⁶ Case C-190/89, *Marc Rich & Co AG v. Società Italiana Impianti, PA*, 1991 E.C.R., I-03855, ¶¶19–21, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989CJ0190>. Brussels I was largely based on the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, dated 27 September 1968 (“Brussels Convention”), and this precedent therefore applied.

⁷ *Id.* ¶¶ 19, 29. The English court noted that the fact that the Italian court would have to examine a preliminary issue affecting the existence or validity of the arbitration agreement, did not bring under Brussels I what was otherwise expressly excluded—that is, the appointment of an arbitrator. *Marc Rich*, ¶¶ 26–28.

⁸ Case C-391/95, *Van Uden Maritime BV (t/a Van Uden Africa Line) v. Kommanditgesellschaft in Firma Deco-Line and Another*, 1998 E.C.R. I-07091; [1999] 2 WLR 1181.

⁹ *Id.* ¶¶ 31–33 & 48.



same way as the defendant in the *Marc Rich* case could not be restrained from proceeding with an action he had instituted in Spain in defiance of a previously instituted civil action in England.¹⁰ The CJEU held that one EU national court could not order an injunction that would restrain proceedings in another EU national court; and that it was immaterial that the second proceeding was motivated by bad faith.¹¹

The *Turner v. Grovit* decision set the scene for the far more controversial and hotly debated decision in *West Tankers*.¹² *West Tankers* was before an Italian court due to an action brought by a non-party to the original contract, which contained an arbitration clause, and an arbitration proceeding was also pending against *West Tankers* in London by virtue of the same contract. In this context, *West Tankers* won an order for an anti-suit injunction from the English courts restraining the Italian proceedings in view of the existence of the arbitration agreement. On a preliminary reference to the CJEU, the CJEU held that such an injunction was incompatible with Brussels I and was contrary to the principle of mutual trust as was envisaged amongst sister (EU) national courts. The Court held that the Italian court had assumed jurisdiction under Brussels I and must be allowed to determine its own jurisdiction and not stripped of its powers to do so via an anti-suit injunction, even if the anti-suit injunction was founded on the existence of an arbitration agreement.¹³

In sum, as set out in these CJEU decisions, the Court reaffirmed the exclusion of arbitration agreements as provided for under article 1(2)(d) of Brussels I, and distinguished between matters that are ancillary to arbitration and those that are preliminary to it, and clarified the criteria for such determination—a national court dealing with ancillary issues is interfering and encroaching upon the jurisdiction of the arbitral tribunal.

1. Commentary on the CJEU Case Law

¹⁰ Case C-159/02, *Gregory Paul Turner v. Felix Fareed Ismail Grovit and Others*, 2004 E.C.R. I-3565.

¹¹ *Id.* ¶¶ 27–28, 31. See also, Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, 2003 E.C.R. I-14693, in which the CJEU held that a second national court, though exercising exclusive jurisdiction, could also not restrain a party from continuing proceedings in the court first seized.

¹² Case C-185/07, *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) & Generali Assicurazioni Generali SpA v. West Tankers Inc.* 2009 E.C.R. I-00663.

¹³ *Id.* ¶¶ 28–30.



In the *Marc Rich* case, the CJEU seemed to strongly side in favor of arbitration by stressing that all evidence pointed to an intention to keep arbitration out of the scope of the Brussels Convention by operation of the NY Convention.¹⁴ That decision was viewed as a fillip to “the increasingly important role played by arbitration in international transactions.”¹⁵ It was easy for the CJEU to avoid the tricky task of balancing the interests of arbitration and litigation in relation to national courts’ jurisdiction. The CJEU steered clear of ruling on an objection to the jurisdiction of the Italian Court based on the existence of the arbitration agreement, but that issue was unavoidable as later decisions showed.¹⁶

Following the *Van Uden* decision, concerns arose as to the lack of clarity surrounding the arbitration exception and its impact on the jurisdiction of national courts to, amongst others, grant interim relief.¹⁷ Rogerson argued that the effect of

¹⁴ See Case C-190/89, *Marc Rich & Co AG v. Società Italiana Impianti, PA*, 1991 E.C.R., I-03855, ¶¶17, 21; [1992] 1 Lloyd’s Rep 342, ¶¶ 17, 21 (ECJ); this referred to the opinion of experts involved in the drafting of the Convention, relating to the fact that the deliberate exclusion of arbitration was due mainly to the fact that other international conventions notably, the 1958 New York Convention (NY Convention) had already covered this area. See, e.g., PAUL JENARD, REPORT ON THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (SIGNED AT BRUSSELS, 27 SEPTEMBER 1968), 1979 O.J. (C59/1) 13 (1979) [hereinafter “The Jenard Report”], aei.pitt.edu/1465/1/commercial_report_jenard_C59_79.pdf. The subsequent report by Professor Peter Schlosser on the accession of Denmark, Ireland and the United Kingdom, was more detailed. See, Peter Schlosser, REPORT ON THE CONVENTION ON THE ASSOCIATION OF THE KINGDOM OF DENMARK, IRELAND AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS AND TO THE PROTOCOL ON ITS INTERPRETATION BY THE COURT OF JUSTICE (SIGNED AT LUXEMBOURG, 9 OCTOBER 1978), [YEAR]O.J. (C59/71) ¶ 61-65 (1979) [hereinafter “The Schlosser Report”], aei.pitt.edu/1467/1/commercial_reports_schlosser_C_59_79.pdf. According to Schlosser, an initial dispute between the original six EEC states and the UK regarding what was to constitute arbitration matters as far as the then article 1(4) was concerned, was unwisely left un-amended or harmonized because a compromise could not be reached.

¹⁵ Wolfram Krohn, *Decisions of Regional and Foreign Courts, Marc Rich & Co., A.G. v. Società Italiana Impianti P.A.* Case No. C-190/89, 86 AM. J. INT’L L. 134, 136 (1992). Krohn also welcomed the “strong position” adopted by A-G Darmon in support of “unimpeded arbitration.” 137-38; see Opinion of Advocate General Marco Darmon in Case C-190/89 (*Marc Rich & Co. A.G. v. Società Italiana Impianti P.A.*), ¶ 22, <http://curia.europa.eu/juris/showPdf.jsf?docid=96695&doclang=en>. However, Krohn appeared to disagree with A-G Darmon, who assumed that the interface problems between arbitration and the Regulation could be resolved by the extant provisions of the Convention. See also ALAN REDFERN, et al., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 262, § 5-63(4th ed. 2004).

¹⁶ See Wolfram Krohn, *Decisions of Regional and Foreign Courts, Marc Rich & Co., A.G. v. Società Italiana Impianti P.A.* Case No. C-190/89, 86 AM. J. INT’L L. 134, 136 (1992).

¹⁷ *Id.* Redfern, *supra* note 15 at 263, § 5-63.



that decision—that parallel issues like provisional measures, which are given in support of arbitration, fall within the scope of the NY Convention—is to narrow the arbitration exception.¹⁸ In effect, the real arguments centered on whether the arbitration exception in Brussels I was to be construed on “a broad or narrow sense.”¹⁹ It was only a matter of time before the ill-defined limits of the arbitration exception became a full blown controversy—a problem that did not seem to matter hitherto—judging by the Jenard, Schlosser, and Evrigenis-Kerameus Reports which, respectively, marked the entry of the UK, Ireland, Denmark, and Greece into the EEC (EU).²⁰

The *West Tankers* decision revealed the lack of clarity and confusion in this area, a state of affairs that seem to favor parties who were not keen on proceeding to arbitration. In *West Tankers*, as discussed above, the same party was simultaneously defending itself in civil litigation and arbitration proceedings instituted by two distinct parties in Italy and London. Yet, the CJEU held that this did not warrant the use of an anti-suit injunction. According to the CJEU, the amity and cooperation existing amongst member EU states would be adversely affected by such anti-suit injunctions.²¹ The *West Tankers* decision created a sharp divide on two levels:

¹⁸ Pippa Rogerson, *Scope of Art 1*, in *EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW: BRUSSELS I REGULATION*, 45, 65 (Ulrich Magnus & Peter Mankowski, eds. 2009). Rogerson commented that the concept of exclusion adopted by the CJEU in the *Marc Rich* case was “wide,” but that its effect was “unclear.” *Id.* at 63–64. Rogerson also noted that English lawyers preferred a wide interpretation that would include most of the sundry issues connected with an arbitration proceeding. *Id.*

¹⁹ Alexander R. Markus & Sandrine Giroud, *A Swiss Perspective on West Tankers and its Aftermath: What about the Lugano Convention?*, 28 *ASA BULL.* 230, 234 (2010), www.lalive.ch/data/publications/2010-MAR+SGI-ASA-A_Swiss_Perspective_on_West_Tankers_and_its_Aftermath.pdf. The authors saw this tension as a “dispute between the common law and the continental European schools of law.” *Id.* at 234.

²⁰ See PAUL JENARD, *REPORT ON THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS* (SIGNED AT BRUSSELS, 27 SEPTEMBER 1968), 1979 O.J. (C59/1) 13, aei.pitt.edu/1465/1/commercial_report_jenard_C59_79.pdf; The Schlosser Report, *supra* note 14, at 64; Demetrios I. Evrigenis & Konstantine Kerameus, *REPORT ON THE ACCESSION OF THE HELLENIC REPUBLIC TO THE COMMUNITY CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS*, in 1986 O.J. (C298/1) 35 (1986), <http://aei.pitt.edu/5623/1/5623.pdf>. The Evrigenis-Kerameus Report was credited with opening the door to the *West Tankers* decision. *Id.* at 233.

²¹ Case C-185/07, *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) & Generali Assicurazioni Generali SpA v. West Tankers Inc.*, 2009 E.C.R. I-00663, ¶ 33, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=72841&pageIndex=0&doclang=E N&mode=lst&dir=&occ=first&part=1&cid=6899896>.



between the arbitration community and others; and between common law and civil law practitioners. In general terms, however, there is something to be argued for both sides. On the one hand, courts in a community as the EU must have the confidence that they are regarded as equal partners by their counterparts elsewhere, in the promotion of their shared European values. On the other hand, it is a fundamental principle of international law that agreements must be obeyed; parties who bind themselves in a contract to settle their future disputes by arbitration ought to be held to that agreement. Most of the arguments for or against the CJEU decision in *West Tankers* are based on one of these two positions.

Moses argued that one probable negative consequence of disallowing anti-suit injunctions in support of arbitration is that it would encourage parallel proceedings and a tendency for such proceedings to become tactical weapons to derail or abort an arbitration.²² Two writers—Grierson and Hascher—independently criticized Advocate General (AG) Kokott’s Opinion, upon which the CJEU relied for its decision.²³ For example, AG Kokott’s view that purely economic issues could not justify breach of Community law was dismissed by Hascher as unconvincing.²⁴ Fentiman, on his part described the reasoning underlying the *West Tankers* decision as “profoundly unsatisfying” and “alarmingly insecure,” etc.²⁵

²² MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 100 (Cambridge University Press, 2008). Another commentator concluded that it was “naïve,” to assume that courts would usually “reach the correct decision on jurisdiction,” and by so doing save the agreement to arbitrate. See Jacob Grierson, *Comment on West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.p.A. (The Front Comor)* 26 J. INT’L ARB. 891, 900 (2009).

²³ Opinion of Advocate General Kokott in Case C-185/07 (*Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v. West Tankers Inc.*) ¶ 66 (Sept. 4, 2004), <http://curia.europa.eu/juris/document/document.jsf?docid=66648&doclang=en>.

²⁴ See Jacob Grierson, *Comment on West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.p.A. (The Front Comor)* 26 J. INT’L ARB. 891, 896, 900 (2009); see Dominique T. Hascher, *Injunctions in Favor of and Against Arbitration*, 21 AM. REV. INT’L ARB. 189, 195 (2010). Grierson, an arbitration practitioner, rendered the first view; followed by Hascher, a French Judge. France is another prominent European arbitration seat. It must be stated, however, that besides derogating from the principles of party autonomy and competence-competence; it is difficult to see what warrants the conclusion that A-G Kokott’s reasoning in this respect is unconvincing. Another writer, Savin, criticized the Court’s readiness to accord the party suing under Brussels I more assistance than the party relying on an arbitration contract. Andrej Savin, *The Arbitration Exception and Protection of Arbitration Agreements in the EU 6–7* (Jan. 13, 2010) (unpublished manuscript), <http://ssrn.com/abstract=1624504>.

²⁵ See Richard Fentiman, *Arbitration and Antisuit Injunctions in Europe*, 68 CAMBRIDGE L.J. 278, 279–80 (2009). Nonetheless, Fentiman commends the Court for keeping arbitration within the confines of



Ambrose, who wrote while the decision in *Turner v Grovit* was still pending, had predicted a bright future for the anti-suit injunction in Europe, especially as an aid to arbitration.²⁶ While her prediction that the CJEU would likely have to rule on the effect of an anti-suit injunction in support of arbitration became a reality; her expectations that the decision would favor arbitration did not materialize. Ambrose had hoped that the CJEU would endorse as legitimate the power of a court to restrain the pursuit of foreign proceedings where this amounts to an abuse of its own process because the prevention of such abuse is “an overriding principle common to all legal systems.”²⁷

Criticisms of the *West Tankers* decision from common law Europe were matched by support for the decision in the continent. Thus, Santomauro saw the decision as sound in law and logic, and consisting of “sensible and comprehensive legal argumentation,” which resolved the clash between the two legal traditions.²⁸ He

national laws except where the civil jurisdiction of national courts (the Brussels I) was in issue. *Id.* 278–81.

²⁶ See Clare Ambrose, *Can Anti-Suit Injunctions Survive European Community Law?* 52 INT’L & COMP. L.Q. 401, 408–409 (2003). However, Ambrose criticized as “superficially attractive,” the view that an anti-suit injunction is aimed not at the court but at the individual; Ambrose concluded that such injunctions would remain unpopular in non-common law jurisdictions, no matter how politely couched the language of the injunction might be. *Id.* at 408, 412–14.

²⁷ *Id.* at 416. Kim argued that the *West Tankers* decision “severely crippled” the powers of British courts to protect arbitration, and “undermines the underlying principles” of the NY Convention, see Grace G. Kim, *After the ECJ’s West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction*, 12 CARDOZO J. CONFLICT. RESOL. 573, 589–91, 594 (2011). In *West Tankers*, the English High Court was of the view that the award of damages as an alternative to anti-suit injunctions is compatible with the CJEU’ decision in *West Tankers*. Case C-185/07, *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) & Generali Assicurazioni Generali SpA v. West Tankers Inc.* 2009 E.C.R. I-00663, ¶¶ 60, 62, 64, 68, 71, 75, 77–78. Two writers approved this decision, but they expressed skepticism as to its effectiveness against a recalcitrant party, see, Elizabeth Kantor, *The West Tankers Saga Continues: Can Damages Compensate for Breach of an Arbitration Clause?*, KLUWER ARB., May 1, 2012, <http://arbitrationblog.kluwerarbitration.com/2012/05/01/the-west-tankers-saga-continues-can-damages-compensate-for-breach-of-an-arbitration-clause/>; Stephen Lacey, *The West Tankers Saga Continues (2): The Arbitral Tribunal Dodges the Torpedo*, KLUWER ARB., May 4, 2012, <http://arbitrationblog.kluwerarbitration.com/2012/05/04/the-west-tankers-saga-continues-2-the-arbitral-tribunal-dodges-the-torpedo/>.

²⁸ Patrizio Santomauro, *Sense and Sensibility: Reviewing West Tankers and Dealing with its Implications in the Wake of the Reform of EC Regulation 44/2001*, 6 J. PRIV. INT’L L. 281, 287 (2010). Grierson had described the Court’s explanations as “disappointingly scant,” see Jacob Grierson, *Comment on West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.p.A. (The Front Comor)* 26 J. INT’L ARB. 891, 900 (2009), 895.



argued that judicial protection as guaranteed under public law should take precedence over a procedural private law initiative like arbitration. And further that an arbitration agreement must, like all other contracts, be subject to a court's ordinary jurisdiction, especially where the existence of that contract is in issue.²⁹ Santomauro concluded that the principles of party autonomy and *competence-competence* were not abridged by the *West Tankers* decision.³⁰

Similarly, Illmer, who argued from a more balanced perspective, wrote that the Court should not be blamed for leaving arbitration contracts vulnerable, and that, "[a]s a matter of law, its decision ..., as unsatisfactory as its result may be, was correct," and should be seen "rather [as] an expression of judicial self-restraint than ignorance."³¹

As previously stated, there is an arguable point to be made for both sides of the contention. Thus, it is not altogether strange to assert that considerations of sovereignty and comity are to be weighed carefully against those of party autonomy and *competence-competence* to ascertain which is to be accorded priority, depending on the factual situation.³²

²⁹ Santomauro, *supra* note 28, at 290. Common law critics also welcomed the "wide" view taken by the court; Piper Rogerson argued that most English lawyers favored "a wide interpretation to ensure that all these cases [ancillary as well as preliminary issues] would likewise fall outside the scope of the Regulation." see Rogerson, *supra* note 17, at 63–64. Santomauro argued for this wide interpretation to be the case across the board, from *Marc Rich* to *West Tankers* and beyond. Santomauro, *supra* note 27, at 291. The implication is that the same CJEU decisions were relied upon by critics to advance or support opposing views. While proponents praised the *Marc Rich* decision as good for arbitration, having returned arbitral issues to the arbitral seat; they were disappointed that *West Tankers* did not toe the same line. On the other hand, their opponents criticized the width of the *Marc Rich* ruling, but applauded the *West Tankers* decision. On the whole, the CJEU's rulings in these cases seemed to have left both sides dissatisfied. One author criticized the Court's imprecise distinction between ancillary and preliminary matters. See Klara Svobodova, *Arbitration Exception in the Regulation Brussels I*, www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/svobodova.pdf.

³⁰ Santomauro, *supra* note 28, at 292.

³¹ Martin Illmer, *Brussels I and Arbitration Revisited: The European Commission's Proposal COM (2010) 748 Final*, 75 THE RABEL J. COMP. & INT'L PRIV. L. 645, 655 (2011).

³² For example, Fentiman had well before the controversial events described here, stated that the crux of the issue with regard to anti-suit injunction is "whether any court..., is entitled to determine the acceptability of proceedings elsewhere." He suggested "a more restrictive view of antisuit relief" if the concept of comity is to thrive. See Richard Fentiman, *Comity and Antisuit Injunctions*, 57 CAMBRIDGE L.J. 467, 467–69 (1998). Cf. with, Fentiman, *supra* note 25 at 278–81. Here, Fentiman criticized almost unrestrainedly, the CJEU decision in *West Tankers*, paying less heed to his past comments on the principle of comity. See also, Thalia Kruger, *The Anti-Suit Injunction in the European Judicial Space*:



Fentiman, who did not share in what little sympathy Illmer had for *West Tankers*, or Santomauro's enthusiasm for it, argued that an arbitration agreement "signals the parties' intention that their dispute is a private matter, unconstrained by the [Brussels I] Regulation."³³ Thus, substantive and procedural rules by virtue of article 1(2)(d) of Brussels I must be interpreted in such a way as to be compatible with the object of that article, and are, therefore, subject to, and not superior to the arbitration exception.

To counter the argument that an anti-suit injunction strips the foreign court of competence to determine its jurisdiction, Fentiman argued that the principles of the court first seized and that of *competence-competence*—with a view to avoiding parallel proceedings—were irrelevant in a case such as *West Tankers*, which involved arbitration and judicial proceedings.³⁴ It should be noted, however, that the *competence-competence* principle is more relevant with regard to the arbitral tribunal than a national court. After all, *competence-competence* is an international law concept which evolved as a result of the need to protect the jurisdiction of international and transnational tribunals. Protection of the jurisdiction of these tribunals requires that they must have the power to determine their own jurisdiction.³⁵ As far as Europe is concerned, arbitral tribunals have been recognized as possessing *competence-competence*. John Barcelo noted that the French, the Swiss, and German civil law jurisdictions have all recognized this principle as invaluable for effective arbitration.³⁶

Turner v Grovit, 53 INT'L. & COMP. L.Q. 1030, 1035 (2004). Kruger viewed mutual trust as a more weighty consideration than comity; she saw *mutual trust* as the singular most important argument that overshadows any merits that anti-suit injunctions may have to offer. *Id.* at 1036. See also Delia Ferri, *An End to Abusive Litigation Tactics within the EU? New Perspectives under Brussels I Recast*, IR. BUS. L. REV. 21 (2013).

³³ Fentiman, *supra* note 25 at 279.

³⁴ *Id.* at 280.

³⁵ See Hefin Rees, *A Seminar on International Commercial Arbitration, Anti-Suit Injunctions after West Tankers—the rise of the "Foreign Torpedo,"* 12, 15 (May 13, 2010) www.39essex.com/docs/articles/internationalarbitrationseminarhr.pdf. Rees criticized *West Tankers* for ignoring the competence-competence concept as regards the arbitral tribunal.

³⁶ John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115, 1122–24 (2003). An arbitral seat court applying the "negative competence-competence" principle, would usually decline jurisdiction once an arbitral



Moreover, it is debatable that article II(3) of the NY Convention envisaged courts of equal jurisdiction, as those in a supranational regional structure like the EU that cooperate and function with sister courts based on the principle of mutual trust; instead of courts within a national jurisdiction, which interacted with each other in a hierarchical order.³⁷ Thus, if parties have committed to arbitrating their future disputes and have reinforced that commitment by designating a seat for such arbitration in a NY Convention country, the NY Convention should be read as empowering first the courts of the seat of that arbitration. In situations where neither the seat nor the procedure to be adopted is mentioned, we must assume that the term refers to the courts of the eventual seat of such arbitration.

Another argument in relation to the NY Convention may be summarized as follows. If the NY Convention is a tool for the promotion of arbitration and the recognition and enforcement of arbitral awards, the *West Tankers* decision is in direct opposition to that goal. Moreover, the decision is also a negative influence in so far as it encourages signatories to the NY Convention to ignore its underlying policy.³⁸ It may be recalled also that under article 71 of Brussels I, the NY Convention is a specialized treaty whose provisions take precedence over those of the Brussels I Regulation.³⁹ The same contention may be raised *mutatis mutandis*, in regard to the

tribunal is seized. But even before this time, such a court embarks only on a *prima facie* scrutiny of the agreement, to determine its jurisdiction. According to Barceló, this approach is hinged on the policy of preventing parties “from obstructing or delaying arbitration.” *Id.* at 1125.

³⁷ The NY Convention predated the Brussels Convention of 1968; the march towards greater cooperation and integration began in earnest in 1992 with the Maastricht Treaty.

³⁸ One of the objectives of the NY Convention is “to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement.” See Introduction (in Objectives) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10 1958, 330 U.N.T.S. 38 (1959), 21 U.S.T 2517, 7 I.L.M. 1046. See also Daniel Rainer, *The Impact of West Tankers on Parties’ Choice of a Seat of Arbitration* 95 CORNELL L. REV. 431, 453–55 (2010). See Dimitri Santoro, *Forum Non Conveniens: A Valid Defense Under the New York Convention?* 21 ASA BULL. 713 (2003). On his part, Barceló recognized the practical difficulties associated with anti-suit injunctions, but argued that by virtue of the arbitration contract, and based on the objectives of the NY Convention; such injunctions should be permissible unless “strong policy considerations” demanded otherwise. See, John J. Barceló III, *Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION & MEDIATION: THE FORDHAM PAPERS 107–18 (Arthur W.I. Rovin ed. 2008), http://scholarship.law.cornell.edu/lrsp_papers/87.

³⁹ See Case C-406/92, *The Owners of the Cargo Lately Laden on Board the Ship “Tatry” v. The Owners of the Ship “Maciej Rataj”* 1994 E.C.R. I-5439, ¶¶ 23–24, 27.



UNCITRAL Model Law.⁴⁰

However, the difficult circumstances in which the above CJEU decisions were rendered must also be appreciated. It is not surprising, therefore, that Brussels I bis, which seeks to accommodate the relevant procedural aspects of the civil and common law traditions, is already facing criticism.⁴¹

III. REPORTS AND EU DOCUMENTS

We shall now evaluate the Hess Report and the Commission's Green Paper, which followed it.

A. The Hess Report

The Hess Report, authored by Professors Burkhard Hess, Thomas Pfeiffer and Peter Schlosser studied, among other topics related to the operation of Brussels I, the status of arbitration. The Report indicated that a majority of the respondents favored the retention of the arbitration exception⁴² and that the New York Convention was working satisfactorily well in this area.⁴³ The Hess Report also found that there was a widespread satisfaction with the provisions relating to jurisdiction and that there was no need for a general review.⁴⁴ With regard to forum selection clauses, the Report recommended either that the EU accede to the Hague Convention, or, extend article 23 of Brussels I in such a way that the chosen court would have exclusive

⁴⁰ UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006, U.N. Doc. A/40/17, annex I and A/61/17, annex I (2006) [hereinafter "UNCITRAL Model Law"]. For example, when articles 8 and 16 of the Model Law are read together, they indicate that, although, international arbitration recognizes the need for support from national courts; the intention was not to devalue arbitration contracts. *Id.* at art. 8 and 16.

⁴¹ See, e.g., ROBERT MERKIN & LOUIS FLANNERY, *ARBITRATION ACT 1996* 283 (5th ed. 2014). See also Pamela Kiesselbach, *Brussels Regulation: The Commission's Proposals for Reform*, PRACTICAL LAW, Jan. 26, 2011, <http://www.uk.practicallaw.com/0-504-5668>.

⁴² See Hess Report, *supra* note 3, at 52 n. 156. The Report noted that the NY Convention was "applauded almost unanimously by the national reports." *Id.* at 57. Most jurisdictions, for different reasons (not necessarily in the best interests of arbitration), did not want the Regulation extended to arbitration. For instance, although, Italy argued against the extension, section 818 of the Italian Code of Civil Procedure denies arbitrators the power to grant interim measures. See Anna de Luca & Giorgio Sacerdoti, *Italy in INTERIM MEASURES IN INTERNATIONAL ARBITRATION* 438 (Lawrence Newman & Colin Ong eds. 2014).

⁴³ Hess Report, *supra* note 3, at 52, 54. However, the Report cites van Houtte as advocating the inclusion of arbitration in the Regulation, provided exclusive jurisdiction over ancillary matters was left to the seat court, but the Report criticized this view. Hess Report, *supra* note 3, at 59.

⁴⁴ *Id.* at 73.



jurisdiction until it determines otherwise.⁴⁵ It recommended a new clause in article 8 (jurisdictional matters), which enjoins other courts to decline jurisdiction in matters of which exclusive jurisdiction under article 22 was conferred on a particular court.⁴⁶ Arbitration would have benefitted from such a provision had the view that Brussels I also covers arbitration been accepted.⁴⁷

The Hess Report suggested that national courts having original jurisdiction should—according to their national laws—have the power to vary provisional measures issued outside their jurisdictions under article 31.⁴⁸ In addition, the report suggested that “[p]rovisional forum shopping,” in order to access the appropriate range of measures across jurisdictions, should be encouraged.⁴⁹ It also recommended an amendment to article 1 of Brussels I, which would empower all national courts to grant provisional measures, notwithstanding the existence of an arbitration agreement.⁵⁰ Finally, the Report concluded that anti-suit injunctions were incompatible with Brussels I, even if aimed at protecting exclusive jurisdiction

⁴⁵ See Hague Convention on Choice of Court Agreements, art. 6, Oct. 1, 2005, I-53483, <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/53483/Part/I-53483-08000002804613e4.pdf> [hereinafter “Hague Convention”]. This paper argues that a workable alternative to the Regulation and arbitration interface problems would be to make any aspects not provided for in the NY Convention subject to the Regulation—by providing for exclusive jurisdiction for the tribunal and the arbitral seat court, in terms of the parties’ agreement. On the other hand, the Hague Convention accords similar deference to the NY Convention by excluding *arbitration and related proceedings* from the scope of its operation. See, Hague Convention, *supra* note 44, art. 2(4). Article 26 of the Hague Convention, which sought to achieve compatibility with other international treaties, seemed to have failed in relation to article 23 of Brussels I, which stresses the priority of courts rather than exclusivity of jurisdiction. See, Ved P. Nanda, *The Landmark 2005 Hague Convention on Choice of Court Agreements*, 42 TEX. INT’L L.J. 773, 776, 785 (2007), www.tilj.org/content/journal/42/num3/Nanda773.pdf.

⁴⁶ Hess Report, *supra* note 3.

⁴⁷ See Commission Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), at 9 § 3.1.3–3.1.5, COM (2010) 748 final (Dec. 14, 2010) [hereinafter “COM (2010) 748 Final”]; which proposed *inter alia* an “enhancement” of Choice of Court contracts; the “improvement” of the interface between Brussels I and arbitration; and “better coordination” of proceedings in national courts, respectively. See Brussels I bis, *supra* note 1, at recital 12, art. 1(2)(d).

⁴⁸ See Hess Report, *supra* note 3, at 362; it referred to the previous situation as deplorable.

⁴⁹ *Id.* at 363. Having adopted this view, it also adopted the CJEU interpretation of article 31 of Brussels I (former article 24); that the jurisdiction to grant measures by national courts was unaffected by an arbitration agreement. See, Van Uden Maritime, *supra* note 8, ¶¶ 25, 34.

⁵⁰ Hess Report, *supra* note 3, at 324, 327, 364.



provisions.⁵¹

B. The EU Commission's Report and Green Paper

The Commission⁵² further subjected the Hess Report to discussions and comments by governments, institutions, and individuals, from which it distilled a final proposal.⁵³ The Commission's Green Paper summarized the areas of concern highlighted in the Hess Report, as well as the difficulties that gave rise to these concerns.⁵⁴ The Green Paper cited the merits of a partial deletion to include the possibility of bringing supportive court proceedings in aid of arbitration within the scope of Brussels I, the strengthening of such support by allocating exclusive jurisdiction for such issues to the arbitral seat court, etc. The result of these is the formulation of a uniform conflict rule in this area, which would in turn enhance the effectiveness of arbitration agreements within the EU.⁵⁵ The Green Paper recognized that the *ex parte* variant of interim measures could be available within the Community as long as the defendant had the opportunity to contest the measure *ex post facto*. Amongst other recommendations, it also concurred with the suggestion that the *exequatur* procedure should be abolished.⁵⁶

⁵¹ *Id.* at 178–79.

⁵² See Report from the Commission to the European Parliament, the Council and the European Economic & Social Committee on the Application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 174 Final (Apr. 21, 2009), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52009DC0174>; see Commission Green Paper on the Review of Council Regulation 44/2001, COM (2009) 175 Final (Apr. 21, 2009), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0175>. For a list of responses to the Commission's Report and Green Paper, see https://web.archive.org/web/20100423030801/http://ec.europa.eu:80/justice_home/news/consulting_public/news_consulting_0002_en.htm.

⁵³ In June 2010, the Commission also established an Expert Group of arbitration practitioners, this was followed by a stakeholder's survey in December 2010; both events would have substantially influenced the Commission's final proposals.

⁵⁴ These difficulties included the possibility of parallel proceedings involving courts and arbitral tribunals, and the use of anti-suit injunctions, which were held to be incompatible with the Regulation, etc. See COM (2009) 174 Final, *supra* note 52, at 9.

⁵⁵ COM (2009) 175 Final, *supra* note 52, at 9.

⁵⁶ *Id.* at 8. Regarding *lis pendens* and parallel proceedings, the Commission considered that “strengthening the communication and interaction” between courts involved in parallel proceedings, or the exclusion of the rule of priority in cases of negative declaratory actions, might prove a viable alternative. *Id.* at 7.



Having outlined the general areas of concern, the Commission then formulated questions based on issues arising from these concerns. For arbitration, the Commission sought views on ways to strengthen the effectiveness of arbitration agreements and awards, and to achieve a harmonious relationship between arbitral and judicial proceedings. The questions regarding provisional measures revolved around the need to access such measures more freely; it invited submissions on further possibilities in this regard. In relation to the exercise of jurisdiction in order to avoid parallel proceedings—and to amend the extant *lis pendens* rule—the Commission sought ways of coordinating such proceedings and improving interactions amongst national courts in this respect.⁵⁷

C. *Respondent Views on the Arbitration Exception*

In response to the Commission's Green Paper, stakeholders proffered different views in relation to the future of the arbitration exemption and its effect on the power of courts to order provisional measures in support of arbitration proceedings. While some favored the retention of the arbitration exemption, others advocated for the expansion of the exemption. A third group suggested a partial exclusion of arbitration from the new, revised regulation. In the first group, for example, is the Chamber of Arbitration of Milan ("CAM"), which stated that no compelling reasons warranted a review of the exemption.⁵⁸ It contended that the regionalization of such international commitments (arbitration) was to encourage litigation of matters that should be arbitrated.⁵⁹ It also argued that the seat court should not be granted exclusive jurisdiction, whether in relation to ancillary or preliminary proceedings.⁶⁰ The

⁵⁷ *Id.* at 7.

⁵⁸ Chamber of National and International Arbitration of Milan, *Position Paper on the European Commission's Report and Green Paper on the Revision of Regulation EC 44/2001*, ¶ 1 (June 23, 2009) [hereinafter "CAM Position Paper"], https://web.archive.org/web/20100423030801/http://ec.europa.eu:80/justice_home/news/consulting_public/news_consulting_0002_en.htm. See also International Bar Association (Arbitration Committee), *Submission on Regulation (EC) No 44/2001*, 10 BUS. L. INT'L 302, pp. 2, 10 & 11 [hereinafter "IBA Submission"].

⁵⁹ CAM Position Paper, *supra* note 58, at 2–3, ¶¶ 2, 3 & 7. The IBA raised similar objections through its Arbitration Committee. See, IBA Submission, *supra* note 58, at 2–7.

⁶⁰ CAM Position Paper, *supra* note 58, at 2, ¶ 4. The Chamber also objected to the priority jurisdiction—on issues of validity and scope—suggested for seat courts in cases of parallel proceedings.



Association for International Arbitration (“AIA”) had a similar view.⁶¹ The AIA expressed that there would be difficulties as regards exclusive jurisdiction for national courts where non-EU parties or arbitrations are involved.⁶² Some individuals also favored retention without review, in the belief that such review would not serve the best interests of arbitration.⁶³

Within those who advocated the expansion of the exemption is the UK, whose government’s official response suggested a total exclusion of arbitration that would “remove the entire arbitral process from the scope of the [Brussels I] Regulation.” The UK considered that this would minimize the problems associated with parallel proceedings by ensuring that such issues are resolved under the NY Convention rather than national laws.⁶⁴ With regard to interim measures, the UK conceded to the usefulness of freely circulating *ex parte* measures so long as the defendant’s subsequent right to challenge it was guaranteed. The UK expressed reservation to the possibility that measures ordered by a national court could be subsequently altered or discharged by the court with substantive jurisdiction.⁶⁵ The UK supported protection for forum selection agreements and endorsed the view that judgments entered in breach of such agreements should not be afforded recognition.⁶⁶ The

⁶¹ Association for International Arbitration, SUBMISSION OF THE ASSOCIATION FOR INTERNATIONAL ARBITRATION IN RELATION TO THE GREEN PAPER RELEASED IN CONNECTION WITH THE REVIEW OF REGULATION 44/2001, 10 (Jun. 25, 2009), http://arbitration-adr.org/activities/profwork/pdf_files/response_on_green_paper_Brussels_I_regulation.pdf [hereinafter “AIA Submission”].

⁶² For the basis of the Association’s position, see *id.* at 3–7. The Danish government also opposed a review. See Denmark, RESPONSE TO THE COMMISSION’S GREEN PAPER, ¶¶ 2.5–2.6 (Jul. 20, 2009). The Spanish University of Valencia posited that forum selection agreements and arbitration contracts should be treated alike and should be enforced in like manner even against third parties and that the seat court should have priority as regards jurisdiction. See University of Valencia, OBSERVATIONS ON THE GREEN PAPER, § 3, ¶¶ 3.4–3.5 (June 30, 2009).

⁶³ For example, Emmanuel Gaillard argued that deleting the exclusion would be “highly detrimental” to arbitration in the EU. See Emmanuel Gaillard Letter to (former) EU-Commissioner Barrot (June 29, 2010).

⁶⁴ United Kingdom (Ministry of Justice), RESPONSE TO THE GREEN PAPER ON THE REVIEW OF THE BRUSSELS I REGULATION 44/2001, ¶¶ 33–40 (Sept. 3, 2009). Specifically, the Comments recommended that national courts resolve any matters before them which have any bearing with arbitration in accordance with article II of the NY Convention.

⁶⁵ *Id.* ¶ 32. The Response criticized that idea on the grounds that it would lead to “legal uncertainty and additional costs,” as well as constitute a deliberate breach of the mutual trust principle.

⁶⁶ *Id.* ¶¶ 17–21. This is understandable, most arbitration-friendly countries would probably support forum selection contracts, at least, based on their theoretical affinity with arbitration agreements. The UK government also supported the availability of “negative declaratory relief” in *Lis Pendens* cases, as a



response from the British House of Lords substantially agreed with the conclusions of the UK government. For interim measures, it advocated that the *Van Uden* decision—in relation to measures granted by national courts not having jurisdiction as to the substance—should be maintained.⁶⁷ It also endorsed the view that the seat court should have exclusive jurisdiction to decide the validity and scope of the arbitration agreement.⁶⁸

The third group consisted mainly of those who argued that arbitration did not deserve any preferential treatment, and that seat courts and arbitral tribunals deserve no special jurisdiction regarding the grant of provisional measures. For instance, Illmer and Steinbruck had argued that the arbitration exclusion should be retained, but with some modifications.⁶⁹ They supported, for example, the exclusive jurisdiction of the seat court to rule on such preliminary questions as the existence of an arbitration contract.⁷⁰

Another tempered response came from Magnus and Mankowski, who advised

means of avoiding parallel proceedings. See, *id.* ¶ 27. In relation to arbitration, however, a negative declaratory relief has been criticized as likely to precipitate a race for the courts. See Gaillard, *supra* note 63, at 2.

⁶⁷ See United Kingdom–House of Lords (European Union Committee), 21st REPORT OF SESSION 2008–2009: GREEN PAPER ON THE BRUSSELS I REGULATION, REPORT WITH EVIDENCE ¶ 85 (July 27, 2009) <https://publications.parliament.uk/pa/ld200809/ldselect/lddeucom/148/148.pdf>.

⁶⁸ *Id.* ¶ 96. However, the House of Lords argued against a “blanket exclusion of arbitration,” but it conceded that changes were necessary to “facilitate the resolution of disputes through arbitration” See *id.* ¶ 95.

⁶⁹ Martin George, *Brussels I Review–Illmer and Steinbeck on the Interface between Brussels I and Arbitration*, CONFLICT OF LAWS.NET, NEWS AND VIEWS IN PRIVATE INTERNATIONAL LAW, ¶¶ 21–22, June 24, 2009 <http://conflictoflaws.net/2009/brussels-i-review-illmer-and-steinbruck-on-the-interface-between-brussels-i-and-arbitration/>. See also Council of Bars and Law Societies of Europe (CCBE), Response to the Green Paper, 7 ¶¶ 7.3, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EPL_Position_papers/EN_EPL_20090626_CCBE_response_to_the_green_paper_of_the_regulation_44-2001.pdf. Interestingly, the Italian Government’s short response called for exclusive jurisdiction to be vested in the seat court, in relation to the validity and scope of arbitration agreements; it also advocated a uniform conflict rule, which presumably, would avoid the deployment of the irksome anti-suit injunction. See, Italy, RESPONSE TO THE GREEN PAPER, 4. Such a uniform conflict rule option has been criticized as unattainable, due to the disparity in national arbitration laws. See, for example, Luca G. Radicati Di Brozolo, *Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?* 7 J. PRIV. INT’L L. 423, 434 (2011).

⁷⁰ George, *supra* note 69, at 2–4. A subsequent article by Illmer reiterated the conviction that the spontaneous opposition to deletion—of any degree—by the arbitration community, was based on “misconceptions” and lack of faith in the Commission’s real intentions. See Illmer, *supra* note 31 at 669.



against any “[f]undamental changes,” but they saw the need for “certain improvements.”⁷¹ They cautioned that the complete deletion of the arbitration exclusion would be too radical and ill advised, and that it would demand a separate regime for arbitration matters within Brussels I.⁷² The authors suggested that measures granted under article 31 should be enforceable under Brussels I; but they rejected the view that exclusive jurisdiction for arbitration matters should vest in the arbitral seat court.⁷³

On forum selection clauses, which share similarities with arbitration agreements,⁷⁴ the four scholars (Illmer/Steinbruck and Magnus/Mankowski) disagreed. Magnus and Mankowski agreed that the designated court should have exclusive jurisdiction to “allow the wrong-footed party to regain the initiative.”⁷⁵ On the contrary, Illmer and Steinbruck held the view that such a harmonized jurisdictional procedure added no value to what already existed.⁷⁶

The Conflict of Law Principles in Intellectual Property (“CLIP”) project of the European Max Planck Group also submitted a response to the Green Paper.⁷⁷ In relation to choice of court and exclusive jurisdiction, article 2:301 of the CLIP principles, is almost identical with article 25 of Brussels I *bis*, save for the words in

⁷¹ Ulrich Magnus & Peter Mankowski, *Joint Response to the Green Paper on the Review of the Brussels I Regulation*, July 16, 2009.

⁷² Magnus & Mankowski, *supra* note 71, at 14.

⁷³ They concede that these were not insurmountable problems; they referred to issues such as how to determine the place of arbitration; and the issue of measures that could more practically be availed of in a different jurisdiction than that of the seat court; for example, the taking of evidence in support of the arbitration where the evidence is in a different jurisdiction. *Id.* at 14–15.

⁷⁴ See Andrew Dickinson, *Brussels I Review—Interface with Arbitration*, CONFLICT OF LAWS.NET, NEWS AND VIEWS IN PRIVATE INTERNATIONAL LAW June 17, 2009, <http://conflictoflaws.net/2009/brussels-i-review-interface-with-arbitration/>. Dickson viewed both types of agreements as similar and argued that they should be treated equally for all practical purposes.

⁷⁵ See Magnus & Mankowski, *supra* note 71 at 7.

⁷⁶ George, *supra* note 69, at ¶¶ 21–22. They cite as among the potential problems, the fact that the rule will be redundant since it is appropriate for only “a limited number of supportive measures.” *Id.* ¶ 2. The counter argument is that such exclusive jurisdiction rule is motivated mostly by a need to avoid delaying tactics and a reluctance to arbitrate on the part of the defaulting party.

⁷⁷ EUROPEAN MAX PLANCK GROUP, PRINCIPLES FOR CONFLICT OF LAWS IN INTELLECTUAL PROPERTY (CLIP), SECOND PRELIMINARY DRAFT (June 6, 2009) (Submitted as response to European Commission Green Paper). The CLIP project was meant to regulate the area of intellectual property law, https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Final_Text_1_December_2011.pdf.



italics of article 2:301 of the CLIP principles, which reads as follows:

If the parties have agreed that a court or the courts of a state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction *to decide on all contractual and non-contractual obligations and all other claims arising from that legal relationship unless the parties express an intent to restrict the court's jurisdiction.*⁷⁸

The effect of the words in italics in the CLIP principles is to invest the chosen court with competence to deal with all matters arising from the disputed legal relationship, including ancillary and preliminary matters. In contrast, the Recast having retained the *status quo* regarding arbitration appears to seek to achieve this—ineffectively, as contended in this article—by the addition of recital 12.⁷⁹

IV. THE CHANGES PROPOSED BY THE COMMISSION

In view of the extensive consultations and considerable resources expended towards amending Brussels I; it is worthwhile to consider how much of the Commission's propositions eventually made it into the Brussels I Recast by the following comparison of the Commission's Proposal with the Brussels I Recast.

The objectives of the Commission's Proposal,⁸⁰ as far as is relevant to this article, may be summarized as the improvement of the interface between arbitration and the Recast to achieve certain goals as follows. (1) to stop abusive litigation tactics; (2) to reduce or eradicate parallel proceedings and the uncertainties and inconveniences they engender; and (3) to promote the efficiency of choice of court agreements so as to avoid similar problems as arise in the arbitration-regulation interface.⁸¹ The

⁷⁸ EUROPEAN MAX PLANK GROUP, PRINCIPLES FOR CONFLICT OF LAWS IN INTELLECTUAL PROPERTY (CLIP), Art. 2:301(10) (Dec. 1, 2011), https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Final_Text_1_December_2011.pdf; see also Hague Convention, *supra* note 45, at art. 5(1).

⁷⁹ This paper argues that it is better to invest the seat court with exclusive jurisdiction even over provisional measures, in order to provide a one-stop arbitration service; provided the arbitration exemption is adjusted to mean that the arbitral tribunal and seat court should have priority in matters relating to the arbitration. This would help European arbitration centers compete favorably with others; for the view that there is fierce competition for international arbitration business. See KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 112 (Kluwer Law International 2003).

⁸⁰ See COM (2010) 748 Final, *supra* note 47, at §§3.1.3.–3.1.5.

⁸¹ *Id.* at § 1.2.



Proposal also identified provisional measures as one of its specific areas of interest, with regard to clarification of the conditions under which such measures could circulate more freely within the EU.⁸² As further justification for its proposed intervention in the arbitration-regulation interface, the Commission stated that action at EU level was necessary since national courts could not control or coordinate parallel court proceedings happening outside their territories which might jeopardize arbitral proceedings within their own jurisdiction.⁸³ The following discussion of the Proposal highlights what was finally accepted and introduced into the Brussels I recast, along with what was (rightly or wrongly) rejected.

A. The Proposal on the Arbitration Exemption

The Commission proposed the addition of a new recital stating that the Regulation did not apply to arbitration, and specifically, that it did not apply to any ancillary proceedings. The proposed recital reads:

This Regulation does not apply to arbitration, save in the limited case provided for therein. In particular, it does not apply to the form, existence, validity or effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards.⁸⁴

Secondly, it proposed new articles 29(4) and 33(3), both of which it recommended should derogate from the arbitration exception in article 1(2)(d). The proposed new article 1(2)(d) read as follows: “arbitration, ‘save as provided for in Articles 29, paragraph 4 and Article 33, paragraph 3.’”⁸⁵ Article 29(4) provides that the courts, different from the court of the seat of arbitration, should stay proceedings or decline jurisdiction (in appropriate circumstances) when jurisdiction is contested and an arbitral tribunal or arbitral seat court has jurisdiction over the proceedings—as an

⁸² *Id.* at § 3.1.

⁸³ *Id.* at § 3.4.

⁸⁴ *Id.* at 15. See the proposed recital 11, which the Parliament remolded into the new recital 12 Brussels I bis. In the same vein, the EU Parliament left out in its entirety, the Commission’s proposed recital 20, which had proposed “special rules aimed at avoiding parallel proceedings and abusive litigation tactics.” *Id.* at 15–16. One of such rules should be that which indicate the seat of arbitration as that chosen by the parties or that designated by any other authority nominated by the parties. *Id.* at 16–17.

⁸⁵ See, *id.* at art. 1(2)(d).



incidental or main question—to determine the existence or validity of the arbitration agreement.⁸⁶ The proposed article 33(3) provides for the circumstances under which an arbitral tribunal could be deemed to have jurisdiction, *i.e.*, when a party has nominated an arbitrator or when a party has requested the support of an institution, court, or any other authority for such appointment.⁸⁷

In telling contrast to the foregoing, the Recast did not introduce the proposed qualification which the Commission recommended should be added to the article 1(2)(d) arbitration exemption.⁸⁸ Neither did it introduce the proposed article 29(4), nor yet still a new article 33(3). The first paragraph of the Recast’s new Recital 12, which purportedly sought to redefine the baseline and outer limits of the interaction between the Regulation and arbitration, may, at best, be described as a toned-down (negative) version of its (direct and positively-worded) equivalent in the Proposal. It is a deliberate imitation in style and content of article II of the New York Convention.⁸⁹ The paragraph reads as follows:

This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.⁹⁰

1. The Proposal’s Treatment of Provisional Measures

There is more agreement between the Proposal and the Brussels I *bis* on provisional measures than was the case with the arbitration exemption. The proposed Recital 22 declared the need to clarify the meaning of “interim measures,” which it recommended should include “protective orders aimed at obtaining

⁸⁶ *Id.* at art. 29(4).

⁸⁷ *Id.* at art. 33(3).

⁸⁸ The Recast regulation left that article exactly as it saw it; as it did with provisional measures, which provision it shuffled from article 31 of Brussels I to article 35 of the Brussels I *bis*.

⁸⁹ See, NY Convention, *supra* note 5, at art. II (3).

⁹⁰ See, Brussels I *bis*, *supra* note 1, at recital 12, ¶ 1.



information or preserving evidence,” but not measures of a non-protective nature.⁹¹ Similarly, the proposed Recital 25 recommended the removal of intermediate measures for the enforcement of judgments for interim measures, in order to achieve the free circulation of such interim measures.⁹² In furtherance of this object, it (Recital 25) advised the segregation of the enforcement of provisional measures ordered by the court having substantive jurisdiction, and those from other national courts having secondary jurisdiction only.⁹³ Measures granted by the first were to be freely enforced in the EU, while those by the latter were to have effect only within their jurisdictions.⁹⁴ *Ex parte* measures should be enforceable only after the appropriate safeguards have been complied with, i.e. the defendant must have been served notice of such measures before enforcement is sought.⁹⁵

The Recast’s recitals 25 and 33 on provisional measures reflect, in substantial terms, the above recommendations of the Commission’s proposal. What may be considered the point of divergence is the actual provision in the Recast. Whilst the Proposal sought a new strategy based on cooperation and communication between courts to enhance the effect of measures granted elsewhere in support of the main proceedings, the EU Parliament and Council seemed to have thought this new strategy superfluous. Thus, article 35 of the Recast retained exactly the same provisions as those of article 31 of Brussels I.

Contrarily, the proposed article 31 charged the national court with substantive jurisdiction, and the national court entertaining the request for interim measures, to “cooperate in order to ensure proper coordination between the proceedings as to the substance and the provisional relief.”⁹⁶ It specifically recommended that the court before whom the request is made should “seek information from the other court on

⁹¹ *Id.* at recital 22.

⁹² *Id.* at recital 25.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ COM (2010) 748 Final, *supra* note 47, at article 31.



all relevant circumstances of the case”⁹⁷

2. The Proposal on Choice of Court Contracts

Both the Proposal and the Recast, in plain language, promote and validate any unequivocal intention of parties to have their disputes settled by courts of their own choice in an exclusive choice of court agreement. However, the language employed in both documents is somewhat dissimilar.

Whereas, the Commission-proposed article 23 starts with the words “[i]f the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes...,” thus, deleting the words, “one or more of whom is domiciled in a Member State,” contained in article 23 of Brussels I; the corresponding new article 25 of the Recast interposes between “parties” and “have agreed” the phrase “regardless of their domicile.”⁹⁸ This phrasing may be interpreted as an intention to honor such agreements even if executed by non-EU parties. Although, it may also be interpreted as sanctioning such agreements regardless of domicile within the EU, it seems likely that the earlier conclusion was intended. First, the provision is not at variance with article 5(1) of the 2005 Hague Convention, a Convention that is wholly devoted to choice of court agreements.⁹⁹ Second, the words it replaced intended that the provision apply even where only one of the parties is domiciled in the EU. Extending that intention does not injure any would-be parties. Third, even if the proposed article 23 had been adopted without any of these alternative phrases; it in no way bars foreign parties from choosing a national court within the EU. Nor would it apply with any less vigor (presumably) in relations between parties wholly domiciled in the EU. Yet, the reverse conclusion should not be lightly dismissed.¹⁰⁰

As pointed out earlier, the Proposal and the Recast (articles 23 and 25

⁹⁷ *Id.*

⁹⁸ See Brussels I *bis*, *supra* note 1, at article 25.

⁹⁹ See Hague Convention, *supra* note 45 at art. 5(1).

¹⁰⁰ A similar phrase was used in article 22 (article 24 Recast) in what is again susceptible to two interpretations; it may mean that one or both parties are within the EU or are outside the EU. There can be no illegality or abuse of process in a non-resident party suing another non-resident in the EU if the latter have assets constituting the subject of proceedings is within the EU.



respectively), adapted article 5(1) of the Hague Convention. Both articles added the following words: “as to its substance,” and “as to its substantive validity,” respectively, to the original wording in article 5(1).¹⁰¹ Article 5(1) of the Hague Convention grants the chosen court exclusive jurisdiction, unless the agreement is null and void under the law of that State.¹⁰² The addition of “substance” and “substantive validity” may have been intended to make it more burdensome to contest the validity of the choice of court agreement. Thus, some mere procedural irregularity may be insufficient to overthrow such agreement. Support for this view may be found in the recitals relating to choice of court agreements—recitals 20–22—from which we can infer a strong resolve on the part of the EU Parliament to protect such agreements.¹⁰³

The EU Parliament and Council did not extend to arbitration agreements the same support they gave to choice of court agreements, or perhaps, found no necessity for doing so. They probably did not share the view that the problem of the arbitration-regulation interaction is best resolved from within the EU. It may be concluded that the Recast manifested a resolve not to legislate for arbitration. We may now consider the reverse side of the coin—a comparison of the Recast provisions with the main respondent positions.

V. STAKEHOLDER’S RECEPTION

The extensive consultations towards the recasting of Brussels I elicited responses from a broad spectrum of stakeholders and policymakers; this section focuses attention on how the Recast was received by these interest groups.

A. Further Comments on the Recast Legislation

Governments and organizations responded to the invitation to proffer suggestions on the way forward, as regards the areas that needed attention in

¹⁰¹ See Hague Convention, *supra* note 45, at art. 5(1).

¹⁰² *Id.*

¹⁰³ Article 20 reserves to the chosen national courts the exclusive jurisdiction to determine the validity of the agreement; article 21 seeks to avoid parallel proceedings and irreconcilable judgments by legislating an autonomous means of determining when an action could be deemed a *lis pendens*. Brussels I *bis*, *supra* note 1, at art. 20 & 21. Article 22 aims to effectively protect such agreements and avoid abusive litigation tactics, by making such exclusive choice of court contracts an exception to the *lis pendens* or priority rule. *Id.* at art. 22.



Brussels I. Within the context of their initial responses to the EU Commission's call for views, and the divergent opinions expressed; it is relevant to examine the reaction of these respondents to the new law, especially since it appeared that some respondents had shifted from their previous hard line stance.

1. Arbitration Under the Brussels I Recast

The Chamber of Arbitration of Milan (CAM) moved from its earlier 2009 position, which favored retention of the arbitration exclusion to the more liberal position of a partial deletion.¹⁰⁴ Azzali and De Santis suggested that this was due in part to the less pervasive and non-regulatory stance of the Commission's proposal, in contrast to its Green Paper.¹⁰⁵ They argued that the Proposal, which sought to introduce "a few rules of coordination," to address sundry difficulties arising from the arbitration-regulation interface, could achieve more than the Green Paper's dogmatic attempt to impose pervasive rules.¹⁰⁶ They suggested that the Proposal was "a compromise solution" between retention, and further expansion of the exclusion. The latter position they described as a clamor for the retention of anti-suit injunctions.¹⁰⁷

Another view commended the Proposal as a "balancing act" that keeps arbitration partially excluded while retaining some relevance in matters of jurisdiction under the Regulation; thus allowing for more certainty and clarity in the interplay of arbitration agreements with the Regulation.¹⁰⁸ Support for the Proposal is founded on provisions, which, *inter alia*, enjoined courts other than the arbitral seat court or arbitral tribunal to stay proceedings or decline jurisdiction once jurisdiction is challenged based on

¹⁰⁴ See CAM Position Paper, *supra* note 58.

¹⁰⁵ Stefano Azzali & Michela De Santis, *Impact of the Commission's Proposal to Revise the Brussels I Regulation on Arbitration Proceedings Administered by the Chamber of Arbitration of Milan*, in RECASTING BRUSSELS I: PROCEEDINGS OF THE CONFERENCE HELD AT THE UNIVERSITY OF MILAN ON NOVEMBER 25-26, 2011, 71, 73 (Fauso Pocar, et. al., eds. 2012), http://www.academia.edu/2970154/IMPACT_OF_THE_COMMISSION_S_PROPOSAL_TO_REVISE_THE_BRUSSELS_I_REGULATION_ON_ARBITRATION_PROCEEDINGS_ADMINISTERED_BY_THE_CHAMBER_OF_ARBITRATION_OF_MILAN. The authors, however, maintain that this new position represents their personal views.

¹⁰⁶ *Id.* at 77.

¹⁰⁷ *Id.* at 79.

¹⁰⁸ Bharat Saraf & Ashraf U. Kazi, *Analyzing the Application of Brussels I in Regulating E-commerce Jurisdiction in the European Union—Success, Deficiencies and Proposed Changes*, 29 COMPUTER L. & SECURITY REV. 127, ¶ 3.4.1 (2013).



an arbitration contract, as long as such proceedings have commenced in the proper forum.¹⁰⁹ Unfortunately, however, the Brussels I *bis* omitted these proposals.

As noted earlier, Brussels I *bis* did not extend the same priority it gave to forum selection clauses to arbitration contracts. Indeed, the very phrase “to avoid abusive litigation tactics,” used by the Recast in its recital 22 in support of choice of court contracts, was the exact phrase employed in recitals 19 and 20 of the Proposal dealing with forum selection contracts and arbitration agreements, respectively. But recital 12 of the Recast, addressing arbitration, did not reflect the above phrase or any alternatives that would convey a similar meaning.¹¹⁰ In addition, the article 1(2)(d) arbitration exemption retained the earlier terse and laconic reference to arbitration, as used in Brussels I. Thus, it was impossible to accommodate the proposed articles 29(4) and 33(3) in the Recast’s new article 1(2)(d), as the latter did not contain the Commission’s recommended derogation from the arbitration exception, as provided for in articles 29(4) and 33(3) of the Proposal.

The operation of the Regulation in the interaction between arbitration and the Regulation seemed to have left a *lacuna* that encouraged the use of tactical litigation practices aimed at either rendering the arbitration agreement ineffective or scuttling the arbitral process. As the CJEU had firmly closed the door against the use of anti-suit injunctions, we may wonder how well the substitute strategy introduced by the Recast is likely to function.

As seen earlier, the substitute safeguard is contained in recital 12 alone. One commentator considered the changes to Brussels I in relation to arbitration helpful,

¹⁰⁹ *Id.* According to Saraf and Kazi, the implication is that “courts cannot totally exclude arbitration.” They stated that the Proposal partially supports the *Marc Rich* decision. However, a further conclusion they inferred from the Proposal seems difficult to comprehend. They state that, “courts cannot entertain jurisdiction for interim reliefs or decide on the validity of anti-suit injunctions once an arbitral tribunal is appointed under the Regulation. This overrules the decisions of the ECJ in *Van Uden v. Deco-Line* and *Allianz SpA v. West Tankers*.” Although, this writer advocates “concentrated jurisdiction” in favor of the seat court, for both ancillary and supportive measures; it should be noted that nothing in the Proposal showed an intention to deprive other national courts of jurisdiction to grant interim measures. The second arm of the sentence is even more problematic. Did the authors mean that the Proposal presented an alternative to anti-suit injunctions? Whatever the authors had in mind, it is necessary to state that the Proposal neither sought to overrule the *West Tankers* decision nor to restore anti-suit injunctions, but to achieve the purpose of such injunctions through other means.

¹¹⁰ See Brussels I *bis*, *supra* note 1, at recital 12.



as having minimized “the scope for tactical litigation,” and providing protection for arbitration within the EU.¹¹¹ Another view reasoned that, although the amendments could significantly impact the arbitration-regulation area, it had clearly not introduced any radical changes—the arbitration exclusion remained in strict terms—but that on the contrary, it may still give rise to “jurisdictional clashes” within the Community.¹¹² This was the prevalent situation before efforts to review the Regulation commenced.

The non-prescriptive language (usual of EU legislative drafting), used in recital 12, paragraph 1 indicates that the Brussels I recast did not set out to achieve any radical result. Rather, the obvious intention was to maintain the exemption of arbitration matters from the Recast as much as possible. Unlike the Proposal, the Recast did not find it necessary to employ so many words to achieve this. Thus, in recital 12, paragraph 1, it merely repeated in a negative form what the New York Convention had positively provided for in its article II(3). However, the Recast provision went further than the New York Convention to give national courts the power to stay or dismiss proceedings; quite apart from the power to refer parties to arbitration. The Recast also granted national courts the power to examine the agreement in relation to validity “in accordance with their national law.” The EU Parliament and Council did not favor legislating exclusive jurisdiction to the seat court, preferring rather, that such matters be taken care of either by the New York Convention or by the CJEU.

By providing national courts with powers to also dismiss or stay the proceedings, it may be concluded that the Recast also envisaged exclusive jurisdiction in ancillary matters for seat courts, according to CJEU jurisprudence. This view is predicated on the fact that recital 12, paragraph 4 refers to ancillary matters. However, since such

¹¹¹ Sarah Garvey, *Reform of the Brussels Regulation: Are We Nearly There Yet?* ALLEN & OVERY, Apr. 26, 2013, <http://www.allenoverly.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx>. Garvey also viewed the amendments as having circumvented the difficulties imposed by the *West Tankers* decision.

¹¹² Deyan Draguiev, *Impact of Brussels I's Recasting on Arbitration: Putting Enforcement Problems on Statutory Basis* (Pt. I), KLUWER ARBITRATION BLOG, Feb. 23, 2013, <http://arbitrationblog.kluwerarbitration.com/2013/02/23/impact-of-brussels-is-recasting-on-arbitration-putting-enforcement-problems-on-statutory-basis-part-i/>.



a scenario could only be inferred as implied, it can only be done by the CJEU. Secondly, the words “in accordance with their national law,”¹¹³ suggests that the Recast legislation appreciated the reality of parallel proceedings, because where validity is determined according to each national law, different conclusions would doubtlessly result. The Recast makes allowance for this in subsequent paragraphs of recital 12, dealing with the recognition and enforcement of civil judgments *vis-à-vis* arbitral awards.

In recital 12, paragraph 2, the Recast deprived of recognition and enforcement any ruling by a national court regarding the validity of an arbitration agreement, whether or not such a decision was reached as a principal issue or incidental question.¹¹⁴ In contrast, recital 12, paragraph 3 extends recognition to a subsequent substantive judgment of the same court. However, the second half of paragraph 3 counterbalances the first by stating that recognition of such substantive judgments is “without prejudice to the competence”¹¹⁵ of other national courts to recognize and enforce arbitral awards by virtue of their contractual rights under the New York Convention. The purpose of this latter provision was confirmed by its concluding statement that the New York Convention takes precedence over the Recast. In summary, paragraph 3 implies that a parallel or subsequent arbitral award that is contrary to a judgment—being a judgment sequel to an invalidation of an arbitration agreement—is nevertheless enforceable within the territories of other member states by virtue of the “superior” New York Convention.¹¹⁶ It is to be noted, however, that

¹¹³ See *Brussels I bis*, *supra* note 1, at recital 12, ¶ 4.

¹¹⁴ This paragraph apparently supports the decision of the French Court of Appeal in *Republic of Iraq v. Fincantieri-Cantieri SPA*. *Republic of Iraq v. Fincantieri-Cantieri SPA*, Cour d'appel (CA) [regional court of appeal] Paris, June 15, 2006 (Fr.), http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=172. The Court of Appeal in Paris denied recognition and enforcement to an Italian Court of Appeal's declaratory judgment because that judgment did not decide the merits of the arbitration but merely decided a preliminary issue dealing with validity and scope of the arbitration agreement. The Paris Court presaged the vision of recital 12 ¶ 2, which intends to preserve the sanctity of arbitration agreements against adventurous litigants who tactically abort such contracts by bringing them before courts; such courts must then decide the validity and scope question, so as to determine their own jurisdiction.

¹¹⁵ See *Brussels I bis*, *supra* note 1, at recital 12, ¶ 3.

¹¹⁶ See *id.* at article 73(2) which expressly recognizes the precedence of the NY Convention in arbitration matters.



the reference is to arbitral awards, and not arbitral or court ordered measures; or to other contrary court rulings validating the arbitration agreement.¹¹⁷

Recital 12, paragraph 4 showed an intention to legislatively flesh out parts of the CJEU decision in the *Marc Rich* case. The implication is that ancillary matters were to be left under the jurisdiction of the arbitral seat court.¹¹⁸ Paragraph 4 further adds to the list of exempted arbitral matters the following: any action or judgment dealing with the “annulment, review, appeal, recognition or enforcement of an arbitral award.”¹¹⁹ This has the same positive implication for arbitration as does the second half of Paragraph 3. EU national courts would have the freedom to decide arbitral matters before them in keeping with their obligations under the New York Convention and other laws, i.e., national laws, or treaties; albeit, by virtue of article 73(3) of the Recast.

Regarding arbitration, therefore, we may conclude that: whereas, article 1(2)(d) of the Recast retained the exact provision as was under Brussels I, coupled with the above observations as derived from recital 12 in view; it is tempting to conclude that the Recast sought a general compromise. Such a compromise is reflected in the retention of the arbitration exemption, but with some amendments.¹²⁰ A careful scrutiny of the above provisions suggest that the retention of the terse article 1(2)(d), while discarding the Commission’s proposed articles 29(4) and 33(3), was aimed at preserving the arbitration exemption.¹²¹ Moreover, the rejected idea of exclusive

¹¹⁷ It is noteworthy also that under the UNCITRAL Model Law 1985 (as amended in 2006), such arbitral interim measures could be enforced as final awards; see, UNCITRAL Model Law, *supra* note 39, at arts. 17 (2) & 17H(1).

¹¹⁸ See Case C-190/89, *Marc Rich & Co AG v. Società Italiana Impianti, PA*, 1991 E.C.R., ¶19 I-03855; [1992] 1 Lloyd’s Rep 342 (ECJ). In ¶ 18 of the same judgment, the CJEU adverted to the fact that the drafters of the Brussels Convention deliberately excluded arbitration because the NY Convention had already provided for such matters. *Id.* ¶ 18; see also, *id.* ¶ 17 (stating views expressed by the group of experts in relation to the exclusion of arbitration).

¹¹⁹ See *Brussels I bis*, *supra* note 1, at recital 12, ¶ 4. See generally, Simon Camilleri, *Recital 12 of the Recast Regulation: A New Hope?* 62 INT’L & COMP L. Q. 899 (2013).

¹²⁰ The comments by Sarah Garvey viewed the new Recast as a compromise; Garvey thinks it may turn out to be a compromise that weighs more heavily against some respondents than others. See Garvey, *supra* note 111.

¹²¹ See AIA Submission, *supra* note 61.



jurisdiction for the seat court in arbitration matters by the Recast is an approbation of the view that opposes any preferential treatment for traditional arbitration seats within Europe.¹²²

The Recast legislation may have recorded only little success, depending on perspectives. By marking out boundaries beyond which the Regulation may not venture into arbitration, the Recast seemed to have avoided some of the controversies inherent in the arbitration-regulation interface. Thus, while the Recast did not provide for exclusive jurisdiction for seat courts, as suggested by Illmer and Steinbruck;¹²³ it also did not modify the article 1(2)(d) arbitration exemption—to accommodate the proposed amendments mentioned above—as hoped for by both authors.¹²⁴ In effect, the Brussels I bis plainly intended to continue the arbitration exemption.

While this may appear advantageous for arbitration, it should remain bothersome that one important problematic area—parallel proceedings—targeted by the review project, was left in no better position than it was previously. It was remarked in a recent case that the continued exclusion of arbitration from the Regulation could only give rise to conflicting judgments.¹²⁵ These conflicts can only exacerbate with the arrival of recital 12, which reinforced the powers of all national courts to rule on validity and scope issues. The resulting possible scenario may be summarized. A non-seat court, after invalidating an arbitration agreement, might proceed to decide the case on its merits. While its ruling invalidating the agreement is not recognized or enforceable under the Recast, its substantive judgment on the merits is. In addition, the arbitral tribunal may proceed and issue an award as such invalidation was not

¹²² The IBA had counseled that exclusive jurisdiction for seat courts should be restricted to ancillary measures only, etc. The Recast's refusal to legislate for arbitration sits well with the IBA's main position that the arbitration exception should remain; thus, making it unnecessary to examine its subsequent suggestions, see IBA Submission, *supra* note 58, at 311.

¹²³ See George, *supra* note 69, at 2 (providing a summary of Illmer and Steinbruck's position).

¹²⁴ *Id.*

¹²⁵ *National Navigation Co. v. Endesa Generacion Sa (The Wadi Sudr)*, [2009] EWHC 196 (Comm.), [2009] 1 CLC 393, ¶ 120. The *West Tankers* case should serve as an anecdotal example of this possibility. However, Justice Gloster may not so much have been advocating a change in the law as merely declaring the state of the law.



done by a court in the arbitral seat. The subsequent arbitral award would be enforceable by virtue of the New York Convention, and would as a result be binding in all EU jurisdictions, except the invalidating jurisdiction.

Under the Recast there is a risk of parallel arbitral and court proceedings, the fear of which could precipitate a race to strike first, i.e., the first to initiate proceedings. There could also be a race to secure enforcement, where enforcement is sought before a third national court. The neutral court would then have to choose between the competing arbitral award and the judgment on the merits. The choice becomes easier if enforcement is sought before the arbitral seat court, which would most likely favor the award, depending on its policy on arbitration. However, the risk of inconsistent and conflicting decisions remains.¹²⁶ The Recast may have, figuratively speaking, indicated a regulatory Maginot Line between arbitration and the Regulation; it remains to be seen whether that line would prove effective or follow the example of its French precursor.

2. Anti-Suit Injunctions: Alive or Dead?

The primary reason for the use of the English style anti-suit injunction is to avoid parallel proceedings or “torpedo actions” that threatens the international arbitral process as a universally recognized form of dispute resolution.¹²⁷ Such injunctions are deployed in order to ensure that the essential ingredients of arbitration—speed, efficiency and legal certainty—are not jeopardized.¹²⁸ According to one view, they are meant to act as counter measures against “abusive litigation tactics” and “parallel

¹²⁶ Alessandro Villani & Manuela Caccialanza, *The Proposal for Reviewing the Brussels Regulation and the New Regulation No. 1215/2012 after the West Tankers Decision: A New Step Back for Arbitration?* KLUWER ARBITRATION BLOG, May 30, 2013, <http://kluwerarbitrationblog.com/2013/05/30/the-proposal-for-reviewing-the-brussels-regulation-and-the-new-regulation-no-12152012-after-the-west-tankers-decision-a-new-step-back-for-arbitration>. The authors viewed the omission of the proposed article 29(4) as unlucky for the arbitration community.

¹²⁷ See M. Moses, *Arbitration/Litigation Interface: The European Debate*, 35 NW. J. INT'L L. & BUS. 1, 10 (2014), <http://scholarlycommons.law.northwestern.edu/njilb/vol35/iss1/1>.

¹²⁸ See Opinion of the Economic and Social Committee on the Green Paper, COM (2009) 175 Final (2010/C 255/08), (Sept. 22, 2009), ¶ 4.7.2. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C.2010.255.01.ENG&toc=OJ:C:2010:255:TOC>. The Committee's Opinion acknowledged that parallel proceedings could adversely affect a choice of court agreement, in terms of speed, legal certainty and efficiency. These three advantages, as well as the reduction of legal costs, are what the anti-suit injunction aims to achieve by discouraging parallel proceedings.



proceedings” which prevailed under Brussels I.¹²⁹ In view of the controversy that trailed the CJEU decision in *West Tankers*, what then is the position with regard to anti-suit injunctions with the passing of the Brussels I Recast?

If the *Marc Rich* case was partially confirmed, what is the position with *West Tankers*? Kiesselbach’s view that the Proposal had neutralized the effects of the *West Tankers* decision was quickly followed by a denial that it had reinstated the power to order anti-suit injunctions.¹³⁰ Di Brozolo was more specific. He asserted that the proposed (but rejected) article 29(4) essentially eliminated “the danger of parallel proceedings and abusive litigation and should put to rest the concerns of the orphans of anti-suit injunctions after *West Tankers*.”¹³¹ Di Brozolo was convinced that parties needed no longer to fear the derailing of their arbitration contracts by recalcitrant opponents as they had become equipped to forestall all such exigencies.¹³² The views of the above authors seem to imply that efforts were directed at avoiding situations that gave rise to the use of anti-suit injunctions, and not at reinstating their use.

Thus, it may be asked whether the Brussels I bis has effectively outlawed anti-suit injunctions? Another look at article 1(2)(d) and recital 12 of the Recast, considered in conjunction with the proposed but rejected article 29(4), shows that the Commission, Parliament, and Council, all agreed with the CJEU that anti-suit injunctions were illegal. At all events, nothing in the Recast suggests an intention to overrule the

¹²⁹ Delia Ferri, *An End to Abusive Litigation Tactics within the EU? New Perspectives under Brussels I Recast*, 1(1) IR. BUS. L. REV. 21, 24 (2013). Ferri signified that the CJEU nonetheless rejected the anti-suit injunction as an inappropriate counter measure. *Id.* at 24.

¹³⁰ See Kiesselbach, *supra* note 41. Kiesselbach also suggested that the Proposal had destroyed the ‘torpedo litigation’ tactics. *Id.*

¹³¹ See Di Brozolo, *supra* note 69, at 438.

¹³² *Id.* Di Brozolo had stated that: “It is not clear whether...the recast Regulation will revive the use of anti-suit injunction...” See also *Reform of Brussels I: An end to West Tankers and Endesa?* NORTON ROSE FULBRIGHT, Dec. 2012, <http://www.nortonrosefulbright.com/knowledge/publications/73789/reform-of-brussels-i-an-end-to-west-tankers-and-endesa>. This paper argues that the Recast did not save the anti-suit injunction, notwithstanding the clear intention to give arbitration a boost. See Juliette Huard-Bourgois and Swati Tripathi, *Recast Brussels Regulation: A Brighter Future for Arbitration in the EU?* KING & WOOD MALLESON, May 21, 2015, <http://www.kwm.com/en/de/knowledge/insights/recast-brussels-regulation-a-brighter-future-for-arbitration-in-the-eu-20150520>. See also Gilles Muller, *Comments on the CJEU Case ‘Gazprom’ OAO v Lietuvos Respublika*, TRANSNATIONAL NOTES, July 13, 2017, <http://blogs.law.nyu.edu/transnational/2017/07/comments-on-the-cjeu-case-gazprom-oao-v-lietuvos-respublika>.



decision in *West Tankers*, in so far as anti-suit injunctions are concerned. If *West Tankers* remains good law in this regard, then, it follows that such type of injunctions remains illegal within the EU. According to one view, the Recast, like Brussels I before it, elected to leave the question of anti-suit injunctions in the care of the CJEU.¹³³

In *West Tankers*, the CJEU reasoned that the New York Convention did not provide for the use of anti-suit injunctions to protect arbitration agreements. Recital 12 of the Recast seems to have adopted this conclusion.¹³⁴ However, there is nothing in the New York Convention to suggest that such injunctions (or any other legitimate alternative) may not be used to secure the sanctity of arbitration agreements, an aim that is central to the objectives of the New York Convention. That notwithstanding, EU national courts are bound by the decision of the CJEU in this regard. The reality that it is impossible to keep arbitration and the Regulation in parallel waters may tend to suggest that the Recast may not have brought settlement to this area.¹³⁵ However, not a few think that these problems are too minor and isolated to give cause for concern.¹³⁶ The Recast seemed to have partially hinged its rejection of a “European solution” to the interface problems on this view.¹³⁷

B. The CJEU’s *Gazprom* Decision

The *Gazprom*¹³⁸ decision is the latest development on the use of anti-suit

¹³³ Guido Carducci, *Validity of Arbitration Agreements, Court Referral to Arbitration and FAA § 206, Comity, Anti-Suit Injunctions Worldwide and their Effects in the E.U. Both Before and After the New E.U. Regulation 1215/2012*, 24 AM. REV. INT’L ARB. 515, 543–44 (2013). See generally Felix Wilke, *The Impact of the Brussels I Recast on Important Brussels Case Law*, 11 J. PRIV. INT’L L. 128 (2015).

¹³⁴ The simplicity of the NY Convention renders it susceptible to use as a malleable tool, see, Louise E. Tietz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 549; see also, Jack Graves, *Court Litigation over Arbitration Agreements: Is it Time for a Default Rule?* 23 AM. REV. INT’L ARB. 113, 122 (2012).

¹³⁵ Hess saw this as an illusion. See Burkhard Hess, *Should Arbitration and European Procedural Law be Separated or Coordinated?* CONFLICT OF LAWS.NET, Feb. 14, 2010, <http://conflictoflaws.net/2010/guest-editorial-hess-should-arbitration-and-european-procedural-law-be-separated-or-coordinated/>. Pedro Asensio asserted that the Recast did not engineer any “significant change” in the arbitration-regulation interface. See Pedro De Miguel Asensio, *El nuevo Reglamento Bruselas I bis*, Dec. 10, 2012, <http://pedrodemiguelasensio.blogspot.com/2012/12/>.

¹³⁶ See Di Brozolo, *supra* note 69 at 427; see also, the AIA Submission, *supra* note 61.

¹³⁷ Illmer, *supra* note 31, at 666. Illmer was of the view that once it surfaced, the interface problem of parallel proceedings presented enough challenges to afford the Commission’s Proposal a “strong support.” See *id.* at 647–70.

¹³⁸ Case C-536/13, “*Gazprom*” OAO v. Lietuvos Respublika, ECLI:EU:C:2015:316, [2015] 1 Lloyd’s Rep 610



injunctions, which was declared illegal by the CJEU in *West Tankers*, a decision that seems to have been approved by the Recast. In a nutshell, the CJEU held in *Gazprom* that an arbitral tribunal could order an anti-suit injunction against any parties before it, by virtue of the arbitration contract; and that this was not incompatible with the Regulation (or its decision in *West Tankers*), since such tribunals are not courts.¹³⁹ There were concerns expressed as to whether the Court had finally settled the issues arising from its earlier *West Tankers* decision in the *Gazprom* ruling. This was especially true, since in A-G Wathelet's view, the Case should have been decided under the Recast as recital 12 of the Recast correctly interprets article 1(2)(d), which the Recast did not amend; notwithstanding, the case was ultimately decided under Brussels I.¹⁴⁰ In addition, A-G Wathelet argued that recital 12 shows that arbitration matters, including court-ordered or arbitral-ordered anti-suit injunctions, were exempt from the scope of the Regulation.¹⁴¹

The CJEU, without reference to A-G Wathelet's Opinion, decided the case based on Brussels I.¹⁴² The court agreed that arbitral-ordered anti-suit injunctions were outside the scope of the Regulation, but it pointedly refused to decide whether the Recast approved court-ordered anti-suit injunctions, as suggested by A-G Wathelet.¹⁴³ The Court may have deliberately ignored this issue because it did not think the case was governed by the Recast.¹⁴⁴ On the other hand, its deliberate

(involving a reference from the Lithuanian Supreme Court).

¹³⁹ *Id.* ¶¶ 28, 36–39. Hartley wrote that arbitral-ordered anti-suit injunctions were outside the ambit of the Regulation, and were not covered by the *West Tankers* decision because arbitral tribunals lack the power to impose penalties. See Trevor Hartley, *The Brussels I Regulation and Arbitration*, 63 INT'L COMP. L. Q. 843 (2014).

¹⁴⁰ See Opinion of Advocate General Wathelet in Case C-536/13 “*Gazprom*” OAO v. Lietuvos Respublika delivered on Dec. 4, 2014, ECLI: EU:C:2014:2414, ¶ 91, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CC0536>. At the time, the Recast had not become operational.

¹⁴¹ *Id.* ¶¶ 137–41. The implication of that view was that recital 12 of the Recast reinstated anti-suit injunctions; this is a doubtful conclusion.

¹⁴² *Gazprom*, *supra* note 138, ¶¶ 41–44.

¹⁴³ *Id.* See Opinion of Advocate General Wathelet, *supra* note 140, ¶¶ 137–41.

¹⁴⁴ Some commentators think the *Gazprom* decision has left room for the possible overruling of *West Tankers* in the future. See, Stephen Lacey, *Are Anti-Suit Injunctions Back on the Menu? Part 2: The CJEU's Decision in Gazprom*, KLUWER ARBITRATION BLOG, May 14, 2015, <http://arbitrationblog.kluwerarbitration.com/2015/05/14/are-anti-suit-injunctions-back-on-the->



distinguishing of the facts in *West Tankers* from those in *Gazprom*, leads to the conclusion that it did not think recital 12 overruled *West Tankers*.¹⁴⁵ Thus, it appears that a court-ordered anti-suit order remains illegal within the EU.

It is not certain that the *Gazprom* decision has completely cleared the confusion (and addressed the dissatisfaction) that followed the *West Tankers* decision. One such potential problem is where for example, a party in breach of the arbitration agreement initiates an action in a jurisdiction that is not well disposed to arbitration as a dispute resolution mechanism.¹⁴⁶ However, it is certain that the arbitration-friendly jurisdictions would enforce such an arbitral award; at the very least, it would encourage courts in that jurisdiction to stay proceedings. The decision is, in all probability, a boost to arbitration within the EU, and a further clarification and amelioration of the effects of *West Tankers*, notwithstanding that it may not have smoothened out all the creases.¹⁴⁷

1. Choice of Court Agreements

Unlike the case with the arbitration exemption, the Recast seemed to have included a substantial portion of the suggested proposals on choice of court agreements. The fact that the EU is a signatory to the 2005 Hague Convention has reinforced the value of such agreements within the Community.¹⁴⁸ The similarities between choice of court contracts and arbitration agreements imply that whatever

menu-part-2-the-cjeus-decision-in-gazprom/?print=pdf. However, the deliberate efforts of the Court to distinguish both cases, and its reiteration of some important *ratio* in *West Tankers* seems to suggest the contrary. See, Victoria Clark, *Gazprom, Anti-Suit Injunctions and Arbitration: The Debate Goes On*, BRYAN CAVE LEIGHTON PAISNER, May 21, 2015 www.blplaw.com/expert-legal-insights/articles/gazprom-anti-suit-injunctions-arbitration-debate-goes/.

¹⁴⁵ *Gazprom*, *supra* note 138, ¶ 40. See also, Tobias Lutzi (Jan Von Hein ed.), *The Protection of Arbitration Agreements within the EU after West Tankers, Gazprom, and the Brussels I Recast*, CONFLICT OF LAWS.NET, Jul. 17, 2015, <http://conflictoflaws.net/2015/the-protection-of-arbitration-agreements-within-the-eu-after-west-tankers-gazprom-and-the-brussels-i-recast/>.

¹⁴⁶ See Darryl Kennard & Clare Hammersley, *Anti-Suit Injunctions—The CJEU Decision in Gazprom*, THOMAS COOPER, Jun. 25, 2015, www.thomascooperlaw.com/anti-suit-injunctions-the-cjeu-decision-in-gazprom/. The authors posited that clarity had not been achieved with the *Gazprom* decision.

¹⁴⁷ See Markus Burianski & Daniel Eckstein, *Focus on the Practical Consequences of the ECJ's Gazprom Decision*, WHITE & CASE, June 25, 2016, <https://www.whitecase.com/publications/article/focus-practical-consequences-ecjs-gazprom-decision>.

¹⁴⁸ The EU signed the Hague Convention on April 1, 2009; the US signed on to it on January 19, 2009, while Mexico had previously ratified and acceded to it on September 26, 2007.



strategy that works for one should equally work for the other, in a bid to discourage abusive litigation tactics. However, two realities pose a challenge to such binary application of strategies. First, arbitration is viewed as the inferior alternative to litigation in the dispensation of justice in some societies; secondly, it is a private (non-governmental) initiative.

Recitals 15 and 19, which introduced the Regulation's current policy towards choice of court agreements, expressly anchored it on respect for party autonomy. Recital 22 altered the normal *lis pendens* rule by the introduction of an exception whose aim was "to enhance the effectiveness of exclusive choice of court agreements and to avoid abusive litigation tactics."¹⁴⁹ The goal was simply to give the designated seat court priority over any other court(s), to determine the validity and scope of such agreements. Thus, the court of the seat may proceed with the case irrespective of the status or stage of the case in any other court, in much the same way as an arbitral proceeding may proceed notwithstanding a parallel court proceeding.

Article 25 of the Recast provides that where parties have agreed that a member state court(s) shall have jurisdiction over any disputes in the course of their business relations, such court(s) shall exercise such jurisdiction unless: (i) the agreement is null and void as to its substantive validity under the laws of that member state; and (ii) the agreement is *ipso facto* to be regarded as "exclusive" unless the parties have agreed otherwise. Taken together, article 25 and the above recitals evince the Recast's intention to vigorously enforce choice of court agreements, thus rendering abusive litigation tactics in this area unattractive.¹⁵⁰ However, whether there still remains a loophole to be exploited by opportunistic parties is a matter for the future.

There is no reason to suppose that the above strategy would not have ordinarily worked for arbitration if the arbitration exemption was deleted. The current state of affairs suggests that any future EU-based arbitration carries with it a potential three-

¹⁴⁹ See Brussels I bis, *supra* note 1, at recital 22.

¹⁵⁰ Lukasz Gorywoda, *The New Design of the Brussels I Regulation: Choice of Court Agreements and Parallel Proceedings*, 19 COLUM. J. EUR. L. ONLINE SUPPLEMENT 1 (2013), <http://www.law.columbia.edu/sites/default/files/microsites/journal-european-law/files/gorywoda.pdf>. Gorywoda saw the new provisions as "a move in the right direction." *Id.* at 5.



way fragmentation of jurisdiction, in which arbitrators share jurisdiction with seat courts and non-seat courts. On the other hand, the typical choice of court scenario would involve two national courts from different member states. Whatever reasons there are for retaining the arbitration exemption, the fact remains that absent the New York Convention, it would have been manifestly illogical to exclude arbitration agreements from the provisions of article 25. It must, therefore, be concluded that the Recast showed a stronger interest in protecting choice of court agreements than arbitration contracts.¹⁵¹

2. Provisional Measures in Support of Arbitration

Christian Heinze had commended the Commission's proposals on interim measures for a number of innovations aimed at improving their circulation, recognition and enforcement within the EU.¹⁵² One of these innovations dealt with what Heinze described as "a much clearer distinction between provisional measures issued by the court with substantive jurisdiction ("primary courts") and those from other courts ("secondary courts")—under article 35, Brussels I bis.¹⁵³ This distinction was reflected in recital 33 of the Recast, which describes the implications in terms of recognition and enforcement, for each group of measures. While measures by primary courts command recognition and enforcement throughout the EU, those from secondary courts have force only within the territory of the issuing court. Heinze further suggested the inclusion of the words in italics below, into the proposed article on provisional measures:¹⁵⁴

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if under the

¹⁵¹ According to Faye Wang, one of the Commission's proposed actions in its reform agenda for Brussels I was "to enhance the effectiveness of choice of court agreements and bring harmonization with the 2005 Hague Convention on Choice of Court Agreements...." Faye F. Wang, *Regulation of Internet Jurisdiction for B2B Commercial Transactions: EU and US Compared*, in *REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE*, 102, (Paulius Jurčys, et al., eds. 2013). Wang canvassed for such agreements to be "supported and encouraged" as they promote "legal certainty." *Id.* at 102–103.

¹⁵² Christian Heinze, *Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation* 75 *RABEL J. COMP. & INT'L PRIV. L.* 581, 607 (2011).

¹⁵³ *Id.*

¹⁵⁴ *Id.* The Commission's Proposal did in fact include this suggestion, but the final Recast provision found in article 35 did not include the words i.e., "or an arbitral tribunal."



Regulation, the courts of another Member State or *an arbitral tribunal* have jurisdiction as to the substance of the matter.¹⁵⁵

The italicized phrase was included in the Commission's proposed article 36 but was omitted in article 35 of the Recast. The Commission's proposal, outlining the power of a court with substantive jurisdiction to issue measures with an EU-wide circulatory effect (art. 35), was reflected in recital 33 of the Recast.

The following questions, therefore, arise in relation to the impact of the Recast on provisional measures in support of arbitration. First, because arbitration remains excluded from the Regulation to the extent described above, do the provisions dealing with provisional measures in the Regulation still apply to arbitration? Second, which court may now be considered the court with "jurisdiction as to the substance of the matter," as stated in recital 33 and article 35 of the Recast? Is it the court with jurisdiction to entertain requests for ancillary measures under recital 12, or is it the court which could decide questions of validity and scope of the agreement? Keeping in mind that under recital 12, all courts can now decide such questions and also grant supportive measures under the Regulation and the New York Convention; and that substantive jurisdiction rests in the arbitral tribunal—a fact taken for granted by the New York Convention and most national arbitration laws.¹⁵⁶ Third, is there an inference to be drawn from the provisions and recitals of the Recast that provisional measures could still be sought from national courts under the existing guidelines established by the CJEU?

It should be noted that unlike regular national courts that have general and specific jurisdictional powers under the Regulation (Chapter II, Sections 1–8 of the Recast), the provisions for arbitration are comparatively scant and vague. Moreover, we must also note that recitals differ from the main provisions; recitals only provide

¹⁵⁵ *Id.* at 608. Heinze also suggested the addition of the phrase to the CJEU's definition in the *Reichert* case, viz. "... from the court or *arbitral tribunal* having jurisdiction as to the substance of the case." *Id.* at 603. This suggestion was obviously meant to bring arbitral interim measures within the Regulation. See Case C-261/90, *Reichert v. Dresdner Bank AG*. [1992] E.C.R. I-02149, ¶ 34.

¹⁵⁶ Heinze also detected some ambiguity as to whether the court with jurisdiction as to the substance was that with jurisdiction on the merits under the Regulation, or that which by fact of being the court first seized, appropriated jurisdiction by virtue of the *lis pendens* rule. See Heinze, *supra* note 152, at 607 n.111. Heinze settled for the first possibility; citing the CJEU decision in *Van Uden* as support. *Id.*



the historical and policy reasons behind the main provisions.¹⁵⁷ According to one view, recitals are “subordinate to operative provisions”—they neither have the power to derogate from operative provisions, nor have they any operative effect by themselves.¹⁵⁸ Klimas and Vaiciukaite conclude that while recitals could be active in discerning the meaning and scope of an ambiguous provision, they are irrelevant where clear and unambiguous provisions are concerned. Recitals are also incapable of creating legitimate expectations of rights and obligations.¹⁵⁹ It may be concluded, therefore, that since the detailed provisions in the Recast relating to arbitration and interim measures appeared in its recitals—rather than in its operative sections—the intention was to deprive these provisions of the legal force the operative sections would have conferred upon them. We should bear this in mind as we consider the three questions posed above.

Answers to these questions would involve adopting one of two approaches. Either we assume that the Recast intended for CJEU case law to govern relations in places it is not overruled by the Recast, and that future CJEU intervention would remedy any lacunas; or we assume that the Recast intended that arbitration (including provisional measures in support) be *totally* excluded from the operation of the Recast. The former appears more likely the case than the latter, as the following analysis suggests.

With regard to the first question (do the provisions dealing with provisional measures in the Regulation still apply to arbitration?), since the Recast refused to recognize arbitral tribunals under article 35 as suggested by Heinze, we must conclude that it still intended that provisional measures in support of arbitration should be sought from national courts under article 35, as was hitherto the case. First, there is nothing in the provision that positively forbids this conclusion or that tends

¹⁵⁷ Although, recitals are a part of the Act, they only provide background information and reasons for the Act in “non-mandatory language.” See European Parliament, JOINT PRACTICAL GUIDE OF THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE COMMISSION FOR PERSONS INVOLVED IN THE DRAFTING OF EUROPEAN UNION LEGISLATION WITHIN, 31–32, §§ 10.1 & 10.5.1 (Office for Official Publications of the European Union 2015), <http://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf>.

¹⁵⁸ Tadas Klimas & Jurate Vaiciukaite, *The Law of Recitals in European Community Legislation*, 15 ILSA J. INT’L & COMP. L. 61, 82–83 (2008).

¹⁵⁹ *Id.* at 65, 89, 91–92.



to overrule the CJEU decisions that underscore this view, i.e., the *Marc Rich*, *West Tankers*, and *Van Uden* decisions. Second, when paragraphs 2 and 4 of recital 12 are read together, they suggest that while ancillary proceedings in relation to arbitration are excluded from the scope of the Recast; supportive and preliminary proceedings like interim measures are included in the scope of the Recast, in consonance with the *Marc Rich* and *Van Uden* decisions. Third, there is a good explanation as to why the Recast expressly stressed the exclusion of ancillary arbitral measures without a corresponding mention of supportive arbitral measures; this relates to the policy in favor of retaining the arbitration exclusion.

Adopting the same approach also helps answer the second question. Consistent with the *Marc Rich* decision, the seat court must be assumed to be the court with substantive jurisdiction—albeit, a quasi-substantive jurisdiction to the arbitral tribunal’s original jurisdiction—since it is the seat court that decides ancillary matters. To assume the contrary—that the reference is to the court that would have exercised jurisdiction in the absence of an arbitration agreement—would lead to the absurd conclusion that several courts were contemplated. Every other court could rule on validity and scope of the agreement; and having ruled the agreement invalid, such a court may then proceed to hear the case on its merits as a purely civil matter.

Recital 33 and article 35 envisage one court, not several courts, unless by some remote possibility it can be concluded that the Recast meant a national court, which having invalidated the arbitration contract now assumes *substantive* jurisdiction in the case. Such a tenuous possibility, however, would face the mountainous challenge of displacing a more probable conclusion; that the Recast could never have intended that measures in support of arbitration should not be sought from national courts. Had the Recast incorporated the Commission’s proposals into its recitals and main provisions, there would have been no doubts as to the court with substantive jurisdiction. There would then have been a seat court that not only decides on validity and scope, but that would also decide ancillary measures. Evidently, the seat court would then have been the court in reference under recital 33 and article 35.

The third question also invites the conclusion that a greater premium was placed on reinforcing the policy of excluding arbitration from the Recast. Hess had wisely



pointed out the flaw in the thinking that arbitration and the Regulation could be completely separated.¹⁶⁰ Looking therefore at the recitals and main provisions, their wordings appear to support the view that it was intended that CJEU jurisprudence should govern whatever interface issues remain between arbitration and the Regulation; especially in view of the terse but bluntly phrased exclusion in article 1(2)(d). From this perspective, especial reference could be made to recital 12, paragraph 4, recitals 25 and 33, article 1(2)(d) and article 35; all of which have at one point or the other come up for interpretation before the CJEU. In particular, recital 12, paragraph 4 is a legislative affirmation of the Court's ratio in *Marc Rich*. Moreover, it should be observed that the Commission's proposal and the Recast did not find it useful to give another "autonomous" definition for provisional measures; preferring instead to retain that given by the CJEU in the *Reichert* case.¹⁶¹

3. The Future of Provisional Measures in Support of Arbitration

The picture depicted above shows that the problems associated with the deployment of interim measures in aid of international arbitration will endure into the foreseeable future. The Brussels I bis viewed arbitration and provisional measures as if they are mutually exclusive, due to its desire to maintain the arbitration exemption. One effect of this is that for arbitral tribunals to be able to issue provisional measures that could have EU-wide enforceability, it must be rendered as a partial award,¹⁶² depending on where it is to be enforced, and whether or not it is competing with a contemporaneous court judgment on the merits. This is because whereas a national court judgment on the merits rendered after the invalidation of the arbitration agreement remains inferior to a final award of an arbitral tribunal in

¹⁶⁰ See Hess, *supra* note 135.

¹⁶¹ Case *Reichert*, *supra* note 155, ¶ 34; see also, Van Uden Maritime, *supra* note 8, ¶ 37 (where the CJEU re-echoed the definition).

¹⁶² Article III of the NY Convention enjoins recognition and enforcement of arbitral awards by contracting states, but it made no reference to provisional measures. NY Convention, *supra* note 5, at art. III. However, under article 17(2) of the Model Law, interim measures may be couched as orders or awards. UNCITRAL Model Law, *supra* note 40, art. 17(2). Recital 12 recognizes the priority of only arbitral awards, by virtue of the NY Convention, unless we have recourse to recitals 35 and 36, which refer to prior "international commitments" and "bilateral conventions and agreements." Brussels I bis, *supra* note 1, at recital 12. While the Model Law is not a convention, it may qualify as an international commitment.



all jurisdictions save that which invalidated the contract. A provisional measure order from the same tribunal will not enjoy the same status because the Recast did not accord such measures any priority over court judgments.

With the disappearance of the *exequatur* procedure, if the idea of cooperation between courts, mooted in the Commission-proposed article 35, is pursued to favor the enforcement of measures issued by the seat court, it would ensure an easier circulation of provisional measures in support of arbitration. Modern information technology could enhance such cooperation and the general management of arbitral proceedings, thus making it easier to pursue arbitration and supportive measures within the same territory; in other words, in the same forum, i.e., a “concentrated jurisdiction.”¹⁶³

On the contrary, it may be argued that privileging the seat court in this manner is contrary to the provisions of the New York Convention and the Model Law. But that argument may be countered by simply recalling that the underlying objective of these international norms is to preserve the sanctity of arbitration agreements.¹⁶⁴ The principle of party autonomy underlying all contractual rights demands no less from policy makers. Thus, national courts are therefore important to the success of international arbitration. In the EU, for instance, arbitral tribunals have not the same status as regular courts.¹⁶⁵

Lastly, it should be noted that the idea of a “concentrated jurisdiction” is not

¹⁶³ See Marketa Trimble, *GAT, SOLVAY, and the Centralization of Patent Litigation in Europe*, 26 EMORY INT'L L. REV. 515, 516–17 (2012). Trimble concedes that this idea is, at least, theoretically possible. *Id.* at 516. Nevertheless, this paper argues that the mutual off-shore facilitation of arbitration across national frontiers of an integrated market like the EU would be immensely beneficial.

¹⁶⁴ See NY Convention, articles II (1) & (3).

¹⁶⁵ For instance, arbitral tribunals are unable to exercise the rights of referral to the CJEU, as such can be done by national courts. See Case C-102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] E.C.R. I-01095, ¶¶ 10 & 13. One view suggests that this could be circumvented by parties instigating an *amicus curia* brief through the Commission. See Emanuela Lecchi & Michael Cover, *Arbitrating Competition Law Cases* 74 (1) ARB. 70–71 (2008). Cf. with, Assimakis P. Komninos, *Assistance to Arbitral Tribunals in the Application of EC Competition Law*, in EUR. COMPETITION L. ANN. 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW, 361 (Claus-Dieter Ehlermann & Isabela Atanasiu, eds. 2003). While Komninos rejected the view that arbitral tribunals should have direct access to the CJEU; he suggested that a tribunal-originated reference could be indirectly routed through a national court, by virtue of the latter's review functions. *Id.* at 368–70.



entirely novel, as it has been suggested as a viable alternative to multi-court litigation in the resolution of patent disputes.¹⁶⁶ Just like arbitration, patent litigations are not limited to simple infringement actions, but include challenges to validity and declaratory actions, which are aimed at pre-empting, stalling or otherwise legitimately defending the main infringement action. As with Arbitration, most of these actions are diversionary and tactical in nature. Their main goal is to abort the main action.¹⁶⁷ Trimble saw the concentration of patent litigations in one or a few national courts as a possible way out, and in some cases, as a better alternative to a unified patents court.¹⁶⁸

VI. CONCLUSION

This article examined the amendments affected by the new Brussels I bis in the areas of arbitration, provisional measures, and choice of court agreements. The paper attempted a forecast of how the revisions would impact arbitration and interim measures in support of arbitration. The choice of court contract provisions were used to highlight the contrasting attention received between that area and the arbitration and provisional measures areas.

Considering the above discussions, the article concludes that while the Recast achieved substantial improvements in the area of choice of court agreements, this was not the case with arbitration and provisional measures. The implication is that problems related to parallel proceedings, the use of tactical litigation to abort arbitral proceedings, lack of a clear demarcation at the intersection between arbitration and the Regulation, etc., would all remain potential problem areas.

The research revealed that it was difficult for the new law to provide the direction expected of it because of the multivariate interests to be accommodated. The underlying tension between the two major legal traditions in the EU, which differ

¹⁶⁶ See Trimble, *supra* note 163 at 515, 516–17.

¹⁶⁷ Marta P. Sender, *Cross-border Injunctions in Patent Litigation: Ingenious Tactics or Misuse of Private International Rules?* 37 JURA FALCONIS 505 (2000-2001), <https://www.law.kuleuven.be/apps/jura/artikels/jaargang/37>.

¹⁶⁸ See Trimble, *supra* note 163, at 515, 516–17. Trimble argues that even the possibility of a unified (European) Patent court, does not affect this view, as not only would this take time to fructify, but also that such a single court would be unable to deal with all the problems of patent owners. *Id.* at 516.



markedly in their approaches to private and procedural law, is a significant contributory factor. Against the thinking that these problems are too minor to be a cause for concern, there is evidence that these areas have generated enough debates and disagreements as to merit adequate attention.¹⁶⁹

With arbitration issues more likely to proliferate as international trade expands, and more reliance placed on arbitral dispute resolution, the Recast Regulation should have gone further than it did to provide direction in the arbitration and provisional measures areas. Simply deferring to the NY Convention may not suffice in the long run.¹⁷⁰

While the recent CJEU decision in *Gazprom* provides a respite and some small comfort to the arbitration community within the EU, it has clearly not addressed all the potential trouble spots in this area. Much remains to be resolved.

¹⁶⁹ See Magnus & Mankowski, *supra* note 71, at 8. Cf. Andrew Dickinson, *Brussels I Review—Online Focus Group*, CONFLICT OF LAWS.NET, June 8, 2009, <http://conflictoflaws.net/2009/brussels-i-review-online-focus-group/?print=pdf>. Dickinson expressed the view that the CJEU was “insensitive to the traditions and methods of the common law.” *Id.* Such sentiments seem to encourage and swell the ranks of the “euro-skeptics” in England, who think that their long-term interests are best secured outside the EU; and lead to the conclusion that some stakeholders in the EU are dissatisfied with not just the arbitration exception, but also with some other aspects of the Union. See Anatole Kaletsky, *Will Britain Really Leave the European Union?* REUTERS, Jan. 16, 2014, <http://blogs.reuters.com/anatole-kaletsky/2014/01/16/will-britain-really-leave-the-european-union/>. The British electorate voted to exit the EU in a referendum on June 23, 2016 (known as ‘Brexit’). With the British disengagement from the EU well under way, it is tempting to wonder whether the reasons adduced by Dickinson above is among the factors that led to this rather unfortunate decision; and which in all respects, marks the entrance of a new British foreign policy. On Brexit, see Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS, Nov. 10, 2016, www.bbc.com/news/uk-politics-32810887. Similar disenchantment with the decisions of the ECtHR have led to moves aimed at replacing the European Rights Act 1998 with a British Bill of Rights, see *id.*; see also, Lord Kerr, *The Conversation between Strasbourg and National Courts—Dialogue or Dictation?* (2009) 44 IR. JURIST 1 (2009). For further discussions on the arbitration-regulation interface problems, and the Recast Regulation, see Louise Wilhelmsen, *European Perspectives on International Commercial Arbitration*, 10 J. PRIV. INT’L L. 113 (2014).

¹⁷⁰ The English authors, Merkin and Flannery criticized the Recast for missing “[A] golden opportunity to rectify the problems of the 2001 Regulations....,” See ROBERT MERKIN & LOUIS FLANNERY, *ARBITRATION ACT 1996*, 283 (5th ed., Routledge 2014). They described the recitals section of the Recast as “confusing,” “internally inconsistent” and “ambivalent.” *Id.* at 285. Cf., Philip Clifford & Oliver Browne, *Reform of the Brussels Regulation—Latest Developments and the “Arbitration Exception,”* LATHAM & WATKINS, Apr. 2013, 5, www.lw.com/thoughtLeadership/Reform-of-the-Brussels-Regulation. The authors posited that the Recast “has met with positive reception” because it has improved “legal certainty” in the arbitration area and would prevent “abusive litigation tactics.”



PATRICK IKE IBEKWE, is a qualified attorney in Nigeria, whose practice interests was in the areas of litigation, corporate and commercial matters. After obtaining his LL.B. from the University of Nigeria, Nsukka (1990), and his B.L. (Barrister at Law–1992); he further acquired a Master in International Law and Diplomacy (M.I.L.D.) from the University of Lagos in 1994. After some years in practice, Ike Ibekwe left Nigeria for Dublin-Ireland where he obtained an LL.M. (Research – Commercial Law) and a Ph.D. in international arbitration, both from the University College Dublin – Ireland. Ike Ibekwe is currently a lecturer at the College of Law, Afe Babalola University–Ado Ekiti, Nigeria, where he lectures graduate and undergraduate students in international commercial arbitration, commercial law, contract, and insurance law.

**NOTE:
TO DOMESTIC COURTS WORLDWIDE:
HERE IS WHY YOU CAN DISREGARD THE AUGUST 2018 PARTIAL AWARD
FROM THE HAGUE, NETHERLANDS IN THE CHEVRON-ECUADOR
LITIGATION**

by Lorena Guzmán-Díaz

I. INTRODUCTION

The complexities of the Chevron-Ecuador litigation have enthralled the minds of both scholars and journalists since the dispute began in 1993. Not only has the case challenged courts globally, it has also transfixed the world through headlines fraught with allegations of bribery, fraud, and judicial corruption.¹ The vast canon of literature on this case is testament to the broad scope and far-reaching ramifications of Chevron's and Ecuador's history.² This Note examines the Chevron-Ecuador litigation through a specific lens: It dissects and critiques a partial award rendered by an international tribunal at the Permanent Court of Arbitration in The Hague, Netherlands, on August 30, 2018 ("Partial Award"), as well as discusses the implications of that award on investor-state dispute settlement (ISDS) system. Therefore, this Note is uniquely addressed to the domestic courts worldwide faced with this dispute, and it urges the courts to disregard the tribunal's Partial Award.

Multiple courts worldwide³ have heard the decades-long, multi-billion-dollar case between Chevron Corporation ("Chevron" or "Claimant") and the Ecuadorian

¹ See Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador*, 1 STAN. J. COMPLEX LITIG. 429, 438 (2013) (introducing the Chevron-Ecuador litigation as "the largest, and allegedly one of the most controversial court cases in the history of Ecuador").

² *Id.* at 433. See, e.g., Damira Khatam, *Chevron and Ecuador Proceedings: A Primer on Transnational Litigation Strategies*, 53 STAN. J. INT'L L. 249, 251 (2017) (noting that this dispute has been the subject of countless television highlights, newspaper clippings, and law review articles). See generally PAUL M. BARRETT, *LAW OF THE JUNGLE: THE \$19 BILLION LEGAL BATTLE OVER OIL IN THE RAIN FOREST AND THE LAWYER WHO'S STOP AT NOTHING TO WIN* (2014); MICHAEL GOLDBABER, *CRUDE AWAKENING: CHEVRON IN ECUADOR* (2014); JUDITH KIMERLING, *AMAZON CRUDE* (Susan S. Henriksen, ed. 1991).

³ See Gómez, *supra* note 1, at 449 (Argentina, Brazil, Canada, and the United States). See also *infra* Section II.A (discussing Chevron's history in Ecuador).



plaintiffs from Lago Agrio (“Plaintiffs” or “Respondent”).⁴

The Plaintiffs have traversed the globe⁵ chasing Chevron’s assets since Judge Zambrano-Lozada of the Ecuadorian Provincial Court of Justice of Sucumbios rendered a judgment in favor of the Ecuadorian villagers on February 14, 2011 (“Ecuadorian Judgment”).⁶ Since 2012, the Plaintiffs have been petitioning domestic courts worldwide to recognize and enforce the \$9.5 billion Ecuadorian judgment against Chevron’s subsidiaries to achieve restitution for the effects of the pollution left behind in the Lago Agrio region of the Ecuadorian amazon.⁷ This pollution was the result of nearly 30 years of oil operations⁸ spearheaded by Texaco Petroleum (Texaco), Chevron’s subsidiary, in partnership with Petroecuador, Ecuador’s state-owned oil company.⁹

Canada is the most recent State to hear the Chevron-Ecuador litigation.¹⁰ As such, this Note traces how the Chevron-Ecuador litigation unfolded in Canada to highlight the proceedings other domestic courts around the world may encounter. On May 23, 2018, the Ontario Court of Appeals affirmed the Superior Court’s 2017 finding that Chevron Corporation and Chevron Canada Limited “were two distinct legal entities”

⁴ See Chloe A. Snider & Honghu Wang, *The Latest Development in Yaiguaje v. Chevron Corporation – The Court of Appeal for Ontario Refuses to Pierce the Corporate Veil*, DENTONS, June 29, 2018, https://www.dentons.com/en/insights/alerts/2018/june/27/the-latest-development-in-yaiguaje-v-chevron-corporation#_ftn4. See also Colin Perkel, *Court Rules Chevron Canada doesn’t have to pay US \$9.5 billion to Ecuador villagers*, THE GLOBE AND MAIL, May 23, 2018, <https://www.theglobeandmail.com/business/industry-news/energy-and-resources/article-court-rules-chevron-canada-doesnt-have-to-pay-us95-billion-to>.

⁵ See Gómez, *supra* note 1, at 449.

⁶ Maria Aguinda v. Chevron Corp., Sentencia definitiva, Corte Provincial de Justicia Sucumbios [Provincial Court of Justice of Sucumbios], Sala Única, Febrero 14, 2011, file 2003-002, at 187 (Ecuador), available at <https://chevronecuador.org/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf> (original February 2011 Ecuadorian Judgment in English).

⁷ Gómez, *supra* note 1, at 449.

⁸ See Megan L. Mah, *An End to The Enforcement Saga? Yaiguaje v. Chevron Corporation and the Preservation of the Corporate Veil*, WEIRFOULDS LLP, May 30, 2018, available at <http://www.weirfoulds.com/Yaiguaje-v-Chevron-Corporation-and-the-Preservation-of-the-Corporate-Veil> (explaining the “extensive environmental pollution” surrounding “oil exploration and extraction” projects were “undertaken in the Oriente region of Ecuador from 1964 to 1992”).

⁹ See Jason MacLean, *Chevron Corp. v. Yaiguaje: Canadian Law and the New Global Economic and Environmental Realities*, 57 CAN. BUS. L.J. 367, 369-70 (2016).

¹⁰ *Id.* at 368 (underlining the historical facts of Chevron in Ecuador from 1964 until 1992).



and that one could not be held liable for the other's debts.¹¹ On April 4, 2019, the Canadian Supreme Court dismissed the Ecuadorian Plaintiffs' leave to appeal from the Court of Appeals' judgment.¹² Contemporaneously, this same Ecuadorian Judgment was scrutinized by an international tribunal administered by the Permanent Court of Arbitration (PCA) in The Hague, Netherlands.¹³ On August 30, 2018, the tribunal rendered its Partial Award,¹⁴ under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules¹⁵ in favor of Chevron. The tribunal found that the Republic of Ecuador, "by the acts of its judicial branch ... violated its obligations under Article II(3)(c) of the [United States-Ecuador Bilateral Investment] Treaty, thereby committing international wrongs towards each of Chevron and TexPet."¹⁶ The Award also addressed the 2011 Ecuadorian Judgment, stating that "no part of the said Lago Agrio Judgment should be *recognized or enforced* by *any* State with knowledge of the Respondent's said denial of justice."¹⁷

¹¹ See *Yaiguaje v. Chevron Corp.*, 2018 ONCA 472 (Can.) (latest development in Canada). See also *Yaiguaje v. Chevron Corp.*, 2017 ONSC 135, 136 O.R. (3d) 261 (Can.) (Ontario Superior Court decision ruling against the Ecuadorian Plaintiffs' arguments for piercing the corporate veil). The Superior Court found that because Chevron and Chevron Canada were separate legal entities, "the latter could not be held liable for the debts of the former."

¹² *Yaiguaje et al. v. Chevron Corp.*, 2019 SCC 1, 2 [2019] No. 38183 (Can.).

¹³ *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, Permanent Court of Arbitration, Second Partial Award on Track II (Aug. 30, 2018) [hereinafter "Partial Award"], available at <https://pca-cpa.org/en/cases/49> (latest decision from tribunal in The Hague).

¹⁴ See Press Release, *International Tribunal Rules for Chevron in Ecuador Case*, MARKET WATCH, Sept. 7, 2018, available at <https://www.marketwatch.com/press-release/international-tribunal-rules-for-chevron-in-ecuador-case-2018-09-07-221595215> (summarizing the tribunal's proceedings and the latest partial award).

¹⁵ The tribunal conducted the arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. See UNCITRAL Arbitration Rules (1976), art. 32(1) [hereinafter "UNCITRAL Arbitration Rules"] (defining arbitral awards) ("In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards."). See generally, John D. Franchini, *International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement*, 62 FORDHAM L. REV. 2223, 2223-29 (asserting that the UNCITRAL rules were developed "to arbitrate international trade disputes between countries with different legal, social, and economic systems"); Charles B. Rosenberg, *Challenging Arbitrators in Investment Treaty Arbitration – A Comparative Law Approach*, 27 J. INT'L ARB. 505, 510-12 (2010) (illustrating ad hoc arbitration under the UNCITRAL Arbitration Rules) ("To avoid the expense of institutional arbitration, many parties opt for ad hoc arbitration, often conducted under the [UNCITRAL] Arbitration Rules. The UNCITRAL Rules are a comprehensive set of procedural rules covering all aspects of the arbitral process.").

¹⁶ Partial Award, *supra* note 13, ¶ 8.8, at 476.

¹⁷ *Id.* at 515 (emphasis added).



As the Plaintiffs continue to pursue enforcement of the Ecuadorian Judgment around the world, the tribunal's Partial Award sets forth critical implications that domestic courts worldwide must examine. Part II of this Note is divided into four background sections. Section A provides a brief overview of Chevron-Ecuador litigation and its procedural background, including a notable 2011 US decision. Section B traces the Ecuadorian Plaintiffs' recognition and enforcement attempts of the Ecuadorian Judgment in Canadian courts to depict what other courts may confront. Section C discusses the framework and scope of the investor-State dispute system, in addition to the relevant law. Section D examines the most recent development in this complex transnational dispute—a Partial Award rendered on August 30, 2018 by an arbitral tribunal in The Hague. Next, Part III dissects the tribunal's August 2018 Partial Award and analyzes the implications of the tribunal's ruling on: (1) the framework and scope of ISDS and (2) the case before domestic courts globally. Furthermore, Part III presents national courts with a solution for whether the Ecuadorian Plaintiffs should be permitted to collect from Chevron's subsidiaries' assets.

This Note illustrates why the tribunal's August 2018 Partial Award rendered in The Hague should be rejected—in short, it is an over-broad international anti-enforcement injunction masqueraded as an arbitral award.

II. BACKGROUND

The US Court of Appeals for the Second Circuit wrote, “[t]he story of the conflict between Chevron and residents of the Lago Agrio region must be one of the most extensively told in the history of the American federal judiciary.”¹⁸ This statement from the Second Circuit resonates in numerous jurisdictions and domestic courts. Even before the naissence of the Chevron-Ecuador litigation more than 20 years ago, Chevron and Ecuador had over three decades of tumultuous history that compounded this transnational conflict.

¹⁸ See *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d. Cir. 2012) (reversing Judge Kaplan's 2011 decision, which granted Chevron an anti-enforcement injunction). See also Maya Steinitz & Paul Gowder, *Transnational Litigation as a Prisoner's Dilemma*, 94 N.C. L. REV. 751, 779 (2016) (quoting the Second Circuit's decision reversing earlier ruling granting an anti-enforcement injunction).



A. *The Chevron-Ecuador Litigation: An Overview*

The Chevron-Ecuador litigation stems from pollution and environmental damage to the rivers and rainforests of Ecuador.¹⁹ From 1964 to 1992, Chevron's corporate predecessor,²⁰ TexPet, and Ecuador's national oil company, Petroecuador, developed exploration and oil extraction operations in the Oriente region of the Amazonian forest. Chevron inherited the suit when it merged with Texaco in 2001.²¹ Although the oil development projects stopped in 1992, the remaining residents in the Lago Agrio Region of the Oriente suffered lasting health epidemics.²² The nearly 30 years of excavation projects resulted in grave oil contamination, loss of natural resources, dislocation, extinction of indigenous groups, and loss of sovereignty.²³

In 1993, the Lago Agrio Plaintiffs²⁴ filed a class-action lawsuit in the US District Court for the Southern District of New York²⁵ claiming a serious public health crisis,

¹⁹ Steinitz & Gowder, *supra* note 18, at 779.

²⁰ See MacLean, *supra* note 9, at 368 (identifying that Texaco Petroleum Company was Chevron's subsidiary). See generally Andrew Ross Sorkin & Neela Banerjee, *Chevron Agrees to Buy Texaco For Stock Valued at \$36 Billion*, N.Y. TIMES, Oct. 16, 2000, <https://www.nytimes.com/2000/10/16/business/chevron-agrees-to-buy-texaco-for-stock-valued-at-36-billion.html> (reporting Chevron's intent to acquire Texaco).

²¹ Press Release, FTC Consent Agreement Allows the Merger of Chevron Corp. and Texaco, Inc., Preserves Market Competition, Federal Trade Commission, Sept. 7, 2001, <https://www.ftc.gov/news-events/press-releases/2001/09/ftc-consent-agreement-allows-merger-chevron-corp-and-texaco-inc> (commenting on the Chevron-Texaco merger). See, e.g., Juan Forero & Steven Mufson, *Chevron Alleges Bribery in Ecuador Suit*, WASH. POST, Sept. 1, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/31/AR2009083103542.html?noredirect=on> (mentioning that Chevron acquired Texaco in 2001); Gómez, *supra* note 1, at 432 (contending that Chevron became involved "in the litigation based on its successor liability stemming from Chevron's acquisition of all of Texaco's assets in 2001").

²² See Khatam, *supra* note 2, at 253 (illustrating the various health problems—skin rashes, memory loss, headaches, miscarriages, birth defects, cancer). See also Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413, 466 (2006) (identifying the numerous public health concerns after the region's contamination).

²³ See Khatam, *supra* note 2, at 252 (discussing the devastating consequences of the pollution on the Oriente residents). See also Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 457 (2007) (establishing that the "[c]ontamination through oil spills and discharge of the 'produced water' destroyed fish, animal[,] and plant lives for hundreds of miles").

²⁴ See Khatam, *supra* note 2, at 254 (specifying that the Plaintiffs were a group of "seventy-six Ecuadorian and twenty-three Peruvian citizens on behalf of the ... 30,000 residents" of the Amazonian region). See also *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002) (case enjoining two class-action lawsuits brought by the Lago Agrio Plaintiffs).

²⁵ See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002) (recognizing that a group of Ecuadorian



environmental concerns, and additional tort claims. However, the suit was dismissed on grounds of *forum non conveniens* and international comity.²⁶ As part of the dismissal, Texaco agreed to submit to the jurisdiction of the Ecuadorian courts.²⁷ By 1995, TexPet “proposed a limited remediation plan to address slightly over one-third of the oil sites but included no obligations to clean up the well and separation sites or any degraded waterways, and no obligations to provide medical treatment to affected local residents.”²⁸ That same year, Ecuador executed the Settlement Agreement²⁹ between Chevron, Petroecuador, and Ministry of Energy and Mines,³⁰ where Chevron gave \$40 million “for environmental remediation”³¹ of the polluted area. This multi-million-dollar plan was meant to satisfy all reparations to the affected areas, as well as to preclude the possibility of future claims against Texaco. However, in 2003, the Ecuadorian Plaintiffs filed their case in Ecuador and asserted their “collective right to a healthy environment” under the Environmental Management Act of 1999 (EMA).³² Under EMA, the Lago Agrio Plaintiffs represented the affected indigenous

plaintiffs and Maria Aguinda Salazar “filed a class action against Texaco in the South District of New York advancing claims under the ATCA [Anti-Tort Claims Act]”. See also Steinitz & Gowder, *supra* note 18, at 780 (offering background information on the US court proceedings).

²⁶ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001). See, e.g., *Chevron Corp. v. Naranjo*, 667 F.3d 232, 243–44 (2d. Cir. 2012) (“A decision by a court in one jurisdiction, pursuant to a legislative enactment in that jurisdiction, to decline to enforce judgment rendered in a foreign jurisdiction necessarily touches on international comity concerns.”); MacLean, *supra* note 9, at 368 (facilitating historical background on Texaco’s history in the Amazonian rainforest before the start of the dispute in 1993).

²⁷ Khatam, *supra* note 2, at 255 (citing *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 538 (S.D.N.Y. 2001)). See *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (Chevron agreed to jurisdiction in Ecuador).

²⁸ See Khatam, *supra* note 2, at 253 (citing Barrett, *supra* note 2, at 56).

²⁹ Settlement Agreement and Release among the Government of Ecuador, PetroEcuador, PetroProducción, PetroComercial, and TexPet, Nov. 17, 1005. See Khatam, *supra* note 2, at 254 (highlighting that in 1998, the government of Ecuador “executed the Final release absolving TexPet from liability for environmental impact” during their time in the Lago Agrio region). See also *Chevron Corp. v. Ecuador*, Permanent Court of Arbitration, Claimants’ Notice of Arbitration, 4–6 (Sept. 23, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf (declaring that Texaco was no longer liable for the environmental damage after completion of the Settlement Agreement).

³⁰ See Gómez, *supra* note 1, at 436 (“In September of 2008, the government of Ecuador issued a final release to Texaco, thereby putting an end to any possible reclamations arising out of the consortium activities.”).

³¹ See MacLean, *supra* note 9, at 369 (outlining that Texaco entered into the Settlement Agreement while enforcement proceedings were underway in the US).

³² Gómez, *supra* note 1, at 433; Ley No. 37. RO/245 de 30 de Julio de 1999, Environmental Management Act of 1999 (Ley de Manejo Ambiental de 1999) (Ecuador) [hereinafter “EMA”].



communities, as opposed to seeking remedies for the individual injuries “inflicted on their own bodies or property.”³³ Thus, any remedy that resulted from the litigation would benefit the community, rather than the parties involved.³⁴ After eight years of litigation, Judge Zambrano-Lozada rendered a judgment against Chevron,³⁵ finding Chevron liable for \$9.5 billion. In 2016, Ecuador’s Constitutional Court upheld the Provincial Court’s ruling against Chevron, making it the highest court in the State to affirm the 2011 Judgment.³⁶

Since the favorable ruling in 2011, the Plaintiffs have targeted Chevron’s assets around the globe in an effort to recognize and enforce the Ecuadorian Judgment.³⁷ As Chevron did not have any assets in Ecuador, the Plaintiffs shifted their focus to Brazil, Argentina, Canada, and the United States.³⁸ The proceedings in the United States and Canada are the most relevant to the scope of this Note.

1. Enforcement in the United States and Anti-Suit Injunctions

After the Provincial Court rendered a judgment in favor of the Ecuadorian villagers, Chevron sought “a preemptive global anti-enforcement injunction against the Lago Agrio plaintiffs in the US District Court for the Southern District of New

³³ Gómez, *supra* note 1, at 433. See, e.g., Khatam, *supra* note 2, at 255 (underlining that the EMA “created a private right of action for the cost of remediation of environmental harms generally, as opposed to individual damages to specific plaintiffs”).

³⁴ Gómez *supra* note 1, at 433.

³⁵ See MacLean, *supra* note 9, at 369 (“The “Ecuadorian court found Chevron liable for US\$8.6 billion in damages and ordered Chevron to pay an additional US\$8.6 billion in punitive damages unless it agreed, within 14 days of the order, to apologize. Chevron refused. A final judgement of US\$17.2 billion was entered against Chevron, which was subsequently reduced to US\$9.5 billion by the Ecuadorian National Court of Justice.”).

³⁶ *Chevron Suffers Major 8-0 Defeat in Ecuador’s Constitutional Court Over Landmark Pollution Judgement*, CSR WIRE, Press Release (July 11, 2018, 10:32AM), available at http://www.csrwire.com/press_releases/41192-Chevron-Suffers-Major-8-0-Defeat-in-Ecuador-s-Constitutional-Court-Over-Landmark-Pollution-Judgment (“Ecuador’s Constitutional Court— which deals only with Constitutional issues—is the third major appellate court in Ecuador and the fourth court overall in the country to uphold the [2011] trial-level decision against Chevron[.] ... Ecuador’s highest civil court, the National Court of Justice, already ruled unanimously to affirm the judgment against Chevron.”).

³⁷ See Khatam, *supra* note 2, at 271 (commenting on the nature of complex transnational disputes and identifying the multiple parallel proceedings in the Chevron-Ecuador litigation). See also Christopher A. Wytock, *Some Cautionary Notes on the “Chevronization” of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467, 474-75 (2013) (distinguishing the breaches of the US-Ecuador BIT).

³⁸ Gómez, *supra* note 1, at 449.



York, alleging that the Ecuadorian trial court judgment was obtained by fraud.”³⁹ Chevron brought its case to seek a permanent injunction against the Ecuadorian Plaintiffs, as well as their representatives and lawyers, under the Racketeering Influenced and Corruption Organizations Act (RICO).⁴⁰

2. International Anti-Suit Injunction and Source of Law

An international anti-suit injunction is “an instrument by which a court of one jurisdiction seeks to restrain the conduct of litigation in another jurisdiction.”⁴¹ This instrument allows for a court to affect the significance and course of litigation abroad.⁴² In the Southern District of New York, Chevron invoked the Declaratory Judgment Act and the Recognition Act to seek a permanent injunction that would bar “the enforcement, anywhere in the world outside of Ecuador, of any judgment rendered against [Chevron] by the Ecuadorian courts.”⁴³

Judge Kaplan ruled on Chevron’s requests in 2011 and granted the anti-suit injunction.⁴⁴ The numerous tort law and RICO claims granted the New York court jurisdiction over the parties and facilitated Judge Kaplan’s ruling in the international anti-enforcement injunction.⁴⁵ Moreover, Judge Kaplan invoked the Declaratory Judgment Act in order to exercise jurisdiction and power over the parties. He granted Chevron a worldwide injunction against the Ecuadorian Plaintiffs “pursuant to the

³⁹ MacLean, *supra* note 9, at 369.

⁴⁰ See Khatam, *supra* note 2 at 256 (acknowledging that Chevron brought suit against plaintiffs’ attorneys through claims of judicial bribery and fraud). See also Gómez, *supra* note 1, at 448 (“The RICO lawsuit was brought against several individuals and business entities, lawyers, consultants, third-party funders, and forty-seven of the Lago Agrio plaintiffs for allegedly seeking ‘to extort, defraud, and otherwise tortuously injure plaintiff Chevron’ through the use of a ‘sham litigation in Lago Agrio, Ecuador.’ Through this action ... Chevron not only s[ought] to obtain damages, but a series of permanent injunctions that would preclude co-defendants from enforcing—in the United States and elsewhere—any judgment emanating from the Lago Agrio proceedings in Ecuador.”).

⁴¹ See George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT’L L. 589, 593 (1990) (discussing anti-suit injunctions in transnational litigation).

⁴² *Id.*

⁴³ *Chevron Corp. v. Naranjo*, 667 F.3d 232, 238 (2d. Cir. 2012).

⁴⁴ See generally *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (granting global anti-suit injunction in favor of Chevron).

⁴⁵ Emily Siederman, *The Recognition Act, Anti-Suit Injunctions, the DJA, and Much More Fun: The Story of the Chevron-Ecuador Litigation and the Resulting Problems of Aggressive Multinational Enforcement Proceedings*, 41 FORDHAM URB. L.J. 265, 267 (2013).



anti-suit injunction analysis articulated in *China Trade & Development v. Choong Yong*.⁴⁶

In *Chevron v. Naranjo*,⁴⁷ the US Court of Appeals for the Second Circuit reversed Judge Kaplan's ruling and held that the standard provided in *China Trade & Development* did not apply to the Chevron-Ecuador litigation.⁴⁸ The court invoked New York's version of the 1972 Uniform Foreign Country Judgments Recognition Act (the "Recognition Act") to reason that Chevron's requested relief was an anti-enforcement injunction.⁴⁹ By invoking the Recognition Act, the Second Circuit found that the Act "did not authorize a court to declare a foreign judgment unenforceable as a preemptive action filed by a putative judgment-debtor."⁵⁰ In addition, the Second Circuit held that Chevron and all judgment-debtors could "only challenge a foreign judgment's validity *defensively*, 'as a shield but not as a sword.'"⁵¹

The Court of Appeals also expressed its concerns for international comity "and held that nothing in the Recognition Act or related case law authorize[d] 'a court sitting in New York to address the rules applicable in other countries, or to enjoin the plaintiffs from even presenting the issue to the courts of other countries for adjudication under their own laws.'"⁵² The Second Circuit further noted the Ecuadorians (judgment-creditors) could seek to enforce the judgment from the Ecuadorian court "in any country in the world where Chevron has assets."⁵³

⁴⁶ *Chevron Corp. v. Donziger*, 768 F. Supp. 2d at 648 (citing *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d. Cir. 1987)).

⁴⁷ 667 F.3d 232, 243 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

⁴⁸ *Id.*

⁴⁹ Siederman, *supra* note 45, at 267.

⁵⁰ Khatam, *supra* note 2, at 272.

⁵¹ Siederman, *supra* note 45, at 267. ("The Second Circuit concluded that a judgment-debtor could not affirmatively bring an anti-enforcement action against a judgment-creditor when the judgment-creditor has not yet tried to collect on that judgment in the United States, despite declaring its intentions to do so in fora outside the United States.")

⁵² Khatam, *supra* note 2, at 272.

⁵³ See MacLean, *supra* note 9, at 369 (quoting *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d. Cir. 2012)). See also Khatam, *supra* note 2, at 256 ("The Second Circuit noted, however, that '[t]he relief tailored by the district court, while prohibiting Donziger and the LAP Representatives from seeking enforcement of the Ecuadorian judgment and does not prohibit any of the LAPs from seeking enforcement of that judgment



B. *The Chevron-Ecuador Litigation in Canada: How the Case Unfolded Domestically*

In May 2012, Canada became the first jurisdiction outside of Ecuador where the Lago Agrio plaintiffs endeavored to recognize and enforce the Ecuadorian judgment.⁵⁴ The Plaintiffs filed their claim in the Ontario Superior Court of Justice against Chevron and its seventh-level subsidiary, Chevron Canada. Both parent and subsidiary fought the Plaintiffs' recognition and enforcement attempt by bringing motions to stay the Plaintiffs' enforcement action on jurisdictional grounds and to set aside service of the originating process.⁵⁵

The Chevron-Ecuador litigation in Canada examined the corporate law doctrine of piercing the corporate veil by Chevron's jurisdictional challenges asserting "that the corporate entities against which enforcement was being sought were independent from Chevron."⁵⁶ Moreover, the oil company argued that Chevron lacked a "real and substantial connection" to the Canadian courts.⁵⁷ In September 2015, the Supreme Court of Canada (SCC) exercised jurisdiction over Chevron's claim⁵⁸ and held that Canadian courts could affirm jurisdiction over both Chevron Corporation and Chevron Canada. However, SCC emphasized that its finding of jurisdiction did not signify that the Lago Agrio plaintiffs would be successful in enforcing the Ecuadorian Judgment in Canada.⁵⁹ The Ecuadorian Plaintiffs, despite being awarded damages in Ecuador, were only allowed to bring a case in the Ontario

anywhere outside of the United States."

⁵⁴ Gómez, *supra* note 1, at 449.

⁵⁵ *Id.* (clarifying that the Ecuadorian Plaintiffs filed an action against Chevron Canada Limited and Chevron Canada Finance). "The Lago Agrio plaintiffs asserted that, as wholly owned subsidiaries of Chevron and because the same board of directors controlled both entities, the Canadian companies were necessary parties and therefore should be held liable as judgment debtors." See, e.g., MacLean, *supra* note 9, at 370.

⁵⁶ *Yaiguaje v. Chevron Corp.* (2013) 118 O.R. (3d) (Can. Ont. C. A.)

⁵⁷ *Id.* (asserting that a real and substantial connection is "essential for a Canadian Court to establish jurisdiction").

⁵⁸ Mah, *supra* note 8 (analyzing the Supreme Court's 2015 decision).

⁵⁹ See Dani Bryant & Zach Romano, *Corporate Parent Liability: Litigation Risks for Resource Companies*, FASKEN MARTINEAU MINING BULLETIN, Dec. 3, 2015, <https://www.fasken.com/en/knowledge/2015/12/miningbulletin-20151203/>.



courts to seek enforcement of that foreign judgment against the parent company and one of its subsidiaries (Chevron Canada).⁶⁰ This ruling established the possibility of enforcing a foreign judgment against the corporate parent of a Canadian subsidiary. Furthermore, given a “sufficient relationship” between Chevron Corporation and Chevron Canada, there is no requirement for a *real* and *substantial* connection between foreign parties or proceedings in the Canadian court for the court to enforce a foreign judgment:

In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment.⁶¹

SCC made no further findings about whether a court could pierce the corporate veil to give the Ecuadorian villagers access to Chevron’s Canadian assets—all it decided was that the Ontario court possessed jurisdiction to render that decision.⁶² Moreover, the court reiterated that its finding of jurisdiction did not indicate that the plaintiffs could successfully enforce⁶³ the Ecuadorian Judgment in Canada.

The 2015 ruling in *Chevron Corp v. Yaiguaje* was met with backlash, as legal critics considered this measure of enforceability to be too liberal because the ruling involved creditors who obtained a judgment in Ecuador, but sought relief in Canada under the same terms.⁶⁴ The Supreme Court’s decision established transnational litigation risks

⁶⁰ Nancy Kleer, *Canadian courts have jurisdiction to enforce foreign damage awards against Canadian subsidiaries*, OLTHUIS, KLEER TOWNSHEND LLP, <https://www.oktlaw.com/canadian-courts-jurisdiction-enforce-foreign-damage-awards-canadian-subsidiaries>.

⁶¹ *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 [2015] S.C.R. 69 (Can.).

⁶² Bryan & Romano, *supra* note 59.

⁶³ *Id.*

⁶⁴ Varoujan Arman, *Supreme Court Issues Decision that has Implications for Canadian Subsidiaries, Foreign-Owned Parents*, BLANEY MCCURTHY LLP, Mar. 2, 2016, <https://www.blaney.com/articles/supreme-court-issues-decision-that-has-implications-for-canadian-subsidiaries-foreign-owned->



for defendants with any Canadian assets.⁶⁵ As “enforcement in Canada can now be pursued against foreign companies and their Canadian affiliates even if neither party to the original dispute has a ‘real and substantial’ connection to Canada,” and the Supreme Court’s decision has significant cross-border implications.⁶⁶ If the Lago Agrio plaintiffs were successful “in their claim to levy execution on the assets of the judgment[-]debtor, they would simply seize the shares of Chevron Canada as an asset of Chevron Corporation.”⁶⁷ Chevron Canada’s shares could then be sold “to satisfy the judgment the plaintiffs had obtained against Chevron Corporation.”⁶⁸

The Canadian Supreme Court “emphasized that Canada takes a generous and liberal approach to recognition and enforcement proceedings”⁶⁹ and focused on the importance of international comity. Furthermore, the court asserted:

[T]here is no requirement for a connection between the substance of the dispute and the new jurisdiction where enforcement is sought. The enforcing court only needs proof that the judgment was issued by a court of competent jurisdiction, is final, and proof of its amount. There is no requirement for a debtor to have assets in Canada at the time enforcement is sought.⁷⁰

Despite its perceived liberal approach regarding enforceability, the Supreme Court of Canada also highlighted that even though it may possess jurisdiction over the recognition and enforcement proceedings, the court is not obligated to exercise

parents.

⁶⁵ *Id.*

⁶⁶ Brandon Kain et al., *Chevron Corp. v. Yaiguaje: SCC Decision Highlights Increased Litigation Risk for Canadian Companies for Misdeeds of their Foreign Affiliates*, MCCARTHY TETRAULT, Sept. 8, 2015, <https://www.mccarthy.ca/en/insights/articles/chevron-corp-v-yaiguaje-scc-decision-highlights-increased-litigation-risk-canadian-companies-misdeeds-their-foreign-affiliates>.

⁶⁷ Angela Swan, *The Elephant in the Room: How ‘Piercing the Corporate Veil’ Led the Court Astray in Yaiguaje v. Chevron Corporation*, AIRD & BERLIS BLOG, Apr. 26, 2018, <https://www.airdberlis.com/insights/blogs/firmblog/post/fb-item/the-elephant-in-the-room-how-piercing-the-corporate-veil-led-the-court-astray-in-yaiguaje-v.-chevron-corporation>.

⁶⁸ *Id.*

⁶⁹ Kevin O’ Callaghan & Zach Romano, *SCC: Courts May Enforce Foreign Pollution Awards*, FASKEN MARTINEAU: CORPORATE SOCIAL RESPONSIBILITY BULLETIN, Sept. 17, 2015, <https://www.fasken.com/en/knowledge/2015/09/corporatesocialresponsibilitylawbulletin-20150917/>.

⁷⁰ Arman, *supra* note 64.



that jurisdiction.

In 2017, the Plaintiffs sought the enforcement of the Ecuadorian Judgment. That year, the Ontario Superior Court granted summary judgment in favor of Chevron Canada.⁷¹ The court “upheld the separate legal personality of parent and subsidiary corporations and declined to ‘pierce the corporate veil’ to allow the plaintiffs to seize the Canadian subsidiary’s assets in order to satisfy their judgment against the parent company.”⁷² On May 23, 2018, the Ontario Court of Appeals affirmed the Superior Court’s 2017 decision that Chevron and Chevron Canada were separate legal entities. Despite the court’s decision in 2015 suggesting that “Canadian courts should take a generous approach in finding *jurisdiction* to allow litigants holding foreign judgments to bring enforcement actions in Canada, the Court of Appeals’ [May 2018] decision ... demonstrates that *procedural* matters related to such actions will not necessarily be afforded such a generous approach.”⁷³ The decision by the Court of Appeals demonstrates that certain procedural matters, like an award of security for costs, “should not be treated differently solely because the main action concerns the enforcement of a foreign judgment.”⁷⁴ Although the plaintiffs’ lawyers applied for leave to appeal the Ontario Court’s ruling, on April 4, 2019, the Canadian Supreme Court dismissed their application with costs,⁷⁵ refusing to pierce the corporate veil in favor of the Ecuadorian Plaintiffs.

C. *The Structure and Scope of Investment Treaty Disputes*

Since the early 1990s, the system of investor-state dispute settlement has expanded due to an increasing commitment by States to enter into international investment agreements (“IIAs”), such as bilateral investment treaties (BITs) and

⁷¹ Stephen Brown-Okunlik & Robert Wisner, *No Easy Way Around Separate Corporate Personality: Ontario Court Releases its Decision in Yaiguaje v. Chevron*, McMILLAN LLP LITIGATION BULLETIN, Feb. 2017, <https://mcmillan.ca/No-Easy-Way-Around-Separate-Corporate-Personality-Ontario-Court-Releases-its-Decision-in-Yaiguaje-v-Chevron>.

⁷² *Id.*

⁷³ Mah, *supra* note 8 (emphasis added).

⁷⁴ *Id.*

⁷⁵ *Yaiguaje et al. v. Chevron Corp.*, 2019 SCC 1, 2 [2019] No. 38183 (Can.).



multilateral treaties with other States.⁷⁶ These treaties allow States “to attract foreign investment by granting broad investment rights to foreign investors and creating flexibility.”⁷⁷ IIAs between two or more States create substantive rights for foreign investors, which in turn protect international investments.⁷⁸ Moreover, they “grant reciprocal investment rights—of a procedural and substantive nature—to foreign investors from the signatory countries.”⁷⁹ After satisfying specific prerequisites, “IIAs permit investors to initiate arbitration directly against a state.”⁸⁰ This procedure is known as investment treaty arbitration (ITA).⁸¹

Investment treaty arbitration “permits investors to vindicate substantive treaty rights that states granted to investors by directly suing states for government conduct that allegedly breached a treaty and created an adverse effect on a foreign investment.”⁸² Moreover, ITA provides “investors with a direct forum for depoliticized adjudication that is conducted by arbitrators who are required to be independent and impartial and generate an enforceable award.”⁸³

D. *Arbitral Award Rendered on August 2018 in Favor of Chevron*

⁷⁶ See Susan D. Franck & Lindsey W. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J., 459, 461–63 (2015).

⁷⁷ Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing International Public Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521 (2005) [hereinafter Franck, *Legitimacy Crisis*].

⁷⁸ See Franck & Wylie, *supra* note 76, at 462 (commenting that the substantive rights granted to foreign investors include “the right to compensation for government expropriation and freedom from discrimination, to people or entities investing abroad”). See also *id.*, at 470 n.43–45 (discussing substantive rights in IIAs).

⁷⁹ *Id.* at 470.

⁸⁰ *Id.* at 470, 473 (delineating the mechanics of ITA).

⁸¹ *Id.* at 461 (remarking that governments worldwide are “focusing on how to best use bilateral and investment treaties as strategies to increase their economic prosperity”). See e.g., Catherine Titi, *The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration*, 14 J. WORLD INVEST. & TRADE 829, 830 (2013) (stating that the “system of investment dispute resolution has taken the [center] stage and has been placed in a unique position from which to formulate international investment law”); Charles N. Brower & Sadie Blanchard, *What’s in a Meme? The Truth About Investor-State Arbitration: Why It Need Not and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT’L L. 689, 706–08 (2014).

⁸² Franck & Wylie, *supra* note 76, at 469.

⁸³ *Id.* at 472 (exploring the doctrines and policies underlying ITA); see, e.g., Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 3–7 (2007) (providing “an overview of ITA doctrine and arbitration mechanics”).



On August 30, 2018, an international arbitral tribunal administered by the Permanent Court of Arbitration in The Hague rendered a 521-page Partial Award in favor of Chevron,⁸⁴ concluding that Ecuador “wrongfully committed a denial of justice under the standards both for fair and equitable treatment [(FET)] and for treatment required by customary international law”⁸⁵ under Article II(3)(a) of the Ecuador-US BIT (“Ecuador-US Treaty” or “Treaty”) signed in 1997.

On September 5, 2018, the world became privy to the tribunal’s ruling, which holds Ecuador liable for violating Chevron’s “fundamental procedural rights”⁸⁶ “by rendering decisions enforceable, maintaining the enforceability, executing the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and knowingly facilitating its enforcement outside Ecuador.”⁸⁷ Furthermore, the Partial Award states that the Ecuadorian Judgment “is contrary to international public policy[,] and no part of said Lago Agrio Judgment should be recognized or enforced by any State with knowledge of the Respondent’s said denial of justice.”⁸⁸ The tribunal will hold a trial in the following months to assess the damages Ecuador must pay Chevron.⁸⁹

This Partial Award is the most definitive affirmation of Ecuador’s culpability in this complex transnational dispute in nearly 30 years of litigation before multiple courts.⁹⁰

⁸⁴ See Press Release, Chevron Corp., International Tribunal Rules for Chevron in Ecuador Case, Sept. 7, 2018, <https://www.chevron.com/stories/international-tribunal-rules-for-chevron-in-ecuador-case> (stating that Ecuador was “found liable for violating international law, [and] supporting fraud and corruption”).

⁸⁵ Partial Award, *supra* note 13, at 513–14, ¶ 10.5.

⁸⁶ *Id.* at 514, ¶ 10.10.

⁸⁷ *Id.* ¶ 10.5.

⁸⁸ See *id.* at 515, ¶ 10.10 (alteration in original) (emphasis added). See also Todd Tucker, *Chevron v. Ecuador decision: Breaking Bad or Breaking ISDS?*, MEDIUM, Sept. 11, 2018, available at <https://medium.com/@toddtucker/chevron-v-ecuador-decision-breaking-bad-or-breaking-isds-c3e3a91144bf> (comparing the arbitral tribunal’s award with the 2016 US appellate decision, “which predictably remove[d] Donziger from his ability to profit from the case, without limiting ... plaintiffs from pursuing justice and without telling other countries’ courts what to do”).

⁸⁹ See Partial Award, *supra* note 13, at 476, ¶ 8.9 (examining that “[a]s with Chevron, issues as to reparation for any injury in the form of compensation claimed by TexPet are currently assigned to Track III” of the Tribunal’s arbitral proceedings).

⁹⁰ See Tucker, *supra* note 88 (interpreting the tribunal’s August 2018 Partial Award).



The tribunal found that the Judgment issued against Chevron in the Ecuadorian Provincial Court was obtained through bribery, corruption, and fraud. Moreover, it asserted that the 2011 Ecuadorian Judgment was based on claims that Chevron had already settled and been released of responsibility by Ecuador years earlier. The tribunal's August 2018 Partial Award summarizes the “overwhelming” evidence of the Ecuadorian Plaintiffs’ legal team’s corruption and fraud in Ecuador:

The Tribunal concludes that the Lago Agrio Judgment (with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts) violates international public policy. In the Tribunal's view, the reinstatement of the Claimants' rights under international law requires of the Respondent the immediate suspension of the enforceability of the Lago Agrio Judgment and the implementation of such other corrective measures as are necessary to ‘wipe out all the consequences’ of the Respondent's internationally wrongful acts, so as to re-establish the situation which would have existed if those internationally wrongful acts had not been committed by the Respondent.⁹¹

The tribunal focused on Ecuador's “internationally wrongful acts”⁹² and held the Respondent accountable for “issuing, rendering enforceable, maintaining the enforceability[,] and executing”⁹³ the Ecuadorian Judgment after “material parts of the Lago Agrio Judgment of 14 February 2011 ... were corruptly ‘ghostwritten’ for Judge Nicolás Zambrano[-]Lozada” while he was serving as a judge at the court in Sucumbios.⁹⁴ In addition, the tribunal found that there is sufficient evidence to conclude that the Judgment was tampered with “by one or more of the Lago Agrio Plaintiffs’ representatives in return for a promise to pay Judge Zambrano a bribe from the proceeds of the Lago Agrio Judgment’s enforcement by the Lago Agrio Plaintiffs.”⁹⁵

The tribunal did not interfere in the rulings of the Ecuadorian courts but found

⁹¹ Partial Award, *supra* note 13, at 497–512 (addressing “the claimant’s and respondent’s material requests for relief”).

⁹² *Id.* at 516.

⁹³ *Id.*

⁹⁴ *Id.* at 513, ¶ 10.4.

⁹⁵ *Id.*



the Ecuadorian Judgment to be procedurally illegitimate under international law. The tribunal noted that the Judgment “exists as a concrete fact under Ecuadorian law ... [and] [g]iven such existence, the Lago Agrio Judgment has a legal effect and resulting consequences under international law.”⁹⁶ Therefore, granting the remedy of annulment is within the scope of “the Respondent’s internal law.”⁹⁷ Regardless, the tribunal asserted that it had “the power to order [Ecuador] to take steps to secure that result.”⁹⁸ The tribunal declared:

[D]enial of justice under the Treaty’s FET standard equates to denial of justice under customary international law, both falling within the scope of Article II(3)(a) of the Treaty ... [therefore,] [i]t follows that the Tribunal’s finding regarding denial of justice under the FET standard equates with finding the Respondent also in breach of its obligations under customary international law for denial of justice.⁹⁹

Under the standards set forth in the Ecuador-US Treaty and under customary international law, “the Respondent (by its judicial branch) was obliged not to hold Chevron ... liable under the Lago Agrio Judgment; and consequently the Claimants are, as a matter of international law, not obliged to comply with the Lago Agrio Judgment.”¹⁰⁰ The tribunal unanimously absolved Chevron of liability by rendering this Partial Award.

III. ANALYSIS

The tribunal extended its jurisdictional power beyond the investor and the State exclusively parties to the investment treaty arbitration when it found the Ecuadorian Judgment to be a violation of international public policy and that therefore, “no part of the said Lago Agrio Judgment should be *recognized or enforced by any State*.” In the realm of ITA, “arbitral interpretation is not intended to establish rules that reach

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *id.* at 500-01, ¶ 9.13 (holding that the Tribunal has the same power as the ICJ did in that case—it has the power to order the Respondent to take steps to secure the desired result).

⁹⁹ *Id.*

¹⁰⁰ *Id.*



beyond the dispute at hand.”¹⁰¹ As the tribunal exceeded its jurisdictional power and rendered an award that goes beyond the scope and framework of the investor-state dispute settlement system (ISDS), this Note argues that domestic courts worldwide should disregard the August 2018 Partial Award.

A. *The Award Goes Beyond the Scope of ISDS*

The Partial Award exceeds the scope of both the investor-state dispute settlement system (ISDS) and the tribunal’s jurisdiction over Chevron and Ecuador. The tribunal sought to implicate international public policy violations upon other jurisdictions if any national court recognizes or enforces the 2011 Ecuadorian Judgment. Consequently, the Partial Award poses the problem of arbitrators exceeding the scope of their jurisdictional power beyond the arbitration, in addition to challenging the systemic underpinnings of the ISDS model because it intrudes far too deeply into judicial proceedings. The tribunal’s Partial Award exceeds “the foundational normative arrangement that [holds together] the contemporary international investment system.”¹⁰² As such, the Partial Award invites a holistic rethinking ITA tribunal’s expansion of power and jurisdiction to judicial proceedings in foreign states.

The Partial Award demonstrates the “great need for systemic [and] institutional solutions.”¹⁰³ As arbitrators are the “central actors” in transnational dispute resolution, they oversee billion-dollar disputes, make decisions implicating international law, and “play a vital role in the global economy.”¹⁰⁴ The tribunal’s Partial Award highlights some of the difficulties in the current ITA framework. Although “foreign investment is a vital tool for economic development and global prosperity,”¹⁰⁵ there are many institutions that “complain about particular aspects of the investment treaty process, including ... [the] subsequent impact of sovereignty.”¹⁰⁶

¹⁰¹ Titi, *supra* note 81, at 830.

¹⁰² *Id.*

¹⁰³ Steinitz & Gowder, *supra* note 18, at 754 (calling for structural solutions within transnational disputes).

¹⁰⁴ Franck, *Inside the Arbitrator’s Mind*, 66 EMORY L. J. 1115, 1116 (2017).

¹⁰⁵ Franck, *Legitimacy Crisis*, *supra* note 77, at 1524.

¹⁰⁶ *Id.* at 1586.



B. Implications on Domestic Courts Around the Globe

When the tribunal stated that no part of the Ecuadorian Judgment “should be recognized or enforced by any State,” the tribunal echoed Judge Kaplan’s 2011 grant of a global anti-suit injunction in favor of Chevron. Similarly, the tribunal’s Partial Award inflicts damage on international comity¹⁰⁷ and the principle of sovereignty.¹⁰⁸ According to the Partial Award, if any domestic court globally enforces the Ecuadorian Judgment against Chevron and allows the Ecuadorian Plaintiffs to recover Chevron’s assets, that State would be in violation of international public policy.

By ruling that the Ecuadorian Judgment should neither be *recognized* nor *enforced* by any State, the 2018 Partial Award is inherently a global anti-enforcement injunction disguised as an arbitral award. As arbitrators are exceeding the scope of investor-state disputes, the “rise of arbitral power over courts brings greater urgency to the broader debates over the legitimacy of investor arbitration.”¹⁰⁹

1. Comparing the tribunal’s Partial Award to Judge Kaplan’s 2011 Ruling

The tribunal’s overbroad ruling is analogous to Judge Kaplan’s 2011 ruling in *Chevron Corp. v. Donziger*,¹¹⁰ granting an international anti-suit injunction (later

¹⁰⁷ See generally John Kuhn Bleimaier, *The Doctrine of Comity in International Law*, 24 CATH. LAW. 327, 327 (1979) (providing a definition for international comity) (“The doctrine of comity is the legal principle which dictates that a jurisdiction recognizes and gives effect to judicial decrees and decisions rendered in other jurisdictions unless to do so would offend its public policy.”).

¹⁰⁸ See Kyle Bagwell & Robert W. Staiger, *National Sovereignty in an Interdependent World*, NBER Working Paper Series on International Trade and Investment (2004), available at <https://www.nber.org/papers/w10249.pdf> (defining sovereignty as the “norm of non-intervention in the internal affairs of other states). “[N]ational sovereignty is a complex notion, reflecting a number of different features. ... [There is increasing tension] between national sovereignty and international objectives.” See generally Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, Comment, 40 STAN. J. INT’L L. 195 (Summer 2014) (commenting on the challenges in finding a workable definition for the notion of “sovereignty”).

¹⁰⁹ See Michael D. Goldhaber, *The Rise of Arbitral Power over Domestic Courts*, 1 STAN. J. COMPLEX LITIG. 373, 376 (2013) (“supervising an independent state judiciary so as to confer rights that transcend domestic law, arguably without the specific consent of the state, seems well-calculated not only to be ignored, but also to inspire backlash to the worthy project of investor-state arbitration.”). See also Franck, *Legitimacy Crisis*, *supra* note 77, at 1556 n.137 (citing Noah Rubins, *Judicial Review of Investment Arbitration Awards*, in *NAFTA INVESTMENT LAW & ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 354, 375 (Todd Weiler ed., 2004)) (“[I]nvestment awards are often colored by issues of sovereignty and political ideology, and may be accompanied by domestic political pressure compelling Sovereigns to challenge awards.”).

¹¹⁰ *Supra* note 46, 768 F. Supp. 2d 581.



found to be an anti-enforcement injunction) “allegedly prohibiting *any* court in *any* nation from enforcing the environmental judgement against Chevron.”¹¹¹ In September 2012,¹¹² the US Court of Appeals for the Second Circuit reversed Judge Kaplan’s injunction and “chastiz[ed] Kaplan for inflicting damage on international comity[–]the principle among modern nations to show respect for each other’s legal systems.”¹¹³ The Second Circuit stated:

[W]hen a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver. In such an instance, the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world’s legal systems.¹¹⁴

Although the tribunal’s Partial Award does not specifically address the any domestic court, “that anti-suit injunctions are addressed to [the parties] within the jurisdiction of the enjoining court[,] ... rather than directly to the foreign court where the proceedings are at issue, does not substantially lessen the element in conflict.”¹¹⁵ Just as the District Court opinion did not address “the legal rules that would govern the enforceability of an Ecuadorian judgment under the laws”¹¹⁶ of other jurisdictions, neither does the tribunal’s Partial Award.

The issuance of international anti-enforcement injunctions poses a challenge to the doctrines of national sovereignty and international comity. As each State adheres

¹¹¹ Rey Wexler, *Chevron’s SLAPP suit against Ecuadorians: corporate intimidation* (May 11, 2018), <https://www.greenpeace.org/international/story/16448/chevrans-slapp-suit-against-ecuadorians-corporate-intimidation> (emphasis added) (interpreting Chevron’s defense tactics through the lens of corporate criticism).

¹¹² *Supra* note 43 (holding that Ecuadorian Plaintiffs could enforce in any country where Chevron had assets).

¹¹³ Wexler, *supra* note 111.

¹¹⁴ *Supra* note 43.

¹¹⁵ Bermann, *supra* note 41, at 589.

¹¹⁶ *Chevron v. Naranjo*, 667 F.3d at 244.



to their own courts and judiciaries, a sizeable problem arises regarding “injunctions prohibiting the commencement or continuation of foreign judicial proceedings.”¹¹⁷ If these injunctions were to become the norm, “the regularity with which a change of forum in the international area [would] mean a corresponding change in applicable law suggests only a heightened potential for conflict over the anti-suit injunction compared to the sister-state setting, without any obvious solution.”¹¹⁸ Due to the sensitivities “involved in assessing the advantages and inconveniences of foreign litigation, as well as the absence of any mechanism for containing recriminations that are likely to follow from some of those assessments,” foreign courts cannot deploy international anti-suit injunctions nor anti-enforcement injunctions.¹¹⁹

Despite anti-suit injunctions finding “their greatest utility in the international setting, it is also in that [same] setting that they have their greatest capacity for mischief.”¹²⁰ A court should be slow to exercise its jurisdiction “so as to interfere with the pursuit of foreign proceedings,” as a matter of judicial comity.¹²¹ Internationally, relations are “more apt to be disturbed,” especially by the “apparent interference” in the judiciary of a State.¹²² This interference “with a foreign country’s exercise of adjudicatory authority has a potential for embarrassing the political branches of government and disturbing” international relations.¹²³

International anti-enforcement injunctions are still speculative in the context of ISDS. The Partial Award asserts its arbitral control over the members of the investor-state arbitration, as well as on unrelated foreign jurisdictions’ national courts through the lens of an investment treaty arbitration. When the tribunal rendered a ruling with effects on parties and jurisdictions beyond the scope laid out within the practice of investor-State disputes, the tribunal overstepped its authority. This fundamentally

¹¹⁷ Bermann, *supra* note 41, at 589.

¹¹⁸ *Id.* at 620.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Louis Flannery, *Anti-Suit Injunctions in Support of Arbitration*, 14 EUR. BUS. L. REV. 143 (2003).

¹²² *Id.*

¹²³ Bermann, *supra* note 41, at 604.



improper Partial Award has direct implications on a State's compliance with international public policy and threatens States' sovereignty. Moreover, the Partial Award contains arbitral directions commandeering the decision of national judges under threat of international public law violations.

The tribunal's Partial Award is a poignant example of how "investment tribunals are far more willing than domestic courts to assert control over a foreign court, and do so with increasing frequency."¹²⁴ In the Chevron-Ecuador arbitration, the tribunal is, in essence, ruling on behalf of jurisdictions not within the scope of the investor-state dispute. However, an innate consequence of this anti-enforcement injunction is that when an international anti-enforcement injunction "is directed at a state, it imposes obligations not only on the executive acting as litigant, but ... on the state's judiciary."¹²⁵ In the context of domestic courts worldwide potentially facing the Chevron-Ecuador litigation, the tribunal's Partial Award is an international anti-enforcement injunction "amount[ing] to an arbitral suspension of judicial proceedings."¹²⁶ It is worth noting that the investor-state dispute at the Permanent Court of Arbitration involved only Chevron Corporation, Texaco, and the Republic of Ecuador. Therefore, the theoretical scope of the tribunal's Partial Award and the award's ramifications should remain within the tribunal's jurisdiction, and the award should solely impact the parties belonging to the investor-state dispute. Despite the Partial Award's potential to function as an anti-enforcement injunction, it is questionable whether or not the tribunal has any basis to affect a jurisdiction separate from the three parties it oversaw in the arbitration.

As the tribunal acted outside its jurisdiction and beyond the scope of the investment treaty arbitration, domestic courts globally should ignore the implications of the Partial Award when deciding whether to enforce the Ecuadorian Judgment as

¹²⁴ See Goldhaber, *supra* note 109, at 374 (remarking on the lack of literature analyzing how "arbitrators might control judges") ("The unique strength of arbitral power over courts has been dramatically demonstrated in Chevron's epic dispute over oil pollution in Ecuador.").

¹²⁵ See *id.* at 375 (tracing the historical development of the anti-suit injunction from medieval times through its contemporary use in investment-treaty arbitration).

¹²⁶ *Id.*



it pertains to potential collection of Chevron's subsidiaries' assets. The tribunal's overextension of jurisdiction in this Partial Award cannot be as easily ignored. It underscores an important criticism of the investor-State dispute settlement system and implores a reconsideration of the scope of ISDS and the jurisdictional limits of an arbitral tribunal.

C. *Solution for Domestic Courts Worldwide*

Although the tribunal's Partial Award does not specifically address domestic courts, by stating no part of the Ecuadorian Judgment should be "*recognized or enforced by any State[,]*" the Tribunal directly intends to extend its jurisdictional power to national courts worldwide. The tribunal overextended its jurisdiction and went beyond the scope of the investor-state dispute. Despite the tribunal's Partial Award pleading domestic courts not to enforce the 2011 Judgment, this Note does not support the tribunal's procedural transgression and overextension of its jurisdictional powers. The tribunal's Partial Award is thus not relevant to any pending domestic proceedings involving the enforcement of the Ecuadorian Judgment. While the tribunal may be willing to go beyond the scope of ISDS, domestic courts worldwide should respect procedure and encourage arbitrators in the ISDS realm to follow its lead.

IV. CONCLUSION

Throughout the Chevron-Ecuador litigation, "the unique strength of arbitral power has been dramatically demonstrated."¹²⁷ The 2011 Ecuadorian Judgment "has revealed the complexity of the multilayered, multistep process of enforcing a foreign judgment across different jurisdictions."¹²⁸ This Note implores domestic courts around the globe and the international law community to question the ISDS system, an arbitral tribunal's power to award international anti-enforcement injunctions, and an arbitrator's control over foreign judicial proceedings, along with their effects on national sovereignty and international comity.

Any State's ruling in this case will elicit substantial backlash—no matter the

¹²⁷ *Id.* at 374.

¹²⁸ Gómez, *supra* note 1, at 433.



decision. And more poignantly, even a decision that favors Ecuador hardly suffices to repair the damage that have been done. This is a case where, unfortunately, victims of environmental pollution will not likely be able to recover under an Ecuadorian Judgment obtained through fraud and judicial bribery by their own representatives. Moreover, as the Ecuadorian Judgment was brought under the EMA, the individuals were never going to recover for the harms they endured.

This dispute has become so complex that it involves BITs, multiple domestic courts, and numerous lawsuits. The case is now too far removed from the Ecuadorian Plaintiffs; it has morphed into a ubiquitous media story of the oil conglomerate spending billions to defend itself against the Plaintiffs' lawyer who bribed Judge Zambrano-Lózada in Ecuador.¹²⁹ The Ecuadorian Plaintiffs have been overshadowed in discussions and taken out of the narrative.

The tribunal's ruling precludes domestic courts from autonomy over their own jurisdiction and dooms any actions taken in favor of Plaintiffs to be a violation of international public policy. As demonstrated by the Canadian proceedings, Canada is not in violation of international public policy by allowing Plaintiffs to recognize the 2011 Judgment in Canadian courts.

The August 2018 Partial Award is a symbol for the overextension of power that has become a problem in investment treaty arbitration. The tribunal's finding sheds light on problems within ISDS and implores reconsideration of the scope of an arbitral tribunal's jurisdiction. This Partial Award blurs the lines between enforcing a foreign judgement in a national court and enforcing an investor-state award that expands beyond the scope of the ITA by holding other states to be in violation of international law—far beyond the jurisdiction of the arbitration between the State and the private investor. As such, the tribunal's Partial Award is questionably sound and arguably

¹²⁹ Emma Cueto, *Donziger Held in Contempt in \$9.5B Chevron Ecuador Fight*, Law360 (May 23, 2019), https://www.law360.com/internationalarbitration/articles/1162725/donziger-held-in-contempt-in-9-5b-chevron-ecuador-fight?nl_pk=943e32d6-ea73-4e41-bbe5-9b44e6e3955f&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&read_more=1 (noting that Steven Donziger, the Plaintiffs' lawyer, "helped secure a fraudulent \$9.5 billion judgment against Chevron Corp. in Ecuador ... [and] blatantly ignored the court's orders forbidding him from profiting from the award").



irrelevant to how domestic courts around the globe decide if faced with the Chevron-Ecuador litigation.



LORENA GUZMÁN-DÍAZ is a Law Clerk to the Honorable C. Darnell Jones II of the United States District Court for the Eastern District of Pennsylvania. She graduated from American University Washington College of Law (AUWCL), where she focused her studies on international arbitration and international trade. While at AUWCL, Lorena served as Articles Editor for the American University Law Review and the Arbitration Brief, Marketing & Events Coordination Chair for the International Trade and Investment Law Society, Mentor for the Latino/a Law Students Association, Research Assistant to Professor Susan D. Franck, and Legal Intern at the International Centre for the Settlement of Investment Disputes (ICSID). Prior to law school, Lorena obtained her Bachelor of Arts and Master of Arts degrees in Philosophy from Boston College.

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REVISITING THE DISCUSSION ON CULTURE SHOCK IN INTERNATIONAL ARBITRATION WITH A MULTIDISCIPLINARY APPROACH

by Alex Vinicius Santana Souza

I. INTRODUCTION

Eminent arbitrators John Barkett and Jan Paulsson wrote that cultural clashes in international arbitration are only a myth,¹ Mr. Paulsson also affirmed that a culture shock occurs when the parties in an international arbitration are represented by lawyers who come from the same jurisdiction.² Similarly, Dr. Horacio Naon has asserted that “international arbitration is essentially culturally neutral and a-historic.”³ In general terms, these authors believe that arbitration’s agreed-upon process will end up trumping cultural differences, but there is reason to conclude that this is not the case.

International businesses are profoundly influenced by the various cultures involved, and arbitration is no exception. In fact, arbitration is a sociocultural phenomenon. That is, international arbitration first and foremost reflects culture. Further, it is also becoming increasingly accepted that international arbitration is developing into a *sui generis* transnational legal order, shaped by the numerous actors around the globe. Arbitration can be said to be the most adequate dispute resolution method in a globalized economy: in the 2016 Olympics, for instance, the cases that appeared throughout the games were under the jurisdiction of an “ad hoc division” of arbitral tribunals, specifically created to avert state jurisdiction.⁴

¹ See John M. Barkett & Jan Paulsson, *The Myth of Culture Clash in International Commercial Arbitration*, 5 FIU L. REV. 1 (2009), available at: <https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1083&context=lawreview>.

² See Jan Paulsson, *Cultural Differences in Advocacy in International Arbitration*, in *THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION* 15 (Doak Bishop & Edward G. Kehoe eds., 2d ed. 2010).

³ Horacio A. Grigera Naon, *Cultural Clashes in International Arbitration: How Much of a Real Issue?*, in *LIBER AMICORUM: BERNARDO CREMADES* 557-560, 558 (M.A. Fernandez-Ballesteros & David Arias Lozano eds., 2010), as cited in Ian Meredith and Hendrik Puschmann, *Notes on the Cultural Dimension of International Commercial Arbitration*, 5 SLOVENSKA ARBITRAŽNA PRAKSA [SAR] 29, 31 (2016) (Slovn.).

⁴ See Lucas Mendes, *Os Jogos Olímpicos Rio 2016 e a globalização de sistemas jurídicos*, COMITÊ BRASILEIRO DE ARBITRAGEM, <http://cbar.org.br/site/os-jogos-olimpicos-rio-2016-e-a-globalizacao-de-sistemas->



Recently, the subject of cultural differences in international arbitration has received increased attention. Joshua Karton, in “The Culture of International Arbitration and The Evaluation of Contract Law,” sought to formulate a framework for understanding decisions on substantive law in arbitration⁵ and Karen Mills⁶ and Lara Pair⁷ addressed the impact of the history, morals, religion and the workplace culture of the general populace, seeking to explain how these issues would affect international arbitration cases.

Because of harmonization, many believed that cultural clashes were trumped and are no longer an issue to be taken into consideration, and this view has become common in the arbitral community. However, this approach is deeply mistaken—as Klaus Peter Berger accurately described, harmonization is a creeping codification of transnational commercial law.⁸ Cultural backgrounds will always influence how people see arbitration and what they expect in its procedure and formalities, as well as the substantive results.⁹ The cultural and legal background of parties and their counsel affect many aspects of the arbitral proceeding, such as (1) arbitrator nomination and appointment; (2) settlement; and (3) the decision making process in general.¹⁰ Although hearings in international arbitration have a highly standardized procedure, as Emmanuel Gaillard has pointed out,¹¹ cultural shock is a real

juridicos/.

⁵ See JOSHUA D. H. KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* (2013).

⁶ See Karen Mills, *Cultural Differences & Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's Perspective*, NOTTINGHAM.AC.UK, available at <https://www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/cultural-differences-and-ethnic-bias-in-international-dispute-resolution.pdf>.

⁷ See Lara M. Pair, *Cross - Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. INT'L & COMP. L. 57, (2003), available at <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1409&context=ilsajournal>.

⁸ KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA* 3 (Wolters Kluwer, 2d ed. 2010) (1999).

⁹ See Pair, *supra* note 7, at 4.

¹⁰ See Claire Morel de Westgaver and Sébastien Krier, *How Legal Traditions (Still) Matter in International Arbitration*. KLUWER ARB. BLOG, Mar. 20, 2017, <http://arbitrationblog.kluwerarbitration.com/2017/03/20/bryan-cave/>.

¹¹ Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L, 1, 11 (2015).



phenomenon in international arbitration, and creating standards and formal guidelines does not address the underlying issues.

Consider, for example, the taking of evidence and document production in international arbitration. In general, these procedures are not fully proscribed by the applicable arbitration rules, but rather they are a product of the culture of the parties' countries. For example, a Brazilian lawyer may not be accustomed to American style cross-examination (due to its general absence in Brazil), to prepare a witness is considered absolutely unethical.¹² Thus, these issues are a matter of ethics and culture, not merely "an issue of simple procedural fairness."¹³ Lawyers educated in common law countries are well versed in discovery and cross-examination—while the ones who come from civil law countries may have never even heard of it, and would likely believe that the best evidence always comes from documents.¹⁴ Of course, that happens because this is generally the only perspective they have seen during their legal education, as well as in court proceedings and domestic arbitration proceedings in their jurisdictions. Indeed, if documents are ordered to be produced in international arbitration, a party from a civil law country may not even be prepared to show the documents.¹⁵

Further, witnesses from civil law countries often feel intimidated by cross-examination, and become flustered, which may be a disadvantage to the civil law party, who might not be familiar with witness preparation.¹⁶ Witnesses' understanding of the procedure directly affects his or her performance on providing the facts.¹⁷ Therefore, although domestic and international arbitration are two very

¹² John M. Townsend, *Clash and Convergence on Ethical Issues in International Arbitration*, 36 U. MIAMI INTER-AM. L. REV. 1, 4 (2004), available at: <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1166&context=umialr>.

¹³ See Barkett & Paulsson, *supra* note 1, at 4.

¹⁴ Siegfried H. Elsing and John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, HUGHES HUBBARD & REED, available at <https://www.hugheshubbard.com/news/bridging-the-common-law-civil-law-divide-in-arbitration>.

¹⁵ Marco Deluigi, *O conflito de culturas na produção de provas em arbitragens internacionais*, in ARBITRAGEM INTERNACIONAL: UNIDROIT, CISG E DIREITO BRASILEIRO 137 (Jonathan Barros Vita, Napoleão Casado Filho & Cláudio Finkelstein eds., Quartier Latin 2010).

¹⁶ See MEREDITH & PUSCHMANN, *supra* note 3, at 5.

¹⁷ José I Astigarraga & Eduardo J De la Peña Bernal, *Cultural Considerations in Advocacy: Latin America*,



different things—“like an elephant and a sea elephant”¹⁸—common law-trained lawyers may have an advantage in international arbitration when they are up against advocates with a civil law background, and standardized procedures will do little to remedy this truth.

Nowadays, the topic of cultural differences is more important than ever. Technological advances such as social networks, and political issues like the refugee crisis clearly expose (and facilitate) cultural clashes. The economy also tends to continuously become more globalized. Foreign investment is growing as innovations in fintech such as cryptocurrencies spread, and conflicts between people with different cultural backgrounds are likely to grow in the years to come. International arbitration is commonly used to resolve important cross-border disputes, involving a variety of different industries and practices, including antitrust and infrastructure.¹⁹

The recently released Prague Rules on the Efficient Conduct of Proceedings in International Arbitration, a set of rules about procedure and taking of evidence based on civil law, generated quite a debate.²⁰ According to its creators, the Prague Rules were a response to the IBA Rules of Evidence, which are closer to common law practices and, therefore, benefit participants educated in this legal tradition.

In addition, the development of international arbitration into a transnational legal order should not be ignored. This topic is of such importance that must be taken into consideration in every discussion about international arbitration. On this topic, the Chief Justice of the Federal Court of Australia, James Allsop, noted:

[A]rbitration is to be recognised as part of a world-
wide legal order or system of dispute resolution – of a

in GLOB. ARBITRATION REVIEW, THE GUIDE TO ADVOCACY 146 (Stephen Jagusch, Philippe Pinsolle & Timothy L Foden eds., 2d ed. 2017), available at: <https://globalarbitrationreview.com/chapter/1147798/cultural-considerations-in-advocacy-latin-america>.

¹⁸ Jan Paulssen, *International Arbitration is not Arbitration*. 2008 STOCKHOLM INT’L ARB. REV. 1, 3, available at: https://www.arbitration-icca.org/media/4/38838389608773/media012331138275470siar_2008-2_paulssen.pdf.

¹⁹ See Catherine A. Rogers, *The World is not Enough*. KLUWER ARB. BLOG, Nov. 6, 2016, <http://arbitrationblog.kluwerarbitration.com/2016/11/06/the-world-is-not-enough/>.

²⁰ See Michael McIlwrath, *The Prague Rules: The Real Cultural War Isn’t Over Civil vs Common Law*. KLUWER ARB. BLOG, Dec. 12, 2018., <http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law/>.



system of justice. It is part of a complex, integrated justice system that involves courts (national and international), arbitrators, and arbitral institutions, mediators, facilitators and legal advisers. This integrated justice system is the manifestation of a true international legal order. The importance of that development in the 20th and 21st centuries should not be ignored or devalued. The recognition of the importance of this, and of the fragility and dynamism of any such system, should frame all serious discussion about it. It is from these two features – a respect for the autonomy of the individual and the place of arbitration as a fair way of vindicating the rule of law – that the institution draws its international support from nations, legislatures and judiciaries.²¹

The present article will show that not merely the law but also the history, customs and traditions of each country influence international arbitration proceedings greatly. The aim is to enlighten the study of the field of international arbitration with a multidisciplinary approach that seems to have been put aside recently and, by doing so, show that culture shock will always prevail, despite harmonization.

The first section discusses how the legal background of the parties and counsel influence international arbitration. In the second section, the article covers how the cultural background of the nationalities shape parties and counsel's view on arbitration.²² Further, the third section provides some suggested guidance on how to best resolve and/or deal with the cultural clash in international arbitration.

II. DOMESTIC LAW DETERMINES EXPECTATIONS FOR INTERNATIONAL ARBITRATION

Expectations are a major factor in international arbitration proceedings. Users expect international arbitration to be similar to the practices of the legal tradition from where they come.²³ A lawyer trained in common law expects an adversarial

²¹ Allsop, Chief Justice, Fed. Court of Austl., CIArb Inaugural Annual Lecture: The Role of Law in International Commercial Arbitration (Oct. 15, 2018), *available at* https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20181015#_ftn1a.

²² Preference will be given to Brazil, Austria and Germany as the representatives of civil law and to the United States as the representatives of common law because this writer is familiarized with the customs and language of these countries. Germany may also represent Continental Europe as a whole.

²³ See Pair, *supra* note 7, at 4.



approach, with both parties playing an important role during the entire process. On the contrary, civil law lawyers expect an active judge and an inquisitorial system. Additionally, in Germany, litigation is normally used as a means of exerting force and leverage,²⁴ and arbitrators are expected, as a tradition, to seek amicable settlements during the proceedings,²⁵ which happens in the majority of domestic arbitrations.²⁶

The *iura novit curia* principle, as observed by the civil law tradition, states that the parties only have to prove the facts alleged by them, because the court is presumed to know the law (“give me the facts and I will give you the applicable law”).²⁷ Conversely, in common law systems, the parties are expected to assist the court in applying the law; the facts have to be scrutinized in order to find the applicable law (“remedies precede rights”).²⁸ Evidence-gathering in civil law jurisdictions is done only by the court, while in common law the parties themselves have a significant role on that point. Hence, the preference for pleadings instead of memorials—or vice versa—in international arbitration is also a cultural issue.²⁹

Oral advocacy plays a major role in international arbitration as well as in the common law tradition. Jury trials are commonplace in the U.S., in which lawyers’ practice and hone their advocacy skills. Civil law systems, on the other hand, have almost no oral advocacy (or it has less importance in the process), not only in court but also in domestic arbitration.

Another fact that should be taken into consideration is that in civil law countries

²⁴ Hannes Unberath, *Auf dem Weg zu einer differenzierten Streitkultur - Neue gesetzliche Rahmenbedingungen für die alternative Konfliktlösung*, 65 JURISTEN ZEITUNG 975, 976 (2010) (Ger.).

²⁵ This practice is explicit under both the 1998 and the new rules of the DIS, issued in March 2018, German Arbitration Institute, 2018 DIS Arbitration Rules, 2018 DEUTSCHE INSTITUTION FÜR SCHIEDSGERICHTSBARKEIT § 27.4 (Ger.) (“With a view to increasing procedural efficiency, the arbitral tribunal shall specifically discuss the following with the parties: (iii) the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues.”).

²⁶ Karl-Heinz Böckstiegel, *Case Management by Arbitrators: Experiences and Suggestions*, REVISTA DE ARBITRAGEM E MEDIAÇÃO, Jan./Mar., 2007, at 103.

²⁷ *Iura novit curia*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=Iura_novit_curia&oldid=818450315 (last updated Jan. 3, 2018).

²⁸ ELISABETH ZOLLER, INTRODUCTION TO PUBLIC LAW: A COMPARATIVE STUDY 121 (2008).

²⁹ See Antony Smith & Marc Jones, *Arbitration News: Memorials or pleadings? A cultural conflict*. BEALE & Co, May 2018, available at <https://beale-law.com/publications/743-arbitration-news-memorials-or-pleadings-a-cultural-conflict.php>.



legal certainty is associated with written rules. This matter is important because the extent of the cultural influence on *ad hoc* processes tend to be much higher because “institutional arbitrations usually have more clearly defined rules of procedure and tend to adopt a common approach for arbitrations, instead of a case-by-case determination.”³⁰ Hence, attorneys who have more experience with *ad hoc* arbitrations may also have an advantage in international arbitration when facing civil law-educated lawyers who do not.

Austria and Germany may be exceptions to that rule. In both these countries the law governing arbitration is in their Civil Procedure Code (*Zivilprozessordnung*), which gives a large set of discretion to arbitrators and make arbitration procedures unpredictable.³¹ In addition, in Austria, mediation is rare and international arbitrations are more frequent than both *ad hoc* and institutional domestic arbitrations.³²

In Germany, the acceptance to arbitration grew after the reforms that were made in the law and in the DIS rules in 1998. A study conducted in the beginning of the century has shown that only about half of the contracts in Germany had arbitration agreements, while in the rest of the world it was around 90%.³³ In January 2018, the *Landgericht Frankfurt am Main* (Frankfurt High Court) established a chamber of international commercial law.³⁴ Its Chairwoman, seeing an opportunity after Brexit, has proposed that German courts adopt the English language in order to encourage doing business in the country.³⁵ International commercial arbitration may benefit from that as well.

³⁰ See Pair, *supra* note 7, at 2.

³¹ Richard Kreindler, Thomas Kopp & Patrick Gerardy, *Arbitration Guide: GERMANY*, 2018 I.B.A. ARB. COMMITTEE 3, 21.

³² Gerold Zeiler, *Arbitration Guide: AUSTRIA*, 2018 I.B.A. ARB. COMMITTEE 3.

³³ JENS-PETER LACHMANN, *HANDBUCH FÜR DIE SCHIEDSGERICHTSPRAXIS* 27 (2d ed. 2008).

³⁴ Christoph Just, *A New Landmark in International Commercial Litigation? The Frankfurt High Court Installed a Specialized Chamber for International Commercial Matters*. [WWW.SCHULTE-LAWYERS.COM](http://www.schulte-lawyers.com) (Jan. 26, 2018), available at <https://www.schulte-lawyers.com/schulteblog/2882017-6y2e6>.

³⁵ Joe Barnes, *BREXIT SNATCH: Germany Plots English-Speaking Courts to Exploit BILLION Pound UK Industry*, WWW.EXPRESS.CO.UK, Aug. 14, 2018. (World), available at <https://www.express.co.uk/news/world/1002905/Brexit-news-UK-EU-Germany-English-speaking-litigation-court>.



In Brazil, arbitration only began to thrive in 2001, when its Supreme Court (“STF”) declared that the 1996 Brazilian Arbitration Act was constitutional. Before that, all arbitral awards had to be confirmed by the Judiciary in order to be enforced. It was also in 2001 that arbitral clauses were allowed to be stated in corporate bylaws.³⁶ Arbitration even became mandatory in some market segments of the country’s Stock Exchange (“B3”) as it is considered to be of the highest standards in corporate governance—this is of utmost relevance because highly developed stock markets, like the American and the Swiss, are still discussing about shareholder arbitration and others, like the German, are hostile against it.³⁷ In the following year, the New York Convention, which is from 1958, was finally ratified by both the congress and the presidency.³⁸ Also, very recently, legislative changes, such as the new Code of Civil Procedure (Law No 13.105/2015), were made in order “to improve the effectiveness of judicial proceedings necessary for the recognition and enforcement of foreign judgments and arbitral awards in the country.”³⁹

The Brazilian Arbitration Act was reformed in 2015, and state-owned enterprises may now take part in arbitral proceedings. The Judiciary Power is also becoming more and more arbitration friendly.⁴⁰ Hence, arbitration is the fastest growing alternative dispute resolution method in Brazil: comparing 2010 and 2017, the number of new proceedings in the country’s leading arbitral chambers grew 114,84%.⁴¹

³⁶ Due to a reform in the Brazilian Corporate Act (Law No 6.404/1976). Lei No. 13.129, de 26 de maio de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.05.2015 (Braz.).

³⁷ Wilmer Cutler Pickering Hale and Dorr LLP, *What to Expect When Arbitrating in Brazil: Recent Developments in International Arbitrations and the Institutional Landscape*, YOUTUBE (May 3, 2018) [hereinafter Wilmer Cutler], available at <https://www.youtube.com/watch?v=ODMSIQH3aEU>.

³⁸ Decreto No. 4.311 de 23 de Julho de 2002, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.07.2002 (Braz.).

³⁹ Renato Stephan Grion, Guilherme Piccardi de Andrade Silva and Thiago Del Pozzo Zanelato, *Recent Legislative Developments in Brazil Expected to Improve the Effectiveness of Proceedings for the Recognition and Enforcement of Foreign Judgments in the Country*, INT’L LITIG. NEWS, Sept. 2017, at 26-27, available at http://www.pinheironeto.com.br/Documents/Artigos/Recent_legislative_developments_in_Brazil_Sept2017.pdf.

⁴⁰ See Felipe Sperandio, *Kompetenz-Kompetenz in Brazil: Alive and Kicking*, KLUWER ARB. BLOG, Dec. 10, 2013, <http://arbitrationblog.kluwerarbitration.com/2013/12/10/kompetenz-kompetenz-in-brazil-alive-and-kicking/>.

⁴¹ See Selma Lemes. *Pesquisa - 2017 Arbitragem em Números e Valores. Seis Câmaras. 8 anos Período de 2010 (jan./dez) a 2017 (jan./dez.)*, SELMALEMES.ADV.BR, (jul/ago 2018) (Braz.), available at <http://selmalemes.adv.br/artigos/An%C3%A1lise-%20Pesquisa-%20Arbitragens%20Ns.%20e%20>



Arbitration is also thoroughly accepted by the Brazilian business community. However, the lack of arbitral tradition seems to be harmful. Despite recent efforts, arbitration is absent in almost all law schools. Some court decisions, especially from the smallest states, prove that judges that are not from Rio de Janeiro or São Paulo do not have basic knowledge of Arbitral Law. The obligation of the use of the Portuguese language and the restriction on the choice of the applicable law are strong barriers to international investors. The country still lacks skilled professionals and scholars and “most of today’s top arbitration experts of the first and even of the second generation—may be arbitrators or counsels—have a litigation background and civil procedure law as their intellectual basis.”⁴²

III. CULTURAL BACKGROUND IS A STRONG FACTOR IN INTERNATIONAL ARBITRATION

Religious, political, and social traditions of a country, underpinning its legal system, have the greatest influence on international arbitration.⁴³

Although the cultural background of international arbitration users is a very important topic, it is seldom considered as it should be. Unlike the corporations that spend millions of dollars to learn about the country they want to invest in, the international arbitration community has “made little or no effort to be culturally sensitive to the parties to international commercial arbitration.”⁴⁴

Despite the attempts to standardize international arbitration and create a “culturally neutral and a-historic” environment, there will always be cultural clash. The background of the users strongly shapes their approach to the topic.

Addressing this issue on a speech held in a conference in Beijing, the President and CEO of the American Arbitration Association, William K. Slade II, said:

Valores-%202010%20a%202017%20-final.pdf.

⁴² See Wilmer Cutler, *supra* note 37.

⁴³ Nikola Georgiev, *Cultural Differences or Cultural Clash? The Future of International Commercial Arbitration*, WWW.WORKS.BEPRESS.COM, at 7, Apr. 13, 2012, available at http://works.bepress.com/nikola_georgiev/8/.

⁴⁴ William K. Slade II, Speech delivered at the 17th ICCA Conference in Beijing, China: Culture Connection in International Commercial Arbitration (May 18, 2004) in DISP. RES. J., Aug.-Oct. 2004. A paper that adapts the remarks delivered from Mr. Slate is available at <https://www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/paying-attention-to-culture-in-international-commercial-arbitration.pdf>.



We need to recognize cultural prejudices and be sensitive to cultural traditions lest we unintentionally offend our real and would-be friends. At the same time, we need to pay attention to culturally induced personal behaviors of our own that could be perceived in an unflattering light.⁴⁵

Hence, it is very easy to offend someone that has a different cultural background while communicating, as both verbal and nonverbal communication are very different throughout cultures. In order to avoid misunderstandings and unintentional insults, it is of great importance to observe body language and language. For example, head nodding can mean “yes, I agree”; “yes, I hear you”; and even “no.” In addition, chitchat and joking prior to the hearings may be very effective tools to break the ice and build a positive work environment, but in some cultures, that may be seen as “signs of mental instability or suspicious attempt at confidence schemes.”⁴⁶ These cultural differences may eventually escalate into something much more serious, which is important to always keep in mind.

However, it would seem valid, even well intentioned, to argue that one should not talk about cultures in general but address each person individually in order to avoid biases and stereotypes. Nevertheless, as Professor Erin Meyer explains, it just so happens that it is the exact opposite:

If you go into every interaction assuming that culture doesn't matter, your default mechanism will be to view others through you own cultural lens and to judge them accordingly. ... Yes, every individual is different. And yes, when you work with people from other cultures you shouldn't make assumptions about individual traits based on where a person comes from. But this doesn't mean learning about cultural contexts is unnecessary. If your business success relies on your ability to work successfully with people from around the world, you need to have an appreciation for cultural differences as well as respect for individual differences. Both are essential.⁴⁷

Culture is much more than just manners. Equally important to international arbitration is the history, the beliefs, the values and the political views from the participant's home country. For instance, Brazil's long-time experience with

⁴⁵ *Id.*

⁴⁶ See Mills, *supra* note 6, at 5.

⁴⁷ ERIN MEYER, THE CULTURE MAP: BREAKING THROUGH THE INVISIBLE BOUNDARIES OF GLOBAL BUSINESS 13 (2014).



exacerbated nationalism, numerous *coup d'états* and stark governmental interference in the private sphere are a strong barrier to international arbitration. The governments always gave preference to state-owned enterprises and to public interest to the detriment of free international trade. Because of the small Brazilian presence in international commerce, there are few conflicts and, therefore, few international arbitration proceedings. Brazilian congress has never ratified any investment treaty agreements⁴⁸ and the country never took part in an investor-state case.⁴⁹ By comparison, the UK is party to numerous bilateral and multilateral treaties and agreements.⁵⁰

Conversely, Japan (and other East Asian countries) has a tradition on conciliatory means of dispute resolution that go back to the feudal times, more specifically to the Tokugawa period:⁵¹ litigation was seen as immoral back then. Hence, it is, to this day, deeply embedded in people's minds that an adversarial, litigant way of resolving conflicts is extremely unethical.⁵² Nowadays, "arbitration is not necessarily regarded by Japanese users as a fast and inexpensive method of resolving disputes"⁵³ and international arbitration is even less popular in the country.⁵⁴ It should also be noted that, in East Asia, "[a]dvocates who appear unprepared for or unwilling to attempt reconciliatory measures may be perceived as insincere and disrespectful towards the dispute resolution process."⁵⁵

⁴⁸ Arnaldo Wald, *Uma nova visão dos tratados de proteção de investimento e da arbitragem internacional*, in REVISTA DE ARBITRAGEM E MEDIAÇÃO, Apr. 21, 2009, at 9-29 (Braz.).

⁴⁹ Fábio Peixinho Gomes Corrêa and Laura Ghitti, *The International Comparative Legal Guide to: Investor-State Arbitration 2019 - Brazil*. ICLG.COM (Nov. 13, 2018), available at <https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/brazil>.

⁵⁰ Dominic Roughton and David Turner, *The International Comparative Legal Guide to: Investor-State Arbitration 2019 - United Kingdom*. ICLG.COM (Nov. 13, 2018), available at <https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/united-kingdom>.

⁵¹ Also known as "Edo Period" it is the period between 1603 and 1868 in the history of Japan. The country was ruled by a military commander known as *shogun*, a member of the Tokugawa clan.

⁵² See Pair, *supra* note 7, at 12.

⁵³ Hiroyuki Tezuka & Yutaro Kawabata, *Arbitration Guide: JAPAN*, 2018 I.B.A ARB. COMMITTEE 3.

⁵⁴ See David A. Livdahl, *Cultural and Structural Aspects of International Commercial Arbitration in Japan*, 20 J. INT'L ARB.. 375 (2003).

⁵⁵ Alvin Yeo SC & Chou Sean Yu, *Cultural Considerations in Advocacy: East Meets West*. GLOB. ARBITRATION REVIEW. THE GUIDE TO ADVOCACY 182 (Stephen Jagusch, Philippe Pinsolle Alexander G. Leventhal eds., 3d



Another fact about East Asia that often baffles Westerners is the philosophy of Sun Tzu. The ideas of the author of *The Art of War* are still thoroughly followed in the Eastern World. The Chinese general taught that, in order to win, one may not just attack continuously (as Occidentals do), but take steps back in order to attract the enemy to a desired spot, where he will be vulnerable, and then attack.⁵⁶ Westerners have a Chess mentality whereas Easterners have a Go mentality.⁵⁷ In Chess, one just attacks; in the traditional Chinese board game Go, on the other hand, the objective is to conquer most of the board's territory (if you just keep moving forward, you will lose).

The population of Continental Europe is highly likely to disfavor international arbitration and investment protection treaties. NGOs and other watchdog groups, like the Corporate Europe Observatory and End ISDS, often gather hundreds of thousands of people to demonstrate against such treaties. The main concern of the demonstrators is the allegation that arbitral tribunals privilege big companies, the processes are confidential, and, therefore, incompatible with democracy.⁵⁸ Many question international investment arbitration's legitimacy.⁵⁹ This sentiment grew even stronger after the two Vattenfall cases. Thus, the critics come from both the people and the government: Germany's Minister for Economics and Energy, Brigitte Zypries, once affirmed that the "Federal Government wants alternative dispute-resolution methods to be kept to a minimum."⁶⁰ About this, Emmanuel Gaillard alerted, in a speech held in a Conference in Rio de Janeiro, that these NGOs should be aware not to criticize investment arbitration and commercial arbitration at the

ed. 2018), available at <https://globalarbitrationreview.com/chapter/1175413/cultural-considerations-in-advocacy-east-meets-west>.

⁵⁶ SUN TZU, *THE ART OF WAR* (Filiquarian 2007) (500 B.C.).

⁵⁷ MARK SPITZNAGEL, *THE DAO OF CAPITAL: AUSTRIAN INVESTING IN A DISTORTED WORLD* 75-77 (2013).

⁵⁸ ARD, *TTIP und Schiedsgerichte: scheinheilige Kritik*, YOUTUBE (June 5, 2015) (Ger.), available at <https://www.youtube.com/watch?v=GMw6BLjYdLM>.

⁵⁹ See S.I. Strong, *Legitimacy and International Arbitration: An Alternate View*, KLUWER ARB. BLOG, Oct. 4, 2017, <http://arbitrationblog.kluwerarbitration.com/2017/10/04/legitimacy-international-arbitration-alternate-view/>.

⁶⁰ Wikithek, *Schiedsgerichte - Im Schatten der Justiz (Freihandelsabkommen TTIP, CETA)* (2014), YOUTUBE (Mar. 21, 2014) (Ger.), available at <https://www.youtube.com/watch?v=-mE7QcTmX-Y>.



same time, in order not to harm the latter.⁶¹

All of this may have culminated in the—at least—peculiar ruling of the Court of Justice of the European Union (CJEU) in the *Achmea* case.⁶² In that occasion, the supranational court decided that an investment arbitration clause was incompatible with EU Law because only European Courts may interpret and apply European Law. After this decision, Germany has requested dismissal of the Vattenfall case.⁶³

IV. MANAGING CULTURAL CLASHES IN INTERNATIONAL ARBITRATION

In order to excel in international arbitration, it is mandatory to develop cross-cultural competency skills. Not only the lawyers should observe this, but also—maybe, even especially—the arbitrators. In addition, oftentimes one will have to work within a global, multicultural team. This means that one must know how to manage the complexities of his own party before confronting the other parties (“know thyself, know thy opponent, and know thy arbitrator”).⁶⁴

Notwithstanding, the agreed-upon process is not enough to avoid cultural clashes. The participants themselves have a significant role on that point. As the lawyers of Smith, Gambrell, & Russell, LLP put it:

The procedural flexibility of arbitration may avoid, or at least limit, the risk of bias inherent in international litigation by giving the parties and the panel a chance to address cultural and legal differences. However, arbitration does not provide the solution; it is ultimately the parties’ and the panel’s responsibility to do so.⁶⁵

In international arbitration, the cultural issues are as important as the matter of the arbitration itself. Committing a culture-related mistake may be excusable for a

⁶¹ Gaillard, Emmanuel, Opening speech of the III CBMA International Arbitration Congress in Rio de Janeiro, Brazil: (Aug. 9, 2018).

⁶² Case C-284/16, *Slowakische Republik v Achmea BV*, 2008 ECLI 158 (Mar. 6, 2018), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0284>.

⁶³ Joerg Risse & Max Oehm, *The Aftermath of Achmea: Germany Requests Dismissal of Vattenfall Case After CJEU’s Achmea Decision*, GLOBAL ARB. NEWS (May 14, 2018), available at <https://globalarbitrationnews.com/aftermath-achmea-germany-requests-dismissal-vattenfall-case-cjeus-achmea-decision/>.

⁶⁴ *Effects of Differing Cultural Backgrounds on Dispute Resolution*. TRUST THE LEADERS (Smith, Gambrell, & Russell, LLP, Atlanta, Ga.), Spring 2005, available at <http://www.sgrlaw.com/ttl-articles/877/>.

⁶⁵ *Id.*



tourist, but it could be extremely detrimental, sometimes even unforgiving, when committed by one of the parties in an international arbitration proceeding.⁶⁶ The lawyers need to be sure that the clients understand this. On this topic, Meredith and Puschmann wrote:

Your clients are unlikely to be lawyers, let alone international arbitration professionals. They are far less likely than you to be mindful of the implications posed by the cultural background of their opponents and the tribunal. Take some time to explain the issue to them.⁶⁷

Although the identification of cultural issues begins at the preliminary hearings, it is highly recommended to consider culture when choosing the tribunal.⁶⁸ One must be sure to interview the potential arbitrators; just reading his or her credentials is not nearly enough.⁶⁹ When establishing procedures, umpires must understand their impact on the parties and ensure that due process is not compromised. The arbitrators cannot manage the case efficiently unless and until they are familiar enough with its substance. When the arbitrators do not know all the issues surrounding the case, there will inevitably be consequences in costs and duration of the proceeding.⁷⁰ Moreover, they must be able to render an award that is both binding and enforceable. He or she will be able to do this only if he or she has a clear understanding on everything about that arbitral procedure. To achieve this, more than just intellectual rigor is required.⁷¹ That is of utmost relevance because, in some locations, to enforce an award is already close to impossible.⁷²

⁶⁶ See Mills, *supra* note 6, at 3.

⁶⁷ See MEREDITH & PUSCHMANN, *supra* note 3, at 6.

⁶⁸ Theodore K. Cheng, *The Importance of Developing Skills to Address Culture in Arbitration*, ARBITRATIONBLOG.PRACTICALLAW.COM (Nov. 22, 2016), available at <http://arbitrationblog.practicallaw.com/the-importance-of-developing-skills-to-address-culture-in-arbitration/>.

⁶⁹ Gary Benton, *The Biggest Mistake in Selecting an Arbitrator*, SVAMC.ORG, available at <https://svamc.org/the-biggest-mistake-in-selecting-an-arbitrator/>.

⁷⁰ Yves Derains, *Some Remarks on the Management of International Arbitration*, REVISTA DE ARBITRAGEM E MEDIAÇÃO, jan./mar., 2007, at 132 (Braz.). This paper is an adaptation of the one prepared for the ICC Miami Conference on Latin American Arbitration, on July 11, 2016.

⁷¹ See Slade, *supra* note 44.

⁷² See Sergejs Dilevka, *So You Think You Can... Enforce an Arbitral Award in the Kingdom of Saudi Arabia?* KLUWER ARB. BLOG, Dec. 7, 2018, <http://arbitrationblog.kluwerarbitration.com/2018/12/07/so-you-think-you-can-enforce-an-arbitral-award-in-the-kingdom-of-saudi-arabia/>.



Diversity in the arbitral panel is also of utmost importance. A famous empirical study suggested that “panels with at least one female judge tend to have a higher quality of reasoning in some respects than an all-male panel.”⁷³ However, it should be kept in mind that diversity based only on gender is not enough. The ideal would be that the appointed arbitrators come from different cultural backgrounds. On this, Joshua Karton and Ksenia Polonskaya observed:

After all, female lawyers come from various backgrounds. There are Asian female lawyers, Indigenous female lawyers, black female lawyers, female lawyers from developing states, Muslim female lawyers, and so on. These overlapping characteristics generate different experiences and different struggles to find “points of entry” into the field of investment arbitration. Being an arbitrator is a position of prestige and importance; it is also well remunerated. If we as a community are to take diversity seriously, we must move beyond the kind of token diversity that sees only white women from developed Western countries added to the pool of arbitrators.⁷⁴

Consider, as an example, the *Liamco v. Libya* case, one of the three cases that arose from Libya’s nationalization of its oil sector in 1973.⁷⁵ On that occasion, Libyan American Oil Co., under its concession agreements with the government, claimed “as its primary remedy the reinstatement of its concessions and as an alternative, damages in the amount of US\$207,652,667 plus interest.”⁷⁶ Sole arbitrator Sohbi Mahmassani rendered an award reasoned not only in English and French law but also in Islamic Law.⁷⁷ He was able to render such an award only because he was familiarized with all these cultures (and legal traditions), as he studied in both Lyon and London and came from Lebanon, being fluent in English, French and Arabic. This

⁷³ Robert Kovacs & Alex Fawke, *An Empirical Analysis of Diversity in Investment Arbitration: The Good, the Bad and the Ugly*, 4 TRANSNAT’L DISP. MGMT. 1, 9–10 (2015)

⁷⁴ Joshua Karton and Ksenia Polonskaya, *True Diversity is Intersectional: Escaping the One- Dimensional Discourse on Arbitrator Diversity*, KLUWER ARB. BLOG, July 10, 2018, <http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/>.

⁷⁵ See, e.g., Valentina Vadi, *Culture Clash: Investor’s Rights v. Cultural Heritage in International Investment Law & Arbitration*, PAPERS.SSRN.COM, at 10–14 (June 19, 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087823.

⁷⁶ *Libyan Am. Oil Co. (LIAMCO) v. Libya*, 4 Y.B. COMM. ARB. 177 (Ad-hoc Arb.1979).

⁷⁷ *Id.*



case also showed the importance of giving attention to culture while drafting the arbitral clause: the arbitrator could not have been a national of Libya.

While defending a culturally diverse panel of arbitrators, Won Kidane wrote:

The algorithm for the selection of arbitrators must thus account for the ability to determine facts, identify and interpret law, and apply the law to the facts. The determination of fact is probably the most culturally sensitive step, but the ability to correctly determine facts is perhaps the most ignored of all criteria for arbitrator selection. There is no doubt that ordinarily Chinese judges would understand Chinese witnesses better than European or African arbitrators because of the cultural proximity. ...

If all three members of the tribunal share a cultural background with each other but not with the party representatives or the witnesses, that alignment of diversity would probably have a negative impact on comprehension. But if, assuming interchangeability, two of the arbitrators change positions with the party-representatives or witnesses, comprehension could improve.⁷⁸

Hence, the best way to develop cross-cultural competence is to seek cultural immersion. Traveling to study or work abroad is the best way to do so. With so many LL.M. and international associate programs that is actually not very difficult. Moot Courts can also be very helpful on that point. In the Willem C. Vis Moot and in the Vis Moot East, for instance, a team never argues against a team from their own country. These competitions are of great value to students because they have been proving to be a great instrument for developing oral and writing skills⁷⁹ as well as fostering a more diverse global legal community.⁸⁰ Teaching arbitration is neglected by many universities. Moot courts can help fill that gap.⁸¹ There are also a vast

⁷⁸ Won Kidane, *Does Cultural Diversity Improve or Hinder the Quality of Arbitral Justice?*, KLUWER ARB. BLOG, Mar. 31, 2017, <http://arbitrationblog.kluwerarbitration.com/2017/03/31/does-cultural-diversity-improve-or-hinder-the-quality-of-arbitral-justice/>.

⁷⁹ See Mark R. Shulman, *Making Progress: How Eric Bergsten and the Vis Moot Advance the Enterprise of Universal Peace*, 24 PACE INT'L L. REV. 1, 3 (2012), <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1318&context=pilr>.

⁸⁰ Mark R. Shulman, Letter to the Editor, *Moot Court in Global Language of Trade*, N.Y. L.J., Apr. 2, 2007, available at <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=http://www.markrshulman.com/publications&httpsredir=1&article=1320&context=lawfaculty>.

⁸¹ See Thiago Del Pozzo Zanelato & Lucas Moreira Jimenez, *The Development of Arbitration Legal Studies In Brazil (or How the Vis Moot Can Change Your Life)*, KLUWER ARB. BLOG, Mar. 28, 2017,



number of preparatory competitions that spawned all around the world because of the Vis Moot. That is one of the reasons why it “is truly an international event at every stage”⁸² and an “entry ticket to practice international arbitration.”⁸³ About this, Vaughan and Graves wrote: “Students are encouraged to employ a comparative perspective in their analysis and advocacy. Through this comparative approach, students arguably gain a better understanding not only of other legal systems, but of their own as well.”⁸⁴

It is also important to learn many languages. Language has a very important role not only in international arbitration but also in the law as a whole. For instance, because of the 24 official languages of the European Union, European lawyers have been struggling with the application and the translation of EU Law.⁸⁵ Hence, it is strongly recommended that lawyers working in international arbitration know a great deal of languages and that the arbitral tribunal itself have a multilingual staff at its disposal.

It is also of utmost importance to keep in mind the religion of the participants in an arbitration. For example, it may be appropriate to take pauses for religious activities, such as prayers.⁸⁶

<http://arbitrationblog.kluwerarbitration.com/2017/03/28/the-development-of-arbitration-legal-studies-in-brazil-or-how-the-vis-moot-can-change-your-life/>.

⁸² Eric E. Bergsten, *Teaching About International Commercial Law and Arbitration: The Eighth Annual Willem C. Vis International Commercial Arbitration Moot*, 18 J. INT'L ARB. 481, 482 (2001), <http://www.cisg.law.pace.edu/cisg/biblio/bergsten1.html>.

⁸³ Julián Bordacahar and Emmanuel E. Kaufman, *Debriefing: University of Buenos Aires Winning the 23rd Willem C. Vis Moot*, KLUWER ARB. BLOG, May 31, 2016, <http://arbitrationblog.kluwerarbitration.com/2016/05/31/debriefing-university-of-buenos-aires-winning-the-23rd-willem-c-vis-moot/>.

⁸⁴ Jack Graves and Stephanie Vaughan, *The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity*, 10 VINDOBONA J. INT'L COM. L. & ARB. 173, 177 (2006), available at <https://ssrn.com/abstract=1425570>.

⁸⁵ The bibliography regarding this topic is utterly vast. See, e.g., LANGUAGE AND CULTURE IN EU LAW, MULTIDISCIPLINARY PERSPECTIVES (Šarčević, Susan ed., Routledge 2015); THE ROLE OF LEGAL TRANSLATION IN LEGAL HARMONIZATION (C.J.W. Baaij ed., Wolters Kluwer 2012).

⁸⁶ According to Justinian “Justice is the constant and perpetual wish to render everyone his due The maxims of law are these: to live honestly, to hurt no one, to give everyone his due.” Justinian I, *The Institutes of Justinian*, THELATINLIBRARY.COM (A.D. 535), available at <http://thelatinlibrary.com/law/institutes.html>.



V. CONCLUSION

A lawyer pursuing a career in international dispute resolution will inevitably come across people who come from different countries with many different cultures. It is impossible to know each one of them in detail, and for this reason, the freedom to choose and tailor arbitration proceedings as the parties see fit is one of arbitration's best qualities.⁸⁷ The arbitral community must be careful not to drive international arbitration procedures into a creeping Americanization nor into a creeping codification.

Nonetheless, it would be naive to affirm that the arbitrators and the counsels will make no mistakes, even after following all the instructions stated in the chapter above. Errors and misunderstandings will always happen. Cognitive bias will always exist. The participants are only humans after all. As Carlos López stated:

Obviously, the arbitrators are not humans isolated in some strange island disconnected from the world, who are called to our world to arbitrate a case, and then when the case is done they return to their island to await, unpolluted, the call to arbitrate another case. Arbitrators are human beings who by nature establish relationships of different levels with people, places, things, ideas, and because of this, biases are inevitable.⁸⁸

In order to diminish this situation, one must always examine the parties, the tribunal, the nationalities involved, and so forth. All the participants must be extremely well prepared and familiarized with all the issues surrounding the proceeding. Especially the arbitrators, who have to be sensible to the parties. As Malcolm Wilkey stated: "an emphatic tribunal should do its best to make both litigants feel at home."⁸⁹ The key words here are sensitivity and open-mindedness. Being open to new ideas and empathic to the differences are the most appropriate ways to behave in international arbitration. By doing so, the attorneys will be able to provide

⁸⁷ See Elsing and Townsend, *supra* note 14.

⁸⁸ Carlos A. Matheus López, *Should Arbitrators Come from Utopia Island?*, KLUWER ARB. BLOG, Dec. 6, 2018; <http://arbitrationblog.kluwerarbitration.com/2018/12/06/should-arbitrators-come-from-utopia-island/>.

⁸⁹ Malcolm Wilkey, *The Practicalities of Cross-Cultural Arbitration*, in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* 79, 86 (Stefan N. Frommel & Barry A.K. Rider eds., Kluwer Law International 1996).



better counselling and the arbitrators will be capable to manage the case properly, which may eventually lead to an amicable settlement or an enforceable award that properly observes all the issues involved.



ALEX VINICIUS SANTANA SOUZA is a recent graduate from the law school of the Federal University of the State of Rio de Janeiro. He worked as an intern in the Brazilian Securities and Exchange Commission and in Cantidiano Advogados. He also contributes to the website LEX MACHINÆ.

BOOK REVIEW:

A GUIDE TO THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

BY ROMAN KHODYKIN AND CAROL MULCAHY

Reviewed by Gretta L. Walters

In their new book, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*,¹ Roman Khodykin and Carol Mulcahy, with Nicholas Fletcher QC as Consultant Editor, take a deep dive into the IBA Rules on the Taking of Evidence in International Arbitration (the “Rules”). Khodykin and Mulcahy’s comprehensive, article-by-article analysis draws on reports of the IBA working groups, case law, academic authorities, comparisons to various arbitral rules, and their own practical experiences to provide practical guidance on evidentiary issues that frequently arise in international arbitrations.

As summarized in the preface, the Rules are “almost ubiquitous” in international arbitration today, with procedural orders routinely referring to them.² Both the 1999 and revised 2010 version of the Rules draw their strengths from the experiences of established arbitrators and practitioners from different legal backgrounds. Khodykin and Mulcahy have followed this approach by “cast[ing] a wide net” to analyze the Rules from common and civil law perspectives.³

The book follows the structure of the Rules, with each chapter providing the full text of each Article before offering a detailed analysis of the individual provisions. This article-by-article approach delivers to readers strategies for confronting evidentiary issues under the Rules that are likely to arise in nearly all arbitrations. Chapter 6, for instance, details the provisions of Article 3 – “Documents,” which will be familiar to many users of the Rules. But Khodykin and Mulcahy’s analysis offers users fresh perspectives on Article 3’s provisions by explaining their drafting history

¹ ROMAN KHODYKIN & CAROL MULCAHY, *A GUIDE TO THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION* (Nicholas Fletcher QC ed., Oxford University Press 2019).

² *Id.* at i.

³ *Id.*



(including introduction of the concept of “relevant and material to outcome”),⁴ key revisions in the 2010 Rules,⁵ and real-world experiences of how the provisions have been applied. For example, in detailing Article 3.3(a), which allows parties to request “narrow and specific” categories of documents, Khodykin and Mulcahy provide examples from actual cases of categories of document requests that were accepted and rejected under Article 3.3.(a)’s standard.⁶

But the book also provides clarity on provisions of the Rules with which practitioners may be less familiar, such as those on consultation on evidentiary issues provided for in Article 2 of the Rules. As the book explains, Article 2 of the Rules deals with the tribunal’s role in managing the exchange of evidence.⁷ Although Article 2 is less frequently referenced than other provisions of the Rules, Khodykin and Mulcahy’s analysis affords readers with strategies to better using Article 2 to more efficiently manage evidentiary issues and to potentially avoid common disputes—both of which can decrease time and costs. For example, the book suggests approaches to consider at an early phase of the arbitration whether certain fact or expert evidence is required and, if so, how it may be limited.⁸

In addition to the detailed article-by-article analysis, the book provides numerous appendices that will serve as helpful references throughout an arbitration. Among the appendices are a sample Redfern schedule and checklists for taking various types of evidence in the arbitration. For example, the “Checklist for Production of Documents” provides checklist items for the requesting party and tribunal, with references to the relevant provisions in the Rules.⁹

A Guide to the IBA Rules on the Taking of Evidence in International Arbitration is a useful and practical resource that provides readers with the tools to manage both routine and complicated evidentiary issue in international arbitration. The book is a

⁴ *Id.* at ¶¶ 6.12–6.23.

⁵ *Id.* at ¶¶ 6.24–6.25.

⁶ *See id.* at ¶¶ 6.62 & Box 6.1.

⁷ *Id.* at ¶ 5.1.

⁸ *Id.* at ¶¶ 5.53–5.61.

⁹ *Id.* at Appx. 7.



welcome addition to understanding how the Rules apply in practice, and arbitrators and international arbitration practitioners alike will undoubtedly find the book to be a helpful and repeatedly referenced source.



GRETTA L. WALTERS is Counsel at Chaffetz Lindsey in New York. She has represented a diverse range of domestic and international clients in commercial and investment disputes in arbitration and state and federal courts. Her experience includes arbitrations arising under the ICDR, AAA Employment, AAA Commercial, AAA Construction, BCICAC, ICC, LCIA, SCC, SMA, and UNCITRAL Rules.

Prior to joining Chaffetz Lindsey, Gretta was an Associate at Mayer Brown, Legal Counsel at the Arbitration Institute of the Stockholm Chamber of Commerce, and a Visiting Lecturer at Stockholm University.

Gretta is an Executive Board member for ICDR Y&I and Secretary of the International Commercial Disputes Committee of the New York City Bar. She is also an adjunct professor and coaches the Foreign Direct Investment and Vis International Commercial Arbitration moot court teams at New York University Law School. Gretta regularly speaks at international arbitration-related conferences and co-authored *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer 2018).

**CHANGED CIRCUMSTANCES:
PRACTICAL INSIGHTS FROM SEASONED ARBITRATION COUNSEL AND
ARBITRATORS**

Aníbal Martín Sabater, *Moderator*

Julie Bédard, *Panelist*
Paula Hodges, QC, *Panelist*
Philippe Pinsolle, *Panelist*
Eduardo Zuleta, *Panelist*

Panel from the 31st Annual ITA Workshop and Annual Meeting, held in Plano, Texas on June 19-21, 2019.

In this panel a set of seasoned practitioners addressed the challenges that arbitration counsel typically face when arguing the doctrines and mechanisms of changed circumstances in arbitration; the challenges that arbitrators typically face when resolving claims based on these doctrines and mechanisms; and the contract negotiation/drafting strategies that can avoid or mitigate those challenges.

ANÍBAL SABATER: Good morning ladies and gentlemen. It is my honor to moderate this panel. We are going to be talking about practical insights into changed circumstances. If you read the Tribune or the New York Times, you know there are in essence two types of change: Change we can believe in, or fake change. We are going to address both. As Professor Klaus Peter Berger was saying earlier, legal theories on change have abounded at least since medieval times. What happens when a supervening legal change or change in market renders performance of a contract illegal? Or impossible? Maybe not illegal or impossible, but at least deprives me of the bargained for exchange, the profit that I was expecting to obtain? These are issues that have been around for centuries and continue to be around. It is one of our goals today to give you some comments on how to these are issues addressed in practice by leading arbitration practitioners.

I am flanked here today by four highly experience arbitration lawyers. They frequently act as counsel or arbitrator in complex big-ticket cases. To my left is Philippe Pinsolle. Philippe is based in Geneva and he is a partner with Quinn Emanuel Urquhart & Sullivan, LLP. He is the head of Global Arbitration for Continental Europe.



Next is Paula Hodges, who is the Global Head of International Arbitration at Herbert Smith Freehills. She is a partner with the firm based in London. She is a QC and recently became the president of the London Court of International Arbitration (LCIA). To my further left, Julie Bédard. She is based in New York, partner with Skadden Arps, Slate, Meagher & Flom LLP, and she is the head of the firm's International Litigation and Arbitration Group for the Americas. To my farthest left is Eduardo Zuleta. After a very long and distinguished period with bigger law firms, Eduardo, a few years ago, established Zuleta Abogados from where he operates. Most of you know him as a very distinguished lawyer and arbitrator in cases around the world with a special emphasis on Latin America.

We would like to start the presentation talking about changed circumstances. This is an issue usually addressed both in the law and in the contract, and not always consistently. We thought it would be a good idea to start by evaluating, in a quick round robin, how are changed circumstances addressed in the laws of the jurisdictions our panelist come from? Then we will talk about contract theories and how those two interact.

Starting with the law, Paula, what does the laws of England and Wales ("English law"), have to say about changed circumstances in its legal system?

PAULA HODGES, QC: English law is, of course, very popular for cross border transactions for the purpose of achieving commercial certainty. The wording of contracts in English law definitely takes precedence when it comes to interpretation. Subjective intentions of the parties before the contract is signed or indeed performance afterwards are irrelevant. We do look at the objective factual matrix, in other words, the information available to both parties before the contract is signed. Once the contract is signed, the words definitely take precedence. Nevertheless, we are not completely heartless. We do have certain principles that have developed over the centuries to assist where there are exceptional unexpected circumstances. However, there is no principle of change circumstances as such.

Now, one of these concepts is frustration. It certainly applies where performance has become impossible or illegal. I think Professor Berger said that it is a type of hardship principle. I would take issue with that. It is much more than hardship. You



cannot invoke frustration just because it has become more difficult or more expensive to perform. It does have to be impossible.

*Taylor v. Caldwell*¹ is an 1863 case that brought this concept to English law in a substantive way. It related to a contract to use a music hall for various very fancy concerts and fetes. Extravagant entertainment was planned, including a forty-piece military band, *al fresco* entertainments, minstrels, fireworks, a ballet, a wizard, Grecian statues, tightrope performers, rifle galleries and air gun shooting, and Chinese and Parisian games, boats on the lake and aquatic sports, whatever all that entails. Sadly, the music hall burned down a week before all of this started. Of course, this was not covered in the contract, and there was no insurance, so the court case developed. One of our great Law Lords, who was Mr. Justice Blackburn at the time, decided that it would be impossible to go ahead because there was no music hall. He actually relied on both Roman law principles, and certain principles in the French civil code to say that when the existence of a particular thing is essential to a contract and if that thing is destroyed through no fault of the parties, then the obligations fall away. So, this was the birth of frustration.

Over the years, the law on frustration has developed and it has become quite clear that it must be interpreted narrowly. It is not applicable just when property prices fall, for example. A more recent attempt to use the law of frustration relates to that certain scenario we are experiencing in the UK at the moment called Brexit. Believe it or not, one party tried to get out of a lease to rent some very expensive property in London because it was going to move its headquarters to Amsterdam instead. It quoted the law of frustration due to Brexit.² Needless to say, that has been thrown out by the High Court. We will see if there are any more attempts coming up.

Estoppel is another favorite that pops up. If a party has made an unequivocal representation that it is not going to rely on strict contractual performance by the other side, and the counterparty then relies on that to change its position so that it would be unfair to go back to strict performance, then estoppel allows the party that

¹ *Taylor & Anor v. Caldwell & Anor*, [1863] EWHC QB J1.

² *Canary Wharf (BP4) T1 Ltd v. European Medicines Agency*, [2019] EWHC 335 (Ch).



has relied on the representation not to perform its side of the bargain. You will not be surprised to hear another famous judge of ours, Lord Denning, really put some legs on this principle back in the 1940s in the *High Trees* case³ which came just at the end of World War II.

In this case a landlord, during the war, had said to his tenants: “Don’t worry about paying rent. Everyone’s in a hard situation.” Then, once the war was over, he tried to collect payment of the rent retrospectively. Lord Denning, well he was Mr. Justice Denning at that time, said No. You, landlord, are estopped from now insisting on collecting the rent due.

Those are just two concepts we have under English law. But there is not a hardship principle as such, and certainly not one that would allow you to get out of a bad bargain.

ANÍBAL SABATER: Thank you very much Paula. Julie could claim title to competently talk about New York law or the laws of Canadian Provinces, but she agreed today to focus on New York law. Julie, what does New York law say about changed circumstances?

JULIE BÉDARD: Thank you Aníbal. I will make one preliminary comment, which I think might resonate with the practitioners and arbitrators in the room. Although it does make a lot of sense for us to start with the analysis of the applicable laws before we turn to discussing the clauses in international agreements, it is interesting to note that the law we are looking at, whether it is in England or in New York, and I suspect other places in the world, we find ourselves in a slightly disappointed. When we try to look at those laws and the case law to inform our decisions or our arguments in international arbitration controversies we are having to use Chinese and Persian games cases, or Brexit analogies, as opposed to much relevant, or at least, closer fact patterns to the controversies we handle on a regular basis for our clients; such as long term oil concession agreements. Those controversies are not, in fact, routinely found in the judicial cases, at least not in some of the common law jurisdictions I deal with. That creates a disconnect. Perhaps less of an emphasis on judicial cases, and

³ Central London Property Trust Ltd v. High Trees House Ltd, [1947] (K.B.) 130.



of course, as one might expect further emphasis in the increased importance of the law that we are developing in international commercial and investment arbitration cases.

Be that as it may, I think we still like to be grounded into some principles of domestic law, even if as the name might suggest, they are very domestic in their nature and factual circumstances, but they do provide legal guidance.

With respect to New York, you will not hear anything that is dramatically different from the English approach. Nevertheless, it is interesting to go through some of these cases with the understanding that there is, generally, overlap. This would be very true as a general principle. The common law jurisdictions, by and large, have been historically, less inviting of arguments about changed circumstances. You do not have anything like the divide between administrative and private law contracts, anything like the variety of concepts such as *imprévision* or changed circumstances. The analysis is done on a case-by-case basis, and it is done with great reluctance if the parties did not speak to the matter in their contract. The default mechanism under the law will provide very little recourse for the parties. Not quite nothing as we will see in some of the examples that we will go through. But it is limited.

If you consider a situation where a party signs a contract, for either the lease or the sale of a property, for example, if the person who signs this instrument dies, there is New York case law that suggests the estate is not, in fact, bound by the contract to proceed and close with the transaction. This might be analogized to some international arbitration situations or perhaps bankruptcy and insolvency, but I leave it to you.

With respect to the importance of the agreement, whenever the parties actually speak to and have in their contemplation some of these eventualities, New York courts will be extremely focused on these provisions. In fact, if the parties speak to this, they are likely to provide something more than the words on the page. So, if the agreement provides for a certain type of compensation in the event, a certain event will occur, then this will be strictly enforced.

If you sign a lease and this lease is frustrated because your competitor leased the property next door and would be your next-door neighbor; your lease is less valuable,



and you are less interested in it; New York courts have no patience for that kind of claim. They will not rule that this constitutes frustration of the contract.

Frustration is being recognized in certain situations, and I think this is close enough to a business context that we might recognize it in international controversies. The situation is such that you have a usage of entrance money for payment of certain restoration costs. That was the basis upon which the restoration agreement was actually entered into; so, the assumption of regular payment was going into the agreement. There is a 2009 case that actually recognizes that this might be entertained as a reason for frustration.⁴ Again, a very specific set of circumstances where the assumption for entering into the contract was communicated to the other side and built into the way the contract came about.

If frustration is tough to get, impossibility and impracticability are harder. We will not dwell on this as there are sophisticated lawyers in the room, we all know impossibility when we see it. Impracticability is a little different. I have been surprised to see some very isolated cases of recognition of the doctrine and circumstances that were perhaps a bit of a close call. In a case as recent as 2017, a premise is destroyed by fire.⁵ This is a resort facility that was destroyed. It was rebuilt and even if the facility was rebuilt, it was found that there was, in fact, no obligation to a lease to the perspective lessee. So, there had been a contract to lease the property and the performance was excused. Frankly this would not, at first blush, meet the impossibility requirements. Perhaps there is a little bit more patience, to call it that, on the part of the New York courts here to excuse the performance when the lessor refused to give the premises and the resort to the perspective lessee.

This is very much in line, I think, with what we might see in some of the international cases. You are merrily talking about an increase in costs of performance, that is not going to cut it for New York law impossibility purposes. This might get close to replacement in case of total loss. So, these are very significant

⁴ *D & A Structural Contrs. Inc. v Unger*, 2009 NY Slip Op 52026(U), 25 Misc 3d 1211(A) (Sup. Ct. Nassau Cty, Aug. 20, 2009).

⁵ *Leisure Time v. Villa Roma*, 2017 NY Slip Op 27055, 52 N.Y.S.3d 621 (Sup. Ct. Queens Cty, Feb. 22, 2017).



financial consequences, but nevertheless would not meet the threshold.

With respect to force majeure, I like this example. It will resonate with some of us. In this particular case, there was a dispute that arose between the defendant and an aircraft manufacturer that prevented the timely delivery of the aircraft. The existence of the dispute was used to argue that the delayed performance should be excused. I suppose you can try anything. That was, in fact, denied by the court.

Perhaps more interestingly and relevantly, when you think about the liability insurance crisis in the mid-80s and the inability of some to maintain proper insurance coverage after their policies expired. This was found not to constitute force majeure. Thus, the difficulty for a party to get or continue insurance coverage required under contract, if the impossibility, as a matter of fact, might arise or become costly to get the coverage, this is not something that the New York courts would recognize as force majeure. If you lease a stadium out and the season is cancelled due to a lockout by the players, that too will not constitute force majeure unless it is specified by the clause.

So, I will leave it at that, in terms of description of New York cases and I probably would sum up the case law situation in New York as one that is overly on the side or greatly on the side of caution in giving much room for a party argue that it is excused from performance. But there are some cases that can be used for that purpose.

ANÍBAL SABATER: Thank you, Julie. Philippe, we sometimes have the impression that civil law jurisdictions are completely at odds with common law ones on the issue of changed circumstances, that they are much more lenient when it comes to allowing for changes in the contract. Is that the case? How are things in France?

PHILIPPE PINSOLLE: That is not necessarily the case. It is as wrong as saying a civil law jurisdiction will not enforce a contract as written. Because, for example, if you take French law, it is simply forbidden to interpret the contract if it is clear. The supreme court will always enforce this. The notion that you look into the subjective intention of the parties arises only if the contract is not clear. The supreme court is very attentive to this.

If I move now into hardship and force majeure, thanks to the work of my friend



Professor Klaus Peter Berger, I can be faster, especially on force majeure, because essentially, in 2016 the definition of force majeure was reformed but the regime is quite straight forward and in keeping with international standards in that respect. More interesting, perhaps, is the evolution or the tentative evolution on hardship. We come from a situation where hardship, as Professor Berger said, was simply denied in commercial contracts. Administrative contracts were the very narrow space where it applied. But, in commercial cases, the rule was very clear dating to 1876 that in no case courts are entitled, however equitable that may seem, to take into consideration change in circumstances to modify the parties' agreement and replace contractual clauses freely accepted by the parties by new clauses. That was the very clear principle. There is no way you can modify the contract.

When we reformed the law on obligations in 2016, there were some discussions as to whether or not we should introduce a hardship principle. Very important professors in France were actually divided. Judges were consulted and judges were not at all divided. They were totally against it. They said, "It's not our role to rewrite contracts. We will not do it. Do whatever you want, we will not do it." The result of that is a provision which is very convoluted and in my view is unlikely to give rise to many changes. If I just read the trigger, it says, "if a change of circumstances that was not foreseeable at the time of conclusion of the contract, results in the performance of the contract being excessively onerous by a party that did not accept the corresponding risks, then that party can ask for renegotiation and ultimately go to a court which can revise or terminate the contract." If you look at it, the trigger threshold is extremely high, because it has to be unforeseeable, it has to result in excessive onerousness in the promise of the contract, and the corresponding risk must not have been accepted by the party, whatever the corresponding risk is. How do you articulate that with notion of unforeseeability is entirely unclear to me? So, the threshold is very high. Then, the remedy is just a discretion. The court can revise, they are not obliged to. Most likely the courts will say: "I'm not going to revise." As a consequence, that provision is not applied in any significant transaction that I have seen; it is simply excluded.

As a result, this provision which applies for contracts between private parties



since the first of October 2016, has produced very few cases so far and only cases of first instance. So, I cannot tell you where the case law is because in most cases, it was rejected. However, it was accepted in one case which is not exactly high priority, so it does not mean anything. I cannot tell you what the future lies and what it will be in terms of this provision. My suspicion is that French case law will remain faithful to the original principle of *imprévision*, like it or not. In general, the contract will not be changed. That is my prediction. Thank you.

ANÍBAL SABATER: Thank you very much Philippe. Eduardo, we have been talking about national theories or domestic theories on changed circumstances, but there is a whole body of arguably transnational law out there that may also have a bearing on changed circumstances. You have the UNIDROIT Principles of International Commercial Contracts (UPICC). You have the United Nations Convention on Contracts for the International Sale of Goods (CISG). You have published arbitral awards. Do you think nowadays we can talk about transnational principles of hardship, force majeure, and if so what would those be?

EDUARDO ZULETA: Arbitrators, to some extent, have been forced to adapt or to create rules for situations where changes of circumstances are alleged for a variety of reasons. First, normally the parties and their counsel are not as thorough and as clear in their drafting. Normally you would find clauses that have been drafted at the very last minute when the businesspeople want to close the deal, get rid of the lawyers, not necessarily in that order, but that is what they want. Thus, we have more and more situations where either the parties have not agreed on applicable law, or, even worse, they have drafted a contract under a system or legal tradition, they draft a contract fitted for certain applicable law, basically common law. For example, they draft an M&A contract under New York law, and then, at the very last minute, they decide to apply Peruvian law, or they decide to apply Paraguayan law. Here we have a contract, which is drafted under one set of circumstances, one set of clauses, and the governing law may say totally the opposite or may not have appropriate provisions or may have inapplicable provisions.

The other types of clauses that you will find are clauses with references to general



principles of law. The contract will be governed by law 'x' but with regard or considering general universal principles and contracts.

You also have vague clauses. Clauses that provide for a change of circumstances in a very general manner, or where the triggering event is not clear, or where the triggering event is tied to a change in the local law or things to that sort. Or back-to-back contracts with different or contradictory provisions; different change of circumstance clauses. As an arbitrator you have to, one way or another, decide on them together, because one contract impacts, of course, the other.

That is the first problem to get into a really transnational approach. The second set of problems is the different approaches the several laws take to this situation. You will find laws where there is a specific provision for changed circumstances. Most of the civil laws in Latin American countries do include a specific provision for hardship or for force majeure for change of circumstances or economic equilibrium. There are, however, a number of legislations where there is no specific provision and there is a development of the changed circumstances based on the principles of good faith or use of process. So, you have different rules that you have to apply.

The third problem that you will find, to try to find something that is common, is that courts put a number of different things under the principle of *rebus sic stantibus*. For example, force majeure, frustration, the theory of *imprévision* from French law, and they mix them all together. They could mean, under the decision of the courts, basically anything.

Now, what the tribunals have done is, number one, try to find common ground in the different sets of legislation. Number two, find international legal principles derived from, sometimes the Vienna Convention on the Law of Treaties that expressly refers to change of circumstances. The principles contain issues such as force majeure and changed of circumstances.

A general review of the awards leads to the conclusion that tribunals, even though they have not built a general understanding or general transnational rules on change of circumstances, there are certain common grounds that tribunals have accepted that I would say are not debated today. The two main principles of *pacta sunt servanda*, sanctity of contracts, and that the issue of change of circumstances is a



matter of allocation of risks. To the extent that the parties have allocated the risks, the tribunal would have to respect that. Those are two general common principles contained in the decisions that I have reviewed.

Third, *rebus sic stantibus* is an exception to the rule. It is generally the rule of restricted application. A common thing that one could see is that the arbitrators have to respect the contract terms, even when the applicable law provides for a different solution. If you have a change of circumstances clause, and the applicable law provides for a different solution, then you would have to apply the contract except in the unlikely event that the solution has the nature of involving public police or the international applicable law.

The fourth principle is that hardship clauses should be interpreted strictly. A clause referring to a specific change of circumstances should be understood to mean only those changes that the parties agreed to and other kinds of changes would not be included in the contract. In other words, there will be not implied changed of circumstances clause.

The fifth and final consideration is that there seems to be a general consensus as to what are the requirements for the change of circumstances, particularly in hardship, to apply. This is, number one, that the triggering event must have occurred after the conclusion of the contract. That is one of the key reasons, of course. The second is that the event must be unforeseeable. Both circumstances should apply. It should be beyond the control of the disadvantaged party and must result, and this is the most difficult one, in a fundamental change in the equilibrium of a contract. That is a difficult factor, because it is an economic concept. It is not a legal concept. What is a substantial change in the condition of the contracts? What is a change in the economic equilibrium of a contract? What is economic excessive onerousness?

To conclude, I would say that there is not a general transnational rule for applying change of circumstances, but you can find in the awards certain general common grounds that are not being discussed today. Regardless of the applicable law, the general rule that the contract terms prevail and that it is normally difficult to find change of circumstances is pervasive. Contractual clauses that try to regulate hardship lack something that, to me, is relevant which is an economic formula for the



adjustment. Normally you will see general definitions of what a substantive change is—substantive change means any substantive change that is substantive—however, those clauses do not have an economic formula and you do not have a clear way to get back to the equilibrium of the contract.

ANÍBAL SABATER: Thank you very much Eduardo. Paula, building on something that Eduardo was just alluding to, how do you build changed circumstances provisions into your contract? A client comes to your firm and says, well we are doing business in Venezuela or in Russia, it is a volatile legal and economic environment. The transaction may suddenly be voided or impossible to perform because of sanctions or because of a market change. What type of protections can you build into the contracts to account for that type of situation?

PAULA HODGES QC: Leaving aside force majeure provisions, material adverse change provisions, and other types of boilerplate clauses that we often see, and which are normally drafted in very general terms, there are certain industries that do try to cater for market changes. Obviously in the gas industry, we have price review clauses, which sometimes have an economic formula and then there is a big argument about whether it should apply. In the upstream oil and gas business, if an oil field straddles two licensees, because oil fields do not always fit nicely into the grid that the state carves up, you have a unitization agreement and the parties on both sides will look at the initial seismic data (giving an indication of where the oil is located) and decide the percentage interests that should be allocated to each side. Of course, until they have more precise information about where the oil is, it may not be the right split. As a result, you often see a redetermination clause, which can be triggered once or twice during the life of the agreement, when there is more information available. Then you get into wonderful principles like the “Indonesian Saturation Equation” which I grappled with last year. Even though the contract will go into huge amounts of detail about when a redetermination clause is triggered and what the results are, needless to say, particularly if there is going to be a big swing one way or another, the redetermination process can spawn into a big technical dispute.

One other example I wanted to raise, focusing in on changed circumstances, was



a case I was involved in fifteen years ago. The UK changed the power industry from a national grid to bilateral contracts. One of our clients had actually come to us in advance. They knew reform was on the cards. How can we deal with it? A clause was put in to deal with changed circumstances, which was specific to a degree, but you still had to include some generic language because you did not know where it would end up. I do not think anyone expected quite the seismic shift from the grid to bilateral contracts that occurred, and the clause did not quite work.

When it came to the arbitration, both sides put in extremely different interpretations for the tribunal at very different ends of the spectrum. I remember clearly after day two of the hearing, the tribunal called a halt to the proceedings and said that they had been considering the situation and given that the governing law was English law, they did not have the ability to take out a blue pencil and rewrite the contract. They would have no choice but to accept the interpretation of one or the other of the parties. Given the extreme nature of the interpretations put forward, one or the other party would be very disappointed. All I can say is that the case settled at about 4 AM in the morning because neither side could risk having the extreme results proposed by the other. I think it is very difficult to put in a change of circumstance clause that actually works in advance of knowing the type of change likely to happen.

ANÍBAL SABATER: Thank you very much, Paula. Two of the most frequently invoked clauses in arbitration involving changed circumstance are renegotiation clauses and stabilization clauses. Philippe, first, and Julie next, what are they about? How do they work in practice? More importantly, how do they make appearances in arbitration cases?

PHILIPPE PINSOLE: Two comments. One first on stabilization, and then on rebalancing clauses. If we discuss stabilization clauses *per se*, they are in theory the best way to avoid any change because you say I operate in a stabilized environment and any future change does not apply to me. We have various degrees of these. You can freeze the applicable law at a given point in time, including that is between private parties, and then you can go further. You can provide that not only the law is frozen,



but any change in the law is frozen, and generally this new tax law, custom law, etc., does not apply to the contract. It can apply to the rest of the world, but it does not apply to the contract. That is the second step.

The first step is a contract where you create a comprehensive regime that applies only to your company in a given country and that is completely divorced from that state of common regime. Of course, that can only work if you have this comprehensive regime and an arbitration agreement, which sort of makes the whole contract. It puts it outside the local legal environment. This happens only if you deal with a sovereign, the state itself, and you have to have some sort of negotiating power, some leverage to obtain this type of agreement.

Until the end of the 90s, the World Bank was very much in favor of those types of arrangements because they give predictability. So, do they occur frequently? The answer would be yes, in certain countries and in certain types of deals. You find them very often in Africa, especially French speaking Africa, in major oil and gas deals. I have arbitrated some of them including very significant cases. One case is US\$77 billion, which was a significant case, pure stabilization clause. These clauses exist. They are reserved, or they are limited to certain circumstances and they are very different from clauses from where you allocate the risk of change. For example, you can have a clause that says: “if the tax law changes, it is not my problem, it is yours.” When you discuss with the local national oil company, that is not strictly speaking a stabilization clause. You just allocated the tax risk to the national oil company.

I wanted to ask a few questions on rebalancing clauses. Not so much on the validity or the compatibility of the local law, or even the trigger, which is very often litigated, but rather, if the parties agree that you should restore the original bargain. My question to you is, what is the original bargain in practice? We find very little guidance on this. How do you do that? What do you mean by that? Do you consider the original bargain in absolute terms? For example, in the gas price review the buyer may have a certain margin built in the price, and do you restore that margin fifteen years or thirty years later in absolute terms? Or is it a proportion? Do you look at the risk allocation? If the change itself affects the risk allocation, how do you remedy that? Maybe it is impossible to restore the agreed risk allocation, because the market



has changed. Do you consider the expectations of the parties when entering into the contract? For me the answer is yes, but what type of expectations? The expected rate of return from the project? It may be that the economics have changed so much the initial rate of return means nothing, even if it was a threshold for an investment decision. But it is something which in practice can no longer be restored? Are you completely changing the formula? Are you changing the parameters of the contract? How far are you prepared to go?

I give you two examples derived from real life. One is a contract for exchange of electricity. One party will exchange what we call base electricity, which is produced during the day for example by a gas turbine system or nuclear electricity, against what is called peak electricity which can be produced by hydroelectric power. Okay, you have a long-term contract with an exchange ratio. The market has completely changed. The ratio does not mean anything. One party gets, let us say, a windfall. How do you rebalance that, if at all, knowing the market will change again in the future? Do you rebalance the formula? Or do you just neutralize the effect of the windfall, assuming you can? That is one aspect.

Another possible example is an old concession type contract entered into at a certain point in time with the expectation that the oil barrel will be between twenty and thirty dollars. Then, there is an increase in taxes which needs to be rebalanced, but at the same time, the barrel has increased to a hundred dollars a barrel, which makes the contract more interesting for the investor, including the new tax. Do you rebalance that or not? Even with the new tax they are making far more money than they expected at the beginning. These types of issues are very concrete issues that we find in the cases.

I do not pretend that I know the answer to my questions, but I do know that Julie will tell you what the principles are that govern the solution.

JULIE BÉDARD: Passing on the buck. Thank you, Philippe. When I noted earlier the disappointment we might have with the domestic cases, I highlighted the importance of the international jurisprudence in this area. Maybe what I should have said, before talking about the importance of the cases, is the overarching critical necessity for us as lawyers, and with our clients, to think through what we draft in the contracts. The



decisions in international arbitration are very focused on what the contracts have to say. This all stems from the default legal regimes being either not supportive of the notion of reviewing and revising contracts or having to some degree of uncertainty about how this is supposed to unfold.

In either situation, whether it is a common law or a civil law backdrop to your contract, there is great value in providing for these situations and thinking them through in the agreement. Many of us do this, or many of our clients are extremely focused on this. The more our clients have long term investments—the more they are putting in money into a project early, and they are putting hundreds of millions, possibly billions of dollars, into a project with the expectation that the return will flow through only over an extended period of time—the more they have to think about how the contract will work over time, over these extended periods of time. What is interesting, and I think Philippe quite correctly focused us on this, is the windfall situation that Philippe alluded to earlier. Although there is a decent amount of intellectual energy on both sides being invested in drafting the contract in such a way that the economic equilibrium might be preserved, I will give you only two cases as an example showing the importance of the words on the page. *Duke Energy*,⁶ this is a case that is known to many with Yves Fortier, sharing the pen with Guido Tawil and Pedro Nikken, in the context of a stabilization clause. The case involves laws enacted in Peru. Peru is really looking to attract investments, so Peru is making a big case of providing this legal stability upfront. Those legal guarantees are incorporated into the actual investment agreements. Then you have a situation where the tax authorities disagree with the legal guarantees that were provided up front. There is a potential loss to the investor. In that situation, the tribunal found that the purported application of the tax laws was in breach of the stabilization clause in the agreement.

There is a decent amount of emphasis put on how much you consider the expectations and intent of the parties. I think reasonable people can disagree in

⁶ *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, (Aug. 18, 2008).



different jurisdictions about what the default ultimately is with respect to whether you analyze the expectation—the intent of the parties—only when there is an ambiguity in the terms of the contract. I found in practice that this distinction matters less than one might think simply because we, as lawyers, argue both sides of this issue. The expectations and intent are always put before the tribunal, regardless of whether a party takes a position that it should not arise, because you have to address the other side's position that says it is in fact relevant and should be considered. Ultimately, tribunals do have all of this information in front of them. It is hardly debated. Most of the time, what we find is that tribunals much prefer, and this is quite understandable, they much prefer to find support in the expectations and intent, and the background and the history, and the negotiations of the agreements, to ultimately justify the interpretation they are giving to the agreement. The distinction between applying expectations and intent only where there is the ambiguity, although hardly debated, in practice is less important than one might think.

A quick word on *Burlington*,⁷ which is also a decision that many of us will look to in the context of product sharing contracts. Prices did rise in Ecuador as many will remember, which did create this purported windfall environment that Philippe alluded to, that then lead Ecuador to tax what it perceived to be were excess profits made by the companies. The contracts, however, did provide for several “tax modification clauses.” The parties, having put their minds to the matter of potential changes in the tax laws, lead to a “correction factor” being included in the agreement. The tribunal found that the tax modification clauses were stabilization clauses. The purpose of which was, of course, to avoid tax increases or decreases, this actually went both ways. We tend to forget the other side of the coin. The award, under the pen of Gabrielle Kaufmann-Kohler, also considered that a decrease could alter the economic foundation. Ultimately the conclusion was that the application of “a correction factor is mandatory when a tax affects the economy of the product sharing

⁷ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012).



contracts for these laws.”⁸ Otherwise stated, “the correction factor must restore the economy of the production sharing contract to its pre-tax modification level.”⁹

Two comments here. One is the notion that it is not always easy to go back to the pretax or pre-unforeseen event situation and restore the equilibrium between the parties. Two, and this is a comment that Gabrielle Kaufmann-Kohler made in a speech that she gave a few years ago at the IBA Arbitration Day in Buenos Aires, Argentina. Gabrielle Kaufmann-Kohler does purport to read and look into the intentions of the parties almost always. She is far from persuaded that if there is lack of ambiguity she should be prevented from looking at the expectations and intents. Here, the particular historical situation between the parties also was important.

ANÍBAL SABATER: Thank you very much, Julie. In the hopefully five minutes that we have left, Eduardo, I think we have been taking for granted perhaps a critical distinction, at least in civil law jurisdictions, and that is the distinction between a contract that involves only private parties and a contract that also involves the government. Civil contracts v. administrative contracts. What differences are you seeing in the way changed circumstances get addressed in those different types of contracts? Consequently, in the arbitrations stemming from them.

EDUARDO ZULETA: Yes, two or three things. First, un-stabilization or the theory that some courts have adopted is that the stabilization clause is an indemnity clause but not a clause to freeze the law. In other words, if the law changes, the changes apply to the contract, the state or the state entity, and the private party. The changes apply to the contract, but the state entity has to indemnify and restore the economic equilibrium of the contract.

Second, the difficulty is: what is an administrative contract? Certain jurisdictions define an administrative contract as any contract signed by state entity. Others define an administrative contract by the content of the contract, etc. That is the second difficulty.

The third difficulty is that generally, in administrative contracts, there is this

⁸ *Id.* at 334.

⁹ *Id.*



concept, this definition of collaboration contracts where the private party is considered to be a collaborator to the administration, to the state entity or the state, and that results in a number of things. First, the criteria to define change of circumstances is different. Second, the criteria to adjust the contract in the case of changed circumstances is different. Under this theory of collaboration, you even see cases where the courts have said that the restoration of the equilibrium should be to the point of no loss, meaning, no gain for the private party. Simply no loss and that is it. That has, of course, a number of economic implications. The third difference is the issue of defining the circumstances that are considered change of circumstances in this so-called administrative contract.

Normally there are four sets of different circumstances. The first one is the so-called administrative, which is the sovereign act. This is the situation in which the state takes a general measure, not a measure into the contract, but a general measure that has a direct or indirect impact in the contract and then the state has to re-adjust price and restore the economic equilibrium in the country.

The second one is the so-called private, which is the act of the state that affects directly the contract. This is the situation in which the state has the authority either to interrupt the contract unilaterally or even to terminate or to suspend the contract unilaterally. Then there is a change there in which the economic equilibrium should be restored.

The third one is something called unforeseen circumstances, which in both in a number of legislations, particularly in Latin America and Spain is called *caso fortuito*. This is the situation in which there are external circumstances that arise in the development of the contract, like, excessive rain or that kind of natural or technical things, that give the right to the private party to adjust the contract if it is an administrative or state contract.

Of course, last, but not least, the very well-known theory of *imprévision* which you find in basically all civil law statutes.

There is a difference there in the grounds, number one, and in the approach to the way of restoring the economic equilibrium of the country, number two. Under these theories of collaboration, the private party may end up in a situation where



there is no gain, no loss, just a collaboration with the state, which is, of course, not an ideal situation.

ANÍBAL SABATER: Excellent! Thank you very much. Thank you to our panelists!

Aníbal Martín Sabater
Chaffetz Lindsey LLP, New York

Julie Bédard
Skadden, Arps, Slate, Meagher Flom LLP, New York

Paula Hodges QC
Herbert Smith Freehills LLP, London

Philippe Pinsolle
Quinn Emanuel Urquhart Sullivan, LLP, Geneva

Eduardo Zuleta
Zuleta Abogados Asociados S.A.S Bogotá

IS THE FUTURE BRIGHT FOR INTERNATIONAL ENERGY DISPUTES IN ASIA? HIGHLIGHTS OF THE INAUGURAL ITA-ICC-IEL JOINT CONFERENCE – SINGAPORE 2019

by Gabriella Richmond

The ITA-IEL-ICC Joint Conference on International Energy Arbitration was held in Singapore in September 2019, examining the future of international energy disputes in the region. There was a focus on the client perspective, with insights from a variety of speakers. The range of participants and speakers was impressive, with practitioners, in-house counsel, and institution representatives covering a broad spectrum of topics in the lifecycle of energy disputes.

As the inaugural holding of the conference in Singapore, Edwin Tong SC (Senior Minister of State for Law (“S.M.S.”)) highlighted the growing importance of Asia as an energy hub, and of Singapore as a dispute resolution hub for parties worldwide. As S.M.S. Tong noted, energy demands have grown hugely in Asia in the last 15 years, driven by Asia’s development and the infrastructure required. Singapore is Asia’s leading oil trading hub, and home to more than 300 leading energy and chemical companies. Its location and position as a neutral and stable jurisdiction make it attractive for multi-party, multi-jurisdictional, high-value disputes, particularly as the industry grows.

I. LIFECYCLES AND GLOBAL REACH OF ENERGY DISPUTES

The conference covered a variety of aspects to an energy dispute, from pre-dispute responsibilities of the parties involved and early case assessment, through awards and settlement possibilities. A panel of in-house counsel and practitioners (Jennifer L. Ferratt, Chevron; Christopher Moore, Moyes & Co; Nandakumar Ponniya, Baker McKenzie; and Liz Snodgrass, Three Crowns) also discussed “Exit” disputes at the end of a project, covering the framework for such disputes, the financial and fiscal aspect, and the commercial and investment aspect of dispute resolution.

From a region-specific angle, Professor Chester Brown delivered a presentation on difficulties encountered through boundary disputes in the Asia-Pacific region, particularly significant for energy disputes. Professor Brown considered the balance



of uncertainty over making investment decisions against the demand for energy, against a background of key boundary disputes in the region.

In terms of comparisons drawn from energy disputes in Europe, Mark Mangan (Dechert LLP) and Joquin Terceno (Freshfields) took part in an interesting debate considering the similarities and differences between gas price reviews in Europe and Asia. This left conference members wondering if price reviews in Asia will follow the same pattern seen in Europe, despite many market differences.

The diversity of topics covered, and global experience of the speakers themselves was an overriding theme throughout the two days, encapsulated by two inspiring interviews with Laura M. Robertson (ConocoPhillips) and Loretta Malintoppi (39 Essex Chambers, Singapore).

II. INNOVATION IN ARBITRATION: KEEPING THE FUTURE BRIGHT

A repeated topic throughout the conference was innovation in arbitration, with both institutions and practitioners staying attuned to what parties want and developments in the field, both generally and energy dispute specific. Senior representatives from the ICC, ICSID, SIAC and HKIA spoke on recent innovations and perspectives from the institutions, including prevalent topics such as third-party funding and transparency. Throughout the conference, the rising importance of mediation and ADR also became clear, particularly with the recent signing of the Singapore Convention on Mediation.¹

III. PRACTICALITIES FROM AN IN-HOUSE PERSPECTIVE.

The in-house perspective added a practical note to discussions, with engaged and interested clients with a desire for time and cost efficiency in proceedings. On a general note, experienced practitioners (Erin Miller Rankin, Freshfields, and Chen Han Toh, Pinsent Masons MPillay), and the client perspective from Mona Katigbak (GE Renewable Energy) and Catherine McNeilly (INPEX Australia) summarised the management of construction disputes. Client interest and involvement in selecting an arbitrator was evident, as well as the need for alignment between counsel and

¹United Nations Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018.



clients in the approach to the dispute.

The practitioners emphasized the influence and responsibility of the parties at the pre-arbitration stage, particularly in relation to attempted settlement and dispute assessment, with early case assessments and proactive resolution plans. They also made reference to the updated ICC Commission Report published in February 2019, with updates on interim measures, settlement, and translations being discussed in relation to energy disputes. The proactivity of institutions in responding to what users and clients want was apparent. As a fitting end to the conference, Craig Miles (King & Spalding) delivered a concise and entertaining review of the top energy dispute cases of the year, including the very recent award in *ConocoPhillips v Venezuela*.²

IV. KEY TAKEAWAYS.

The recurring themes, as highlighted by the conference co-chair Nicholas Lingard (Freshfields), were those of diversity, both in terms of experience, perspectives, and nationalities, and the omnipresence of geopolitics in energy disputes. The importance for clients in maintaining working relationships during a dispute, and the need for cost and time efficiency. Institutions and seats are responding to this by increased focus on areas such as third-party funding, settlement, and expedited arbitrations, amongst others. ADR is gaining greater traction and rising in importance outside of formal arbitration proceedings, particularly with the recent signing of the Singapore Mediation Rules.

The future for energy arbitration in Asia does look bright, bolstered by proactive institutions and engaged clients, against a backdrop of an increasingly important Asian market.

² *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. & ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award (Mar. 8, 2019)



GABRIELLA RICHMOND is an international arbitration associate in the Singapore office of White & Case. Gabriella's experience covers a range of industry sectors, including infrastructure and construction, telecommunications, financial institutions, and investment treaty disputes.

YOUNG ITA FORUM: 2019 – A YEAR IN REVIEW

by Subhiksh Vasudev & Léocadia Lakatos

On January 15, 2020, Young ITA held its forum in Paris, where the panelists discussed key developments in international arbitration. Following is the report from the event, with thanks to Subhiksh Vasudev and Leocadia Lakatos of Quinn Emanuel Urquhart & Sullivan.

I. THE FORUM

Young ITA commenced its Forum with welcoming remarks by Alexander Leventhal (Quinn Emanuel Urquhart & Sullivan, Paris) on behalf of Young ITA, setting the stage for the panel discussion and introducing Alexander Fessas (Secretary General, ICC International Court of Arbitration). The Forum was hosted by Dechert LLP and several arbitration practitioners and law students from all over the world attended.

Sara Koleilat-Aranjo (Senior Associate, Al Tamimi, Dubai) presented on the topic of “Chevron and the Legitimacy of the Arbitral Order” and discussed the recent developments in the Chevron saga in which a “sham” arbitral institution in Egypt rendered an arbitral award of approximately US\$18 billion against Chevron. Ms. Koleilat-Aranjo reported that in September 2019, the US District Court for the Northern District of California refused to enforce the award citing several “procedural irregularities”.¹ In the absence of a common legal definition of an arbitral institution, she referred to a recent Egyptian Court of Cassation judgment (October 22, 2019) which defined the characteristics of an arbitral institution to be “internationally or regionally well-known” and “have gained the trust” of clients over the years in the fields of international business, trade, and investment. Ms. Koleilat-Aranjo questioned whether, as part of the checks and balances safeguarding the sanctity of arbitral proceedings, arbitral institutions ought to be regulated, by drawing attention to the recent regulation efforts in the Russian Federation, which

¹Waleed Al-Qarqani, *et al. v. Chevron Corp., et al.*, No. C 18-03297 JSW, Order Granting Chevron’s Motion to Dismiss the Petition to Confirm Arbitration Award, Sept. 24, 2019 (N.D. Cal. 2019).



has led to a drastic limitation on accessibility to certain internationally-recognized arbitral institutions. In regards to the arbitrators' exposure to criminal liability, she highlighted that, in the Chevron case, the members of the arbitral tribunal, and of the "sham" arbitral institution in Egypt, were criminally prosecuted and convicted for forgery, among other things, in Egypt.

Ana Gerdau de Borja (Associate, Derains & Gharavi, Paris) presented on the topic of "Corruption: Between Law and Reality" and discussed the Court of Appeal of Paris' decision in the *Alstom v. ABL* case (Apr. 2019).² There, the court refused the enforcement of an ICC award on the ground of violation of international public policy, for the reason that it provided ABL a payment of bribes based on intermediary agreements concluded between Alstom and ABL to secure public contracts in China. Ms. Gerdau de Borja also discussed the Hague Court of Appeal decision in the *Bariven* case (October 2019),³ where the Court set aside the ICC award on the grounds that the contract was procured by corruption. She explained that the court found the tribunal's approach in setting the threshold for corruption to be based on clear and convincing evidence was too strict. Lastly, Ms. Gerdau de Borja discussed some developments in Peru, where the Prosecutor's Office accused several arbitrators of specific passive bribery and initiated criminal proceedings against them.

Rocío Digón (Consultant, White & Case) presented on the topic of "Federal Court Discovery and Arbitral Proceedings" and discussed two recent decisions rendered under 28 U.S.C. § 1782, a federal statute that allows a litigant to a legal proceeding outside the US to request a district court to authorize discovery in the US for use in a proceeding before a foreign court or tribunal.

In *Abdul Latif Jameel v. Fedex* (September 2019), the 6th Circuit interpreted the term "foreign tribunal" broadly enough to include the DIFC Court, where a commercial arbitration was pending and where the applicant sought to use the evidence (in the form of deposition testimony and documents) requested from the

² *Alstom Transport S.A. v. Alexander Brothers Ltd.*, Paris Court of Appeal (Apr. 10, 2018).

³ *Wells Ultimate Service LLC v. Bariven S.A.*, The Hague Court of Appeal (Oct. 22, 2019).



respondent.⁴

In *Re Application of Del Valle Ruiz et al.* (October 2019), the 2nd Circuit granted the applicant's discovery request against one of the respondent's affiliates, since it was headquartered within its jurisdiction, and held that for the discovery from those affiliates that were not headquartered or incorporated in the district where the application was filed, the applicant would have to demonstrate that the requested evidence arose from the conduct of such corporation in that particular district.⁵

Ms. Digón further explained the court's holding that the location of evidence was immaterial for the purpose of discovery under the 1782 proceeding, as long as it was within the requested party's possession, custody, or control. She further observed that the impact of these decisions is the likely increase in the number of applications under Section 1782 in certain Circuits, which could result in a US Supreme Court decision resolving the Circuit split on whether a private international commercial arbitration constitutes a "foreign tribunal" for purposes of the statute.

José Manuel Garcia Represa (Partner, Dechert LLP, Paris) presented on the topic of "Discounted Cash Flow Valuation – Not So Rare Anymore?" and discussed the recent developments of valuations based on the discounted cash flow method ("DCF"), particularly in the mining industry. He explained how the DCF has now become a standard valuation technique for income-generating assets, commonly used by international tribunals when the asset has a history of profitability. However, Mr. Represa also pointed out to cases where tribunals refused to apply the DCF, where the asset had not yet begun generating cash flows, especially given the uncertainty involved, and instead preferred to award damages on the basis of the sunk costs. In discussing this trend, he pointed out to *Tethyan Copper v. Pakistan*,⁶ in which the tribunal accepted to value a non-producing mining project on the basis of a "modern DCF" approach, consisting of factoring the "risk" of future cash flow

⁴ *Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019).

⁵ *In re: Application of Antonio del Valle Ruiz & Others for an Order to Take Discovery For Use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782*, 939 F.3d 520 (2nd Cir. 2019).

⁶ *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (July 12, 2019).



generating in each item of revenue, cost, and then discounting the result at a risk-free rate to present value. Mr. Represa noted that this method had also been used by a commercial arbitration tribunal (with the same presiding arbitrator as in Tethyan) back in 2017.

Ilija Mitrev Penusliski (Counsel, Shearman & Sterling, Paris) presented on the topic “Treaty ‘Modernization’: Where Is the Pendulum Swinging?” and discussed the Energy Charter Treaty (ECT) treaty modernization, driven primarily by the EU and its Member States. He recalled that this modernization is part of a series of reforms of other treaties which in recent years have led to a complete rethinking of the international investment regime. As examples, Mr. Penusliski pointed out to the Achmea decision, the adoption of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and the United States-Mexico-Canada Agreement (USMCA), the discussion on Investor-State Dispute Settlement within UNCITRAL Working Group III, the UNCTAD’s Reform Package for the International Investment Regime, and the ICSID’s “most extensive review to date” of the ICSID rules and regulations.

Mr. Penusliski explained that while the progressive items (e.g., environmental protection, labor standards, anti-corruption, etc.) will remain soft law at best, some of the useful and needed amendments will be dwarfed by a scaling down investment protection and imposing restrictions on who can bring a claim and under what circumstances. Arguing that States should be subjected to full rule of law policing, and investors should likewise be obligated to engage in responsible and sustainable business conduct under the scrutiny of adjudicators., Mr. Penusliski questioned why a concept that has been central to investing and investment protection should be practically eviscerated from modern treaties.

José Manuel Garcia Represa (Partner, Dechert LLP, Paris) presented on the topic “Is There a Future to Dual National Claims?” and addressed the future of dual national claims in non-ICSID investment arbitration, since the Article 25 of the ICSID Convention expressly exclude such claims. Mr. Represa took the audience on the comparative tour of the three latest arbitrations involving claims by various members of Garcia Armas family against Venezuela, following the expropriation of its food



distribution business. He first discussed *Serafín García Armas and Karina García Gruber v. Venezuela* (UNCITRAL/PCA Case No. 2013-03), in which, on February 13, 2019, the French Cour de Cassation (No. 17-25.851) quashed the Paris Court of Appeal's partial annulment of the Tribunal's decision on jurisdiction. There, the Court found that it had failed to properly draw the legal consequences from its own findings. In the end, the Tribunal issued its award on the merits on April 26, 2019, ordering Venezuela to pay some US\$357 million.

Mr. Represa then turned to *Manuel García Armas et al. V. Bolivarian Republic of Venezuela* (UNCITRAL/PCA Case No. 2016-08), where, in its December 13, 2019 award, the Tribunal denied having jurisdiction on the basis that, under the 1995 Spain-Venezuela BIT, the signatory states never consented to arbitrate any disputes with dual Spanish-Venezuelan nationals.

Lastly, Mr. Represa discussed *Luis García Armas v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/16/1), involves another family member, a Spanish citizen, and now in front of the same Tribunal is still ongoing.

Ilija Mitrev Penusliski (Counsel, Shearman & Sterling, Paris) presented on the topic "Climate Change Arbitration: To Adopt and Adapt?" and covered the very critical, in the second hottest year, issue of climate change in arbitration. Mr. Penusliski raised a question whether the world of arbitration should adopt and adapt climate change. He observed that climate change disputes will proliferate due to direct efforts to deal with climate change (i.e., cutting emissions and transitioning from fossil fuels), endless construction (from building sponge cities to rebuilding bushfire-scorched Australia), and new realities of risk allocations. To illustrate his point, he took the example of potential delays resulting from construction workers impossibility to work because of the warmth. Mr. Penusliski, detailed three events that have been of importance in 2019: (i) the *Urgenda* case, in which the Dutch Supreme Court held that international human rights obligations required the Dutch Government to lower emissions by 25% through to 2020; (ii) the claim brought by a US mining investor against Canada due to the Alberta's decision to phase out coal by 2030 without any compensation for coal miners; and, (iii) the ICC's seminal report on climate change and arbitration, which analyzed the types of climate change disputes seen to date,



and addressed the suitability of arbitration to resolve them. In conclusion, an open question remain and confirm the need for arbitration to adopt and adapt: how to deal with these disputes expeditiously?

Rocío Digón (Consultant, White & Case) presented on the topic “Singapore Convention: A Challenge to Arbitration” and discussed the potential challenges to arbitration raised by the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the “Singapore Convention on Mediation”, signed on August 7, 2019.⁷ The Singapore Convention’s purpose is to facilitate the cross-border enforcement of settlement agreements obtained following mediation by addressing issues of scope (Article IV) as well as grounds to refuse to grant relief (Article V).

The reception of the Singapore Convention has been mixed. Ms. Digon set out the pros, which are that the Convention created a separate enforcement regime, establishing a broad definition of mediation, and was already signed by 51 Member States, including the US and China. Finally, she concluded with the cons by questioning: Whether the Convention was really necessary considering mediation is consensual? Whether instead of differentiating mediation from arbitration; does it pull it closer? Are the parties given an “out” to avoid enforcement when they allege the mediator’s misconduct and will the initial enthusiasm stall or simply plateau?

II. POLL ADDRESSED TO THE AUDIENCE

The Forum discussion ended with a live poll where the audience was asked to vote on five questions related to the previous discussions. Below is the list of presented questions and answers. In bold are answers that received the highest number of votes from the audience.

1. Whether the standard of proof for corruption allegations in **26/48 votes** international arbitration should be:
 - a) Proof of corruption on a balance of probabilities;
 - b) A heightened standard (clear and convincing evidence);**
 - c) A criminal law standard (beyond a reasonable doubt);
 - d) None of the above.

⁷United Nations Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018.



2. Whether valuation under the “modern DCF”: 31/53 votes
 - a) **Goes too far and should be rejected (because too speculative);**
 - b) Is necessary (and part of the inherent complexity and uncertainty involved in valuing profits).
3. What will be the effect of the recent case law on Section 1782?: 23/50 votes
 - a) Welcome developments that will be affirmed by other circuits and courts;
 - b) **A sign of the further Americanization of arbitration – with increased discovery;**
 - c) More costs and inefficient proceedings;
 - d) Don’t worry – these are outlier decisions.
4. The regulation of arbitral institutions is: 26/53 votes
 - a) **Vital to the legitimacy of arbitration;**
 - b) Limited to the creation of arbitral institutions only (i.e. not their operation);
 - c) A hindrance to the development of arbitration;
 - d) Not warranted or necessary.
5. The Energy Charter Treaty: 27/49 votes
 - a) And investment arbitration, in general, will reach their expiry date soon;
 - b) Must be substantially amended;
 - c) **Should be tweaked;**
 - d) Is perfect just the way it is.



SUBHIKSH VASUDEV is an Indian lawyer part-qualified in England & Wales solicitor (passed the QLTS MCT exam in January 2020). He holds a postgraduate degree from the Geneva LL.M. in International Dispute Settlement (MIDS '18). He also holds a bachelor's degree in Electronics & Communication engineering. Prior to the MIDS, over the period of six years, Subhiksh was managing his own litigation practice in India. After successfully completing a 6-month traineeship at LALIVE in Geneva, he is currently working as an international arbitration trainee in Quinn Emanuel Urquhart & Sullivan in Paris since August 2019, where he is specializing in international commercial and investment arbitration.



LEOCADIA LAKATOS is a French-Swiss international arbitration Trainee currently in Quinn Emanuel Urquhart & Sullivan Paris. She has previously interned in several law firms and arbitral institutions (Betto Perben Pradel Filhol, Baker McKenzie, Hong Kong International Arbitration Center (HKIAC)). Besides, Leocadia has also worked alongside a Solo Practitioner in Massachusetts, US, focusing on IP and Corporate litigation, while also volunteering at the Fair Employment Project. She holds an LL.M. degree from Boston University School of Law (Full Ride Scholarship) and a Master's degree from the Université Paris 2 Panthéon-Assas. In addition, she has successfully completed several certificates from Harvard Law School, Yale Law School & ESSEC Business School, and the High International Studies Institute.

INSTITUTE FOR TRANSNATIONAL ARBITRATION OF THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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5201 Democracy Drive
Plano, Texas, 75024-3561
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