2022
Volume 4, Issue 2

Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration

ITA IN REVIEW

VOL. 4 **2022** **NO. 2**

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ITA in Review is

a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law

5201 Democracy Drive
Plano, TX 75024-3561

ARBITRATION AND THE FIGHT AGAINST CORRUPTION IN CONTRACTS: A PROPOSAL TO REFORM THE UNCITRAL MODEL LAW

by Mateo Miguel Verdias

I. INTRODUCTION

In cases where the underlying contract to an arbitral dispute has proven to be tainted by corruption, there are not at present enough legal tools for arbitrators to avoid enforcing corruption-obtained rights, nor for national courts to reject the enforcement of the arbitral award which upheld, in one way to another, such rights. A preliminary review of domestic court decisions shows that the most frequently applied ground for rejecting enforcement of an award containing corruption-obtained rights is the violation of public policy as provided in the UNCITRAL Model Law and the New York Convention. Still, violation of public policy may entail a myriad of meanings and consequences from one jurisdiction to another. Its ambiguity is less than satisfactory when it comes to tackling such a problematic issue as corruption in contracts.

This article, therefore, argues that a more explicit ground for annulment of awards should be incorporated to the UNCITRAL Model Law: when in the conclusion or performance of the contract or legal relationship whose rights were enforced in the arbitral proceedings, there has been corruption of any of the parties, in accordance with the transnational understanding of corruption. By doing so, we, the arbitral community, would contribute to discourage those engaged in corrupt dealings from using arbitration as a means to have their rights upheld and enforced.

This article is structured as follows. *First*, it assesses the problem of corruption and its impact on the global economy. *Second*, it reviews the transnational legal treatment that states have given to corruption generically and in the context of arbitration (Section III). *Third*, it dives into the analysis of how domestic courts acted to prevent—or not—the enforcement of arbitral awards upholding rights acquired corruptly (Section IV). *Fourth*, it suggests a single legal text solution that tackles the two sides of the same coin: on the one hand entitling domestic courts to reject

enforcement of awards upholding rights arising out of such contracts and, on the other hand, implicitly obliging arbitrators not to uphold corruption-obtained rights in a final award (Section V). Finally, Section VI summarizes the considerations of the author as to the responsibility of the arbitral community to contribute to the fight against corruption in businesses by *expressly* regulating against it.

It is noted that this article focuses on the approach of domestic courts towards the enforcement of commercial arbitration awards. The exequatur of investment arbitration awards is deliberately left out of this analysis, as the instruments available for arbitral tribunals deciding investment disputes are often sufficient to combat corruption contracts:[1] the investment treaties' requirement that the investment must be made in accordance with the laws of the host state allows tribunals to decline jurisdiction over claims arising out of corrupt investments. This tool is not available for commercial arbitration tribunals.

II. THE PROBLEM: CORRUPTION AND ITS IMPACT ON THE GLOBAL ECONOMY

A. A *Transnational Definition of Corruption*

States have adopted several, yet often differing, domestic concepts of corruption. Consequently, conduct considered as corrupt in one country could easily be performed in another state with no fallout. Acknowledging the need to transnationally tackle corrupt conduct, an international legislative process to halt corruption has been underway since 1996. Its main milestone was reached on October 31, 2003, when the United Nations (UN) General Assembly adopted the UN Convention against Corruption ("Convention against Corruption")—of which there are currently 186 signatory states.[2]

Corruption, in the context of public functions, was defined by the Convention as "[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official

[1] Corruption does not necessarily occur through contracts, but we centralize the issue around them as they are the most common form of corruption.

[2] United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter Convention against Corruption].

duties."[3] The same far-reaching definition applies when it is the public official who requests or accepts the "undue advantage."[4] In the private sector, the signatory states to the Convention agreed to consider adopting such legislative or other measures to criminalize corruption defined as "[t]he promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting."[5] Again, this definition applies when it is the private official who requests or accepts the undue advantage.[6]

Transnationally, and outside these specific treaty definitions, corruption may also encompass, non-exhaustively, other conduct such as embezzlement, self-dealing, trading in influence, and extortion.[7] Through corrupt conduct, numerous entities have historically secured commercial contracts containing arbitration clauses. As a result, when disputes arose out of those contracts, those parties utilized the arbitration process to have their corruption-obtained rights enforced through the resulting award. Ultimately, those awards were enforced by domestic courts.

B. *The Impact of Corruption on the Global Economy*

On December 9, 2018, the Secretary General of the UN reported very alarming data. Specifically, it was revealed that US$1,000,000,000,000 is spent annually on corruption payments, while US$2,600,000,000,000 is the global cost of corruption. Considering that the estimated Gross World Product ("GWP") in 2018 was US$80,000,000,000,000, the UN concluded that annually the equivalent to 5% of the GWP is lost to corruption.[8]

Likewise, a report issued by the UN Office on Drugs and Crime disclosed

[3] *Id.* art. 15(a).

[4] *Id.* art. 15(b).

[5] *Id.* art. 21(a).

[6] *Id.* art. 21(b).

[7] *See generally* ANA PEYRÓS LLOPIS, TRANSNATIONAL CORRUPTION (2017).

[8] *See The costs of corruption: values, economic development under assault, trillions lost, says Guterres*, U.N. NEWS, (Dec. 9, 2018), https://news.un.org/en/story/2018/12/1027971.

severe figures on the losses incurred by corporations when investing in corrupt countries:[9]

i. Investing in a moderately corrupt country can be up to 20% more costly than investing in a country without corruption. This directly affects emerging economies that depend on foreign investments.[10]

ii. Countries that combat corruption and strengthen the rule of law could increase their national income by 400%.[11]

Similarly, a memorandum prepared jointly by the World Bank and the European Bank for Reconstruction and Development shows that in small companies, corruption payments account for 5% of these small companies' annual income, while in medium-sized companies it is 4% and in large companies 3%.[12] This evidences a disparity of at least 2% in profits between a large and a small company, simply because of corruption. Experts rightly point out that generally, corruption helps consolidating large companies while endangering the survival of start-up and middle-sized enterprises.[13]

Considering the transnational effort put in motion by the international community to specifically target corrupt activities, this author believes that more far-reaching and specific action is needed from the arbitral community to prevent the enforcement of rights derived from corrupt bargains. This paper aims to provide a clearer understanding of the current role that the arbitral legal tools available are playing.

III. LEGAL TREATMENT OF CORRUPTION

A. *Generic Legislative Crusade to Tackle Corruption*

Since 1996, states have ratified numerous instruments aimed at combating

[9] *See* U.N. Off. on Drugs & Crime, Corruption Facts, https://www.unodc.org/pdf/facts_E.pdf.

[10] Daniel Kaufmann, *Corruption: The Facts*, FOREIGN POLICY, Summer 1997, at 5, https://web.worldbank.org/archive/website00818/WEB/PDF/FP_SUMME.PDF.

[11] Press Release, U.N. Off. on Drugs & Crime, Eliminating corruption is crucial to sustainable development, U.N. Press Release UNIS/CP/866 (Nov. 1, 2015).

[12] *See* Stephan Sumah, *Corruption, Causes and Consequences in* TRADE & GLOBAL MARKET 73 (Vito Bobek ed., 2018).

[13] *Id.*

corruption. In order of ratification, these include:

i. Inter-American Convention against Corruption, adopted by the Organization of American States (OAS) (1996).

ii. Organization for Economic Co-operation and Development (OECD) Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996).

iii. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

iv. European Union (EU) Convention against corruption involving public officials (1997).

v. Criminal Law Convention on Corruption (Treaty No. 173 of the Council of Europe) (1999).

vi. Civil Law Convention on Corruption (Treaty No. 174 of the Council of Europe) (1999).

vii. African Union Convention on Preventing and Combating Corruption (2003).

viii. United Nations Convention against Corruption (2003, in force since 2005).

Specifically, in the Preamble to the Convention against Corruption, the signatory states indicated that the Convention's adoption was based on the conviction that "the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively."

In Article 12, the Convention expressly provides that "[e]ach State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption",[14] which may consist in "[p]romoting the development of standards and procedures … for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the

[14] Convention against Corruption, art. 12(1).

State."[15] All the above strongly suggests that states must incorporate specific provisions aimed at tackling corruption. It is not enough to approve generic norms with which, eventually, some forms of corruption can be combated. Specificity is required. And it is on that basis that this article proposes an amendment to the UNCITRAL Model Law.

B. *Lack of Express Legal Tools to Combat Corruption in the Context of Arbitration*

Article 34 of the 2006 UNCITRAL Model Law on International Commercial Arbitration, entitles a state court (of the seat) to annul an arbitral award provided that:[16]

i. Upon request of the challenging party, the tribunal verifies that either:
   1. The arbitration agreement was invalid;
   2. There was a violation to the due process of the law;
   3. The award exceeded the terms of the dispute encompassed by the arbitration agreement; or
   4. The tribunal was unregularly constituted.

ii. Alternatively, on its own, the tribunal finds either:
   1. The subject matter of the dispute was not arbitrable under the terms of the applicable law; or
   2. The award is contrary to (international) public policy.

This legal formula has been adopted, literally or with minor modifications, by the 85 states that have enacted arbitral legislation based on the UNICTRAL Model Law.[17] This means that, in at least 85 states, the law does not provide for "the award upholds rights arising out of a corrupted contract" as an express ground for annulment of the award that decided the dispute.

[15] *Id.* art. 12(2)(b).

[16] U.N. Commission on Int'l Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, U.N. Sales No. E.08.V.4 (2006), art. 34 [hereinafter UNCITRAL Model Law].

[17] *See* UNCITRAL, Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Nov. 15, 2021).

A distinction is due at this point. This article's analysis and proposal aims to tackle two different situations: (i) what *arbitral tribunals* should do (*i.e.*, avoid enforcing rights arising out of corrupted contracts and make relevant inquiries to that end), and (ii) what *domestic courts* should do when faced with awards that uphold corrupted contracts (*i.e.*, make relevant inquiries and annul the award where applicable). To these ends, the author proposes a reform of the UNCITRAL Model Law, which, upon enactment by states, will create an obligation for both domestic courts (to annul) and an entitlement to arbitral tribunals (to consider how this obligation of the courts under the *lex arbitri* will affect the enforceability of their awards). It is a single measure that could have an impact in both forums.

It should be borne in mind that, in the absence of an express ground for annulment due to corruption in the underlying legal transaction, there has been a position—currently abandoned in practice[18]—according to which the arbitrator should not necessarily make inquiries on this matter whenever it is not an issue in dispute

[18] This approach is no longer followed by most tribunals. *See* GARY BORN INTERNATIONAL COMMERCIAL ARBITRATION 2183 (2009) ("Insofar as arbitrators are requested to make a binding arbitral award through an adjudicative process, either awarding monetary sums or declaratory relief, it is a vital precondition to the fulfillment of this mandate that they consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to public policy . . . a tribunal is incapable of deciding that Party A is legally obligated to pay €100, or to hand over specified property, to Party B without considering public policy objections to the existence of such an obligation. Inherent in the legally-binding resolution of a dispute and the making of a legally-binding award is the duty to consider and resolve public policy (and other mandatory legal) objections."). *See also* Anne-Catherine Hahn, *Bribery Allegations in Arbitration Proceedings*, *in* THE INTERNATIONAL ARBITRATION REVIEW 39 (James H. Carter ed., 10th ed., 2019) ("If they want to avoid their award from being annulled or declared unenforceable, arbitrators can no longer turn a blind eye to red flags indicating potentially illegal behavior, but must address their potential relevance."). There is a well-established rule in comparative jurisprudence, which indicates that arbitrators shall not exceed their mandate when investigating on uncontested points, to the extent that such uncontested points may affect the core of the dispute. *See* Minmetals Germany GmbH v Ferco Steel Ltd, [1999] 1 All ER (Comm) 315, 325-326. ("[T]he arbitrators' reliance on evidence derived from their own investigations . . . went to a central issue within the overall dispute referred to arbitration, namely what loss had been caused to [claimant] by [respondent's] breaches of contract. Whether in relying upon that evidence or in omitting to disclose it to [respondent] ... is entirely irrelevant to the question whether the tribunal's decision was inside or outside 'the scope of submission'. That scope [within the meaning of Section 103(2)(c) of the UK Arbitration Act 1996] falls to be defined by reference to the issues to be resolved by the arbitrators . . . This head of objection to enforcement must therefore be rejected."). *See* Michael Hwang S.C., & Kevin Lim, "Corruption in Arbitration— Law and Reality", 8 ASIAN INT'L ARB. J. 1, 20 (2012), ; ("A tribunal is not 'solely a manifestation and instrumentalization of party autonomy which can ignore' international goals of sanctioning illegality.") (quoting Richard Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators", 6th IBA International Arbitration Day, Sydney (Feb. 13, 2003) at 15).

between the parties.[19] And if the arbitrator does so, and issues a decision on the matter, the arbitrator could decide an issue not submitted to it (*ultra petita*) and therefore exceed her mandate. Therefore, it would be left to the will of the parties whether the arbitrator should make inquiries to verify the existence of corruption in the underlying contract: whether to include it as a disputed issue or not. This position derived from a legislative vacuum. Thus, and although it is not an approach currently followed by tribunals, it remains an issue that deserves an express solution to avoid its potential, and undesirable, return to practice. Notably, as the author will propose, the inclusion of an additional and more explicit ground for annulment of awards enforcing corruption-obtained rights, will—implicitly—entitle a tribunal to make the relevant inquiries even when the parties did not dispute the issue considering the possible impact on the enforceability of the tribunal's eventual award.

The lack of a specific rule aimed at combating corrupted contracts whose rights are sought to be enforced in arbitration is evident. And this is contrary to the international commitments assumed by many states in which, as seen, the insertion of *specific* and not *generic* norms aimed at combating corruption in all its versions, is key.

However, the arbitral community should ask itself: have arbitrators and state judges succeeded in practice to effectively close "arbitral doors" to corruption through the grounds provided for in the UNCITRAL Model Law?

The answer is negative.[20] A review of comparative case law shows that

[19] *See* Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. And Beogradska Banka, ICC Case No. 7047, Final Award (Feb. 28, 1994), *in* 13 ASA Bulletin 301, 343 (1995) ("The word 'bribery' is clear and unmistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate."). In this case, the tribunal considered that if corruption is not a debated issue, the tribunal does not have the duty to analyze it.

[20] The reader should bear in mind, as a starting point, that the allegation of corruption is arbitrable subject matter, as required by the UNCITRAL Model Law. Initially, it was considered that the arbitrator should decline jurisdiction. This was on the grounds that corruption is a matter of public policy (and that the arbitrator should not adjudicate on the performance or breach of a contract that was contrary to public policy, since it was absolutely invalid). If the arbitrator were to rule on the merits of an allegedly corrupt contract, the award would be annullable). This was the understanding of the Swedish arbitrator Gunnar Lagergren in 1963 in the award of the emblematic ICC Case No. 1110, when he considered, from the perspective of "general principles of law" (and not of a national law), that corruption disputes cannot be arbitrated because this would imply enforcing a contract that is absolutely invalid and contrary to

domestic courts on the one hand, and arbitral tribunals on the other hand (considering the different concerns that each entail, as analyzed in the following section) have not always sought to combat corrupted contracts and, in those cases where they have done so, they have repeatedly used the ground of "violation of international public policy" to justify an annulment of the contract in dispute or, perhaps, of the award enforcing the rights of such corrupted contract.[21] However, and as it will be demonstrated below, in most of these cases, by relying on such a ground, the decision-makers faced legal challenges and a lack of uniformity of criteria, enabling corruption to go unpunished. And this is something that the arbitral community should not tolerate.

The duties of courts and tribunals as to how to "close the arbitral doors to corruption", raise certainly different considerations in terms of their legal powers. Still, and to simplify the analysis, the author emphasizes that a new ground for

public policy. Case No. 1110 of 1963, ¶¶ 16, 23 (ICC Int'l Ct. Arb.), *reprinted in* 10 ARB. INT'L 282 (1994) ("[I]t cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators… [J]urisdiction must be declined in this case… Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes . . ."). However, this position has been minor and little followed. Based on the doctrine of separability and, bearing in mind that arbitrators deciding on corruption are merely analyzing the way the contract was arrived at, and that broadly drafted arbitration clauses encompass disputes concerning the invalidity of the contract due to corruption, different arbitral tribunals and state courts have recognized the arbitrability of the dispute. *See* Fiona Trust & Holding Corp. v. Privalov, [2007] EWCA Civ 20 [2007]; *aff'd* [2007] UKHL 40 ("[I]f arbitrators can decide that a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery."). Consequently, an award could not be annulled under the pretext that the tribunal lacked jurisdiction. *See also* Case No. 6474 of 1992, 25 Y.B. Comm. Arb. 279 (ICC Int'l Ct. Arb.) ("The Republic of X alleged that the contract was induced by corruption and fraud. The arbitral tribunal held that corruption or fraud could not be determined in the context of a discussion on jurisdiction. Moreover, even if the Republic of X could prove fraud, it would have to prove that the arbitration clause was entered into due to corruption and fraud."). Finally, there is a consistent practice under the New York Convention to allow arbitrability of disputes where corruption of the underlying contract is alleged. This, in light of Art. VII(2), and Art. II(1), which seek to avoid the application of idiosyncratic approaches of each State to grounds for non-recognition of arbitration clauses. *See*, *e.g.*, Gary Born, International Commercial Arbitration 1079, n. 298 (3d ed., 2021) ("That is particularly true in light of Article II(1)' s requirement that international arbitration agreements be recognized as to differences whether 'contractual or not,' which plainly contemplates recognition of arbitration agreements as applied to non-contractual fraud claims."). Moreover, if understood otherwise, a mere allegation of corruption would be sufficient to remove the court's jurisdiction.

[21] *See supra* note 19, . *See also* Mohamed Abdel Raouf, *How should international arbitrators tackle corruption issues*? 24 ICSID REVIEW 116, 120 (2009).

annulment of awards on the basis of corruption of the underlying contract, will entail two different but effective consequences on both forums: (i) for enforcing courts, to make the relevant inquiries and rejecting enforcement of an award which upholds the rights of a corrupted contract, and (ii) for arbitral tribunals, to make the relevant inquiries and to deny upholding rights arising out of corrupted contracts that will, in any case, later be denied enforcement by domestic courts (such inquisitive approach by tribunals would decrease desirability of corrupts to have arbitration as a means to have their corrupt contracts enforced).

IV. FAILURE OF THE JURISPRUDENCE TO STANDARDIZE CRITERIA TO COMBAT CORRUPTION

Both arbitral and judicial jurisprudence have failed to establish uniform criteria to determine the existence of corruption in a contract and to eradicate it accordingly. The challenges that state courts and arbitrators have faced in establishing uniform criteria can be grouped into three areas:

i. Determination of the applicable law for defining and verifying the existence or non-existence of corruption. This issue, as this paper will further develop, should be tackled by relying on a broad transnational definition of corruption.

ii. Determination of the consequences of a finding of corruption, namely whether corruption leads to unenforceability of the contract (when seen from the perspective of the arbitral tribunal) and, ultimately, to the annulment of an award that would enforce rights arising out of a corrupted contract (when requested before a domestic court). Considering that these are different sides of the same issue (corruption of the underlying contract), and that judicial rulings are generally publicly available allowing the establishment of "trends", this paper analyzes domestic case law exclusively.

iii. Determination of the scope of authority, namely whether the arbitral tribunal can or, on its turn, the state judge, decide on corruption issues if it was not a point disputed by the parties.

A. *First Problem: the Applicable Law*

The determination of the applicable law to define corruption activities is a key element and problem to the effort of combating such activities.

Not all jurisdictions equally criminalize both private and public corruption and, similarly, not all jurisdictions consider the same actions to be corrupt.[22] In fact, courts have varied as to the laws they apply to define corruption and investigate it accordingly: some have chosen to analyze it in light of the law of the seat of arbitration (*lex fori*);[23] others under the law of the place of performance of the contract (*lex loci solutiones*);[24] others based on the law of the country where enforcement is sought;[25] among others.[26]

As arbitrator Alfredo Bullard has rightly stated, it is not clear which law should be applied by the judge to determine the existence of a violation of public order:

> [and] if we want to complicate the picture, the relevant public policy may not only be that of the seat of arbitration, that of the country whose law is applicable to the merits of the dispute, but also that of the law of the country of the parties, or that of the country or countries in which the award will be enforced. As can be seen, a rather more complex problem than simply determining when we are faced with an 'impure act' as sin. The problem is not a simple one. An exaggeratedly broad interpretation of the concept of public policy (as would be the case with impure acts) could lead to a judicial review (always ex post) of almost any aspect of the dispute.[27]

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[22] *See* Matthias Scherer, *Circumstantial evidence in corruption before international tribunals*, 5 Int'l Arb. L. Rev. 28, 29-30 (2002). Even in Scherer's table of cases, it can be seen that under different applicable laws, several amounts of commission in the case of agency contracts have been considered as corrupt.

[23]*See* A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*", TRANSNAT'L DISP. MGMT, no. 2, 2004, at 13 (analyzing Lagergren's decision in ICC Case No. 1110).

[24] Case No. 3916 of 1982 (ICC Int'l Ct. Arb.), *in* I Collection of ICC Arb. Awards 1974-1985 (1994), at 509. The arbitrator had to resolve first the question of applicable law, concluding that the laws that made the most sense to apply were those of Iran (because that was where the contract had been signed and where the obligations were to be performed), and the law of France (because it was the law referred to as the as applicable in the English version of the contract). The arbitrator found that under both regulatory regimes, bribing was illegal and entailed the absolute nullity of the contract.

[25] *See* Martin, *supra* note 23, at 14-15 (analyzing ICC Case No. 3913 of 1981).

[26] *See id.* at 12 *et seq*.

[27] *See* Alfredo Bullard, *No cometerás actos impuros: el orden público y el control judicial del laudo arbitral*, 63 THEMIS REVISTA DE DERECHO185, 190 (2013)(Original in Spanish: "*Y si queremos complicar el panorama, el orden público relevante puede no sólo ser el de la sede del arbitraje, el del país cuya Ley es aplicable al fondo de la controversia, sino también el de la ley del país de las partes, o el del país o países en los que el laudo será ejecutado. Como se ve, un problema bastante más complejo que simplemente determinar cuándo estamos frente a un 'acto impuro' como pecado. El problema no es sencillo. Una interpretación*

The lack of clarity as to the applicable law to determine the existence of corrupt conduct has meant that corruption contracts cannot be tackled adequately in arbitration. Yet, simply shedding light over which would be the appropriate applicable law to define corruption can still potentially fail to tackle the issue of non-uniformity as to such definition (even when the applicable law to define corruption is clear, there are a myriad of conflicting definitions between jurisdictions—which is the true problem we must tackle). Hence, as this paper develops in Section IV, a transnational definition of corruption should be applied in all cases.

A clear example of this is the well-known 1992 ICC case *Hilmarton v. OTV*, in which an arbitral tribunal had to consider allegations of corruption and traffic of influence in an intermediation contract with the Algerian government.[28] Specifically, OTV alleged that Hilmarton had engaged in traffic of influence with the Algerian government to obtain a contract for OTV with the State, and therefore should not perform the intermediation contract because it was a contract with an unlawful object.[29]

The arbitral tribunal conducted a double analysis on the allegations of corruption and traffic of influence. It understood that the analysis should be made (i) in light of the substantive law of the contract (*lex causae*) chosen by the parties (Swiss law), and (ii) under the law of the place of performance of the contract (*lex loci solutiones*) (Algerian law).

Under Swiss law, corruption—specifically bribery—was contrary to public policy. However, traffic of influence did not fall under the Swiss definition of corruption (note that, under a transnational definition of corruption, traffic of influence does constitute corruption). And, since only traffic of influence (but not bribery) had been proven, the contract was not voidable under Swiss law.

Under Algerian law, the arbitrator found that both the payment of bribes and

exageradamente amplia del concepto de orden público (como sucedería con los actos impuros) podrían llevar a una revisión judicial (siempre ex post) de casi cualquier aspecto de la controversia.").

[28] *See* Case No. 5622 of 1992, 19 Y.B. Comm. Arb. 105 (ICC Int'l. Ct. Arb.) [hereinafter *Hilmarton v. OTV*].

[29] *See* Martin *supra* note 23, at 20.

traffic of influence with members of the government were corrupt, illegal, and contrary to public policy. Considering the applicability of both sources of law, and that traffic of influence having been proved (although corruption had not), the arbitrator annulled the contract based on the Algerian legal regime, stating:

> Law of Algeria lays down a general principle which must be respected by all legal systems wishing to fight corruption. This is why the violation of this Law, which concerns international public policy . . . . Hence the brokerage contract is null and void in its entirety.[30]

It is important to note that the arbitrator annulled the contract, considering that under exceptional circumstances, the violation of the public policy of a foreign legal system could be contrary to the standards of morality and good customs of Swiss law, which also implied a violation of the public policy of the latter.[31]

Yet, as explained below, this problematic and complex set of applicable laws—with a non-settled criterion—only benefited the corrupt. What could have been a victory in the fight against corrupted contracts turned out to be the opposite. The Court of Justice of Geneva, in a decision later confirmed by the Swiss Federal Court (1989 and 1990, respectively), annulled the award on the grounds that the arbitrator's analysis of Algerian public policy was incorrect.[32] According to the Court, the applicable law for determining the existence of corruption was the *lex causae* exclusively (Swiss law), not the law of the place of execution of the contract (Algerian law). In fact, the Swiss court considered that "the violation of Algerian law did not conflict with good morals under Swiss law and that, therefore, the arbitrator's decision to annul the contract ' . . . constituted a clear violation of Swiss law . . . '."[33] This conclusion reaffirms the position that there is no clearly defined *transnational* public policy behind the concept. Following this annulment, a new tribunal was then

[30] *Id.*

[31] *See* Raouf *supra* note 21, at 121.

[32] *See* Martin *supra* note 23, at 22.

[33] *See* Fernando Mantilla-Serrano, *Algunos apuntes sobre la ejecución de los laudos anulados y la Convención de Nueva York*, REVISTA COLOMBIANA DE DERECHO INTERNACIONAL, 2009, at 24 (author's translation).

appointed, which, applying only Swiss law, did not annul the contract.[34] Ultimately, a contract that—as proven in the arbitration—was obtained through traffic of influence with the Algerian government, was enforced. Arbitration thus served to enforce a contract obtained through governmental traffic of influence.

B. *Second Problem: the Consequences of Corruption Findings*

Another recurrent issue, which evidences a lack of uniformity, are the consequences of corruption findings. From the perspective of a competent domestic court, can corruption lead to the annulment of the award that indeed enforces a corrupted contract?[35] Once again, the answer will depend not only on each jurisdiction but on fluctuant and changing decisions of state courts (in the case of annulments). And this uncertainty and inconsistency simply facilitates the way for further corrupted contracts.

Recent examples in some of the most sophisticated jurisdictions shed light over this problematic reality. The following analysis focuses on how domestic courts have tackled the issue of enforcing arbitral awards that decided disputes arising out of corrupted contracts (regardless whether such contracts were enforced or not).

In England, for instance, there is no consensus in the courts as to whether to set aside awards where contracts with a lawful object—but which were obtained through corruption—are to be enforced. The following cases are representative of this issue:

i. *Crescent Petroleum Company International Ltd and Crescent Gas Corporation Ltd v. National Iranian Oil Company*, High Court of England and Wales: In 2016, the High Court of England and Wales adopted a particular annulment criterion under public policy: the concept of violation of public policy encompasses contracts that are absolutely void (*e.g.*, for having as main object an unlawful element), but not those

[34] *See* Martin *supra* note 23, at 24.

[35] A similar question could be asked in the context of arbitration proceedings: does corruption lead to the non-enforceability of the contract in the final award? As we argue in this paper, considering that arbitrators are obliged to issue an enforceable and non-annullable award, the existence of a ground to annul awards that enforce corrupted contracts would create an obligation to arbitrators to deny enforceability of such contracts in a final award.

that are potentially voidable (*e.g.*, those with a lawful object but which were procured through corruption). Consequently, according to the Court, it is a ground that does not necessarily prevent the enforcement of contracts *procured* through corruption. The Court held that insofar as the plaintiff in the request for annulment of the award did not add new evidence and no exceptional circumstances were verified to consider that the contract was absolutely null and void, the fact that it had been procured through corruption did not constitute a violation of public policy that would justify a new review of the facts and the annulment of the arbitration award.[36] The award was not annulled, and the Court reasoned:

> I reach the following conclusions: … (2) There is no English public policy requiring a court to refuse to enforce a contract procured by bribery. A court might decide to enforce the contract at the instance of one of the parties. It is not that the contract is unenforceable by reason of public policy, but that the public policy impact would not relate to the contract but to the conduct of one party or the other.[37]

ii. *Patel v. Mirza*, UK Supreme Court: In 2016, the UK Supreme Court ruled on a case in which annulment of an award was requested because the decision mandated the restitution of a payment that, from its very origin, was for the purpose of paying a bribe.[38] Yet, the court rejected

[36] *See* National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor [2016] EWHC 510, ¶ 49 (Comm) (Mar. 4, 2016) [hereinafter *NIOC v. Crescent Petroleum*].

[37] *See id.* Facts: In 2001 Crescent and NIOC signed a contract for the purchase and supply of gas. In 2009 Crescent initiated arbitration alleging that NIOC breached its obligation to supply gas. NIOC denied the allegations, and argued that the contract had also been procured through corruption. In its decision, the tribunal held that while it had been proven that corrupt payments had been discussed during the negotiation of the contract, there was insufficient proof that such payments had actually been made. Moreover, there was no imbalance in the contract that would suggest corruption. The tribunal indicated that NIOC should have provided the minutes of the meetings where the alleged corruption took place. In seeking to vacate the award, NIOC argued that the tribunal erroneously failed to find corruption, and that in any event, the mere fact that the contract was "tainted" with corruption was sufficient grounds for not recognizing and nor enforcing the award (and also to vacate it). Crescent held that the mere "taint" of corruption in the contract did not justify its annulment. The Court indicated that the mere existence of "stains" of corruption is not sufficient to annul an award, since this would violate legal certainty. Finally, it rejected the nullity stating that it can only proceed when there is new evidence that was not presented before the arbitral tribunal or "in very exceptional circumstances". *Id.* at ¶ 32.

[38] Patel v Mirza [2016] UKSC 42 (July 20, 2016).

the request for annulment considering that the restitution of what was considered as an "illegal" payment was not contrary to UK law.[39] In fact, the Judge held that: "Bribes of all kinds are odious and corrupting, *but it does not follow that it is in the public interest to prevent their repayment*."[40] The Judge did not develop the analysis of the existence or not of sufficient evidence of corruption. The award was not annulled.

iii. *Honeywell International Middle East Limited v. Meydan Group LLC (formerly Meydan LLC)*, High Court of England and Wales: In 2014, the High Court of England and Wales dismissed a request to annul an arbitral award in which it was argued that enforcing contracts "tainted" by corruption would render the award contrary to public policy.[41] It should be noted that the Court has historically been opposed to finding

[39] *See id.* at ¶¶ 118-121 ("Bribes of all kinds are odious and corrupting, but it does not follow that it is in the public interest to prevent their repayment. There are two sides to the equation. If today it transpired that a bribe had been paid to a political party, a charity or a holder of public office, it might be regarded it as more repugnant to the public interest that the recipient should keep it than that it should be returned. We are not directly concerned with such a case but I refer to it because of the reliance placed on that line of authorities. … The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal.")

[40] *Id.* at ¶ 118 (emphasis added).

[41] *See* Stacey McEvoy, *Arbitration award upheld by the English court in the face of allegations of bribery*, ALLEN & OVERY (July 15, 2014), https://www.allenovery.com/en-gb/global/news-and-insights/publications/arbitration-award-upheld-by-the-english-court-in-the-face-of-allegations-of-bribery.

that corruption contravenes international public policy and, accordingly, has generally indicated that this is not a sufficient *per se* argument for setting aside an award.[42]

C. *Third Problem: Ex Officio Investigations*

Finally, the third—though far from last—issue involving the arbitration of corrupted contracts, is the lack of clarity as to which approach state courts should take when deciding whether to annul awards related to cases where corruption was not alleged or not sufficiently proven in the arbitration proceedings.

In Switzerland, it is settled that contracts involving corruption payment are invalid and contrary to public policy. However, state courts often dismiss motions for annulment when corruption was not sufficiently proven in the arbitration. There is no *de novo* review nor even further inquiry by the state court. This even means that parties cannot make new corruption arguments with the evidence that was *already* presented before the arbitral tribunal: "It would not be compatible with the foregoing to allow the parties to state facts other than those found by the arbitral tribunal other than in the exceptional cases reserved by case law, even though such facts may be established by the evidence included in the arbitration file."[43] This approach is consistent with the principle that issues on the merits must not be subject to a *de novo* review by domestic courts (unless newly discovered evidence is made available to such court). Some examples:

i. First Civil Law Court of the Swiss Federal Tribunal, July 11, 2017, Judgement 4A-50/2017: allegations of corruption that were known but not alleged by the parties at the time of the arbitration, or that were not

[42] *See* Luis María Clouet, *Arbitrating under the table: the effect of allegations of corruption in relation to the jurisdiction of the arbitral tribunal and the enforcement of foreign arbitral awards* 27(NYU academic paper 2018), *available at* https://www.academia.edu/14855822/Arbitrating_under_the_table_the_effect_of_allegations_of_corruption_in_relation_to_the_jurisdiction_of_the_arbitral_tribunal_and_the_enforcement_of_foreign_arbitral_awards .

[43] First Civil Law Court, Case No. 4A-532/2014, Jan. 29, 2015, ¶ 4.1 (emphasis added) (translation by swissarbitrationdecisions.com), *available at* https://www.swissarbitrationdecisions.com/sites/default/files/29%20janvier%202015%204A%20532%202014%20%20et%204A%20534%202014.pdf;

sufficiently established in the arbitral proceedings, cannot be raised in annulment proceedings.[44] The court noted that "the Appellants submit that the award under appeal is incompatible with substantive public policy because it orders them to make payments to the Respondent that do not comply with their 'compliance rules' [sic] in the fight against corruption and which may expose them to severe criminal sanctions." The court indicated, however, that any annulment based on corruption arguments requires corruption to have been sufficiently established in the course of the proceedings but not taken into consideration in the arbitral award:

> [P]romises to pay bribes, according to the Swiss legal order, are contrary to good morals and, therefore, null and void due to a defect affecting their content. According to past case law, they also contravene public policy . . . . However, in order for the corresponding grievance to be admissible, *corruption must have been established but the arbitral tribunal must have refused to take it into account in its award.*[45]

In practice, applications for annulment based on allegations of illegal conduct are generally dismissed in Switzerland.[46] The ICC award dated December 13, 2016, was not set aside.

ii. First Civil Law Court, case *A. SA v. B. SA*, 4A-532/2014, January 29, 2015: the court held that an annulment on the grounds of corruption will proceed only when the party alleging corruption was able to "establish" it during the arbitration and it was not taken into consideration by the tribunal in its award.[47] In that case, the party alleging corruption

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First Civil Law Court of the Swiss Federal Tribunal, July 11, 2017, Judgement 4A-50/2017, ¶ 1.2 (translation by swissarbitrationdecsions.com), *available at* https://www.swissarbitrationdecisions.com/sites/default/files/11%20juillet%202017%204A%2050%202017.pdf.

[45] *Id.* at ¶ 4.3.2 (emphasis added).

[46] See Natalie Voser & Nadja Al Kanawati, *Arbitral tribunal does not act extra or ultra petita if it limits scope of declaratory judgment by imposing conditions (Swiss Supreme Court)*, Aug. 28, 2018.

[47] First Civil Law Court, Case No. 4A-532/2014, Jan. 29, 2015, ¶ 5.1 (translation by swissarbitrationdecisions.com), *available at* https://www.swissarbitrationdecisions.com/sites/default/files/29%20janvier%202015%204A%2053 2%202014%20%20et%204A%20534%202014.pdf.

> requested the tribunal to stay the proceedings until there was a judgment on a criminal proceeding being conducted in parallel against the alleged defendants for the corruption payment alleged in the arbitration.[48] The arbitral tribunal considered that, being unable to determine an approximate duration of the criminal proceedings, it was not appropriate to suspend the arbitration.[49] In hearing the request for annulment, the court indicated that in accordance with Swiss law, (a) a request for set aside cannot be based on facts other than those presented to the arbitral tribunal; (b) a contract promising corruption payments is void, and that any award enforcing such a contract is contrary to public policy; and (iii) corruption must be proven, and an allegation of corruption with parallel criminal proceedings may or may not justify a stay of the arbitration, but if not stayed, it does not amount to a violation of public policy.[50] Based on these arguments, the court dismissed the annulment.

In France, awards enforcing contracts obtained through corruption are considered a violation of international public order.[51] Historically, French courts have required that, in order to annul awards for violation of international public policy, the violation must be "flagrant, effective and concrete."[52] The courts would not conduct an independent analysis of the facts of the dispute and the application of the law by the arbitrator but limit themselves to determining in a "minimalist" manner whether the award manifestly contravened international public policy. However, beginning in 2014, a trend of relaxation of the standard in cases involving allegations of corruption emerged.[53] Thus, the tendency since 2014 has been: if during the *exequatur*

[48] *Id.* at ¶ B.

[49] *Id.* at ¶ 5.

[50] *Id.* at ¶ 5.1.

[51] For further discussion *see* Pierre Pic & Asha Rajan, *The Public Policy Exception in International Arbitration: A Snapshot From France*, 6 INDIAN J. ARB. L. 197 (2017).

[52] Verhoeft v. Moreau, Court of Cassation Mar. 21, 2000, 2001 Revue de l'ArbItrage 805 (2001).

[53] *See* Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France,

proceedings there is an allegation that the award enforces a contract "tainted" with corruption, the court deciding on a request for annulment for breach of public policy may analyze both the facts and the law to determine the corrupted nature—or not—of the underlying contract, and decide whether enforcing it would breach public policy.[54]

The current inquisitorial approach of the French courts favors the fight against corruption contracts in arbitration. Even if corruption had not been a controversial point in the arbitration dispute, French courts tend to analyze the facts and consider corruption for an eventual annulment of the award. The following emblematic decisions represent this jurisprudential shift:

i. *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH v. Sté CPL Industries Limited* ("*Schneider*"), Paris Court of Appeal, 2009, and Cour de Cassation, 2014:[55] relevant case as it was one of the last (if not the very last) where French courts took a "minimalist / restrictive" position on the analysis to be conducted when deciding on the annulment of awards.[56]In that case, the parties entered into a joint venture agreement whereby CPL Industries and other Nigerian companies were to assist Schneider in the negotiation and execution of public bidding contracts in Nigeria. A dispute arose out of that contract, and CPL Industries initiated arbitration proceedings against Schneider, claiming payment of sums due for the intermediation services performed.[57] Schneider argued that, for the purpose of

Paris Court of Appeal Mar. 4, 2014, 2014 Revue de l'ArbItrage 502 (2014)..

[54] *See* Pic & Rajan *supra* note 51, at 206.

[55] *See* Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH c. Sté CPL Industries Limited, Paris Court of Appeals, Sept. 10, 2009, 2010 Revue de l'Arbitrage 548 (2010); Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH c. Sté CPL Industries Limited, Court of Cassation, 1st Civil Law Chamber, Feb. 12, 2014, 2014 Revue de l'Arbitrage 231 (2014).

[56] *See* Clouet *supra* note 42, at24, n. 92.

[57] *See* Patricia Peterson, *The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?*, KLUWER ARBITRATION BLOG, Dec. 10, 2014, http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/.

winning the public tender awards, CPL Industries had engaged in corruption practices in violation of Nigeria's public policy.[58] The sole arbitrator held that the evidence was insufficient to establish corruption on the part of CPL and, accordingly, ordered Schneider to pay the sums due.[59] During the proceedings to annul the award (in France, seat), Schneider alleged that the award violated the public policy of France, alleging fraud and corruption, on the grounds that the arbitrator did not conduct a proper analysis of the factual evidence, and that the award did nothing more than endorse corruption.[60] When the annulment application was brought before the Paris Court of Appeal, the Court rejected Schneider's arguments. It noted that the Court's role was limited to simply analyzing whether the enforcement of that award would violate French international public policy, and whether such violation was "flagrant, effective and concrete."[61] The Court decided that such standard was not met and rejected all of Schneider's arguments related to public policy violations. Five years later, on cassation, the French Court of Cassation reaffirmed the decision of the Court of Appeal and demonstrated a willingness to continue with the minimalist approach to the review of arbitral awards, even when the challenge is based on allegations of corruption.[62]

ii. *Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France* ("*Gulf Leaders*"), Judgments of the Paris Court of Appeal and the Court of Cassation of France, 2014: in a decision issued approximately 20 days after the Court of Cassation's decision in the Schneider case, the Paris Court of Appeal

[58] *See Schneider*, Cour de Cassation, Feb. 12, 2014, ¶¶ 2.4, 2.5, 8.

[59] *Id.*at ¶ 8.

[60] *Id.*

[61] *Id.*at ¶¶ 2.4-2.5.

[62] *See also* Hwang & Lim *supra* note 18, at ¶ 144.

adopted an opposite position (which was later confirmed by the Court of Cassation).[63] Under this approach, the court's review when analyzing the request for annulment or for recognition and enforcement of the award must be broader and may enter into an analysis of the facts and the law.[64] In this case, the Court enforced the award because corruption allegations were not sufficiently proved.

iii. Paris Court of Appeal, case SAS *Man Diesel & Turbo France v. Sté Al Maimana General Trading Company Ltd.* ("*Man Diesel*"), 2014: a party sought to challenge the enforcement of the award on the basis that it would be contrary to international public policy because the underlying contract was "tainted" with corruption.[65] The tribunal re-examined the arguments and allegations of corruption. By analyzing both facts and the law, it concluded that no corruption was sufficiently established.[66] The award was therefore not annulled.

iv. Paris Court of Appeal, *Belokon v. Kyrgyzstan*, February 21, 2017, decision Nº 15/01650: although this is not a case concerning corruption in the exact meaning as it has been analyzed so far, this case concerns activities of money laundering (which, under a transnational concept of corruption as suggested in this paper, should be tackled as well).[67]

[63] *See Gulf Leaders*, Paris Court of Appeal, Mar. 4, 2014, and Court of Cassation, June 24, 2015. *See also* Peterson *supra* note 57. In this case, SA Crédit Foncier de France (CFF) granted a loan to Gulf Leaders to be paid in three installments plus a service fee. Upon failure to pay the third installment and fees, CFF initiated an ICC arbitration. Gulf Leaders argued that the payments were not due because the contract had been obtained through corruption and therefore it was not appropriate to return the money already received. The tribunal found that corruption had not been sufficiently proven and ordered Gulf Leaders to return the money and pay what was owed. Gulf Leaders attempted to challenge the recognition and enforcement of the award on the grounds of corruption of the underlying contract. Both the Paris Court of Appeal and the Court of Cassation dismissed the challenge. However, it is interesting to note that both Courts independently conducted their own analysis of the facts and law to conclude that there was no corruption.

[64] *See* Peterson *supra* note 57.

[65] *See* SAS Man Diesel & Turbo France v. Sté Al Maimana General Trading Company Ltd., Paris Court of Appeals Nov. 4, 2014, 2014 Revue de l'Arbitrage 1037 (2014).

[66] *See* Inan Uluc, *Corruption in International Arbitration* 348 (Penn State L. Sch., SJD Dissertation, Apr. 13, 2016) *available at* https://elibrary.law.psu.edu/sjd/1/.

[67] *See* Kyrgyz Republic v. Valeri Belokon, Paris Court of Appeals, Feb. 21, 2017, 2017 Revue de l'Arbitrage

> Relevantly, it illustrates the continuing tendency of the Paris Court of Appeal to conduct a detailed re-investigation of the facts of the case before the tribunal in cases alleging violation of international public policy (whether for corruption or money laundering). In this case, the Paris Court of Appeal annulled an investment treaty award based on strong indications that the underlying investment would have been concluded for the purpose of money laundering, after having carefully re-examined the evidence in the case and having considered a fine for non-compliance with anti-money laundering regulations imposed after the arbitration on the party opposing the annulment.[68] This judgment confirms the trend that has been developing since 2014.

Except for the recent trend in the French courts, it can be affirmed that the lack of uniformity in criteria for defining and combating corruption has prevented arbitration from becoming a relevant actor in fulfilling this cross-border objective.

D. *A Recent Case That Reminds Us It Is Time to Act*

The current jurisprudence (except for the French trend since 2014), is unsatisfactory. The lack of jurisprudential uniformity and the different barriers to tackle corruption are contrary to the transnational legislative efforts on which states have embarked to eradicate corruption.

In the author's view, a recent example on how the lack of available tools prevented corruption from being properly tackled via arbitration, is the award dated August 6, 2019, in the case *Concesionaria Ruta del Sol* S.A.S. *contra la Agencia Nacional de Infraestructura* – ANI, Consolidated Proceedings Nº 4190 and 4209 administered by the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogota.[69] The following analysis is not a critique of the tribunal's ruling, but a

336 (2017).

[68] *See* April Lacson, *French Court of Cassation affirms de novo review of arbitral award for compliance with public policy*, LEXOLOGY, May 26, 2022, https://www.lexology.com/commentary/arbitration-adr/france/freshfields-bruckhaus-deringer-llp/french-court-of-cassation-affirms-de-novo-review-of-arbitral-award-for-compliance-with-public-policy.

[69] *See* Concesionaria Ruta del Sol S.A.S. v. Agencia Nacional de Infraestructura – ANI, arbitral proceedings No. 4190 and 4209 of the Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá, Final

consideration of how the tribunal lacked the appropriate legal tools to reach a different solution regarding the compensation to the–proven–corrupt claimant.

In 2015, the construction company Concesionaria Ruta del Sol S.A.S., together with Construtora Norberto Odebrecht S.A. and others, initiated an arbitration against Agencia Nacional de Infraestructura – ANI (*i.e.*, a Colombian public entity) for breach of a concession contract, claiming restitution of sums invested (*e.g.*, tax payments) and additional costs incurred due to delays in the works, allegedly attributable to ANI.[70] The seat of the arbitration was Bogotá, and the applicable substantive law was that of Colombia.

In its defense, ANI argued that the concession contract was null and void due to "unlawful cause and object . . . Likewise, there was a misuse of power . . . due to serious acts of corruption, circumstances that, however, fall under the grounds for nullity due to unlawful cause and object."[71]

The arbitral tribunal considered the allegation of corruption sufficiently proven.[72] Consequently, it declared the contract null and void. However, the award obliged the ANI to restitute part of the capital contributed by the claimant/corrupt company.[73] It considered that under Colombian jurisprudence, restitution is indeed

Award, Aug. 6, 2019.

[70] *See id.* at § 5.3.

[71] *See id.* at 64. Original in Spanish ("[P]or causa y objeto ilícitos … Así mismo, se presentó desviación de poder y se incurrió en expresa prohibición legal por graves actos de corrupción, circunstancias que, sin embargo, se reconducen en las causales de nulidad por causa y objeto ilícitos.").

[72] *See id.* at 304, (ANI's submission: "There are abundant procedural pieces that demonstrate the seriousness of the acts of corruption that had a clear and direct impact on the awarding of Concession Contract No. 001 of 2010 whose validity is the subject of study in this case. It is not necessary to delve into legal disquisitions on the causality and effects of the acts of corruption nor to enter into a debate on capricious arguments that try to mitigate and lessen the very serious situation of corruption that surrounded the awarding of the contract, since it is unquestionable that in the present case illegal agreements were made, bribe payments were made and a number of crimes were committed in connection with the awarding of the contract, to such an extent that the Manager of the Granting Entity (INCO) himself, who awarded the Contract, confessed to the acts of corruption and was convicted for such punishable act." The tribunal agreed with this view in its ruling, p. 679: "In short, everything stated throughout the award brings as an obvious consequence the fact that part of the interests caused and/or paid by the Concessionaire, have not complied with the condition of having been destined to the attention of the public interest, in the terms of article 20 of Law 1882 of 2018.") (author's unofficial translation) (emphasis added).

[73] *See id.* at 691.

admissible when the contract was obtained thorough corruption, as long as it had not an unlawful purpose *per se*.[74] The situation would have been different for a contract with an intrinsic unlawful purpose. Based on Ruling C-207-18 of the Colombian Constitutional Court, the arbitral tribunal had to establish to which of Claimant's *bona fide* creditors should the amounts restituted to the company be allocated.[75] Still, although the restituted amounts were not for the direct enjoyment of the claimant, they were for the company to cover its debts with *bona fide* third parties.[76] And this does nothing more than alleviate the corrupt company's debts.[77]

The claim was for COP$361,346,451,890, and the sum awarded as restitution for Claimant was COP$211,273,405,561 (*i.e.*, 58% of the total amount claimed).[78]

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[74] *See id.*

[75] *See id.*

[76] *See id.* ("Application of Ruling C-207-18 of the Constitutional Court for the direction of payments to bona fide third parties. . . . The amount to be recognized to the Concessionaire in the amount of $211,273,405,561, shall be distributed as follows, in accordance with the guidelines established by the Constitutional Court in its Ruling C-207-19. . . . 'Therefore, the recognition of the restitutions to be made is not a simple payment to the contractor, but rather the competent authority of the declaration of nullity of the contract must direct the resources to guarantee the payment of the obligations with the creditors in good faith, including the protection of the savings captured from the public. Only if after paying all the debts of the project to the bona fide creditors there are resources available, the appropriation of such resources may be made by way of restitution of the capital invested by the contractor or partner that is part of the contractor, who has acted without fraud, bad faith or knowledge of the unlawfulness that gave rise to the nullity. (Emphasis added) In this sense, the Constitutional Court considers that the first part of paragraph 1 being challenged must be declared conditionally executory, in the understanding that the acknowledgments by way of restitutions will be directed to the payment of the external liabilities of the project with third parties in good faith. With the remainder, restitutions may be recognized in favor of the contractor, or the member or partner of the contracting party, in those cases in which it is not proven that he acted by means of a fraudulent conduct in the commission of a crime or an administrative infraction, giving rise to the nullity of the contract for unlawful object or cause, or that he participated in the execution of the contract knowing of such unlawfulness.") (author's unofficial translation).

[77] The claim was for US$361,346,451,890. Simply anecdotally, it should be noted that a petition for annulment was filed against the award on elements unrelated to issues concerning to the corruption of the underlying contract. That appeal was dismissed essentially on procedural grounds by a judgment of September 19, 2020 issued by the Sección Tercera de la Sala de lo Contencioso Administrativo del Consejo de Estado de Colombia. *See* Mónica Alejandra León Gil, *Recurso de Anulación – Concesionaria Ruta de Sol S.A.S. vs. Agencia Nacional de Infraestructura*, Departamento de Derecho Procesal, Universidad Externado de Colombia, Oct. 15, 2020, https://procesal.uexternado.edu.co/recurso-de-anulacion-concesionaria-ruta-de-sol-s-a-s-vs-agencia-nacional-de-infraestructura/.

[78] *See Concesionaria Ruta del Sol*, Final Award, at 698 ("As *a consequence of the declaration of absolute nullity of Concession Contract No. 001 of 2010, and its other contractual agreements, in accordance with the provisions of Article 20 of Law 1882 of 2018 and in strict compliance with Ruling C-207 of 2019 issued by the Constitutional Court, to fix in the amount of* TWO HUNDRED ELEVEN THOUSAND TWO HUNDRED SEVENTY THREE MILLION, FOUR HUNDRED FIVE THOUSAND FIVE HUNDRED SIXTY ONE PESOS

It could be argued that, ultimately, a company that induced a proven corrupted contract, was successful in recovering money via the arbitration proceeding, whichever the ultimate purpose of that restitution was. To the author's view, the available legal tools prevented the tribunal from effectively closing the "doors of arbitration" to corruption.

V. REFORM PROPOSAL TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION.

In light of the flagrant inconsistencies in comparative jurisprudence when closing the arbitration doors to corruption and considering the safe-conduct that these undesirable practices have repeatedly found in arbitration, the author proposes a regulatory modification that complies with the transnational premise of regulating *specifically*—not *generically*—against corruption.

Therefore, and considering the foregoing, the author argues that it is necessary to incorporate, as Article 34.2.b.iii of the UNCITRAL Model Law, the following ground for annulment:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
> [. . .]
> b) the court finds that:
> iii) in the conclusion or performance of the contract or legal relationship whose rights were enforced in the arbitral award, there has been corruption of any of the parties, in accordance with international treaties on the subject matter.

This simple and clear text would allow a wide margin of action to investigate corruption, both for the arbitrator and for the state court of annulment when considering—at the request of a party or *ex officio*—possible circumstances of corruption.[79]

($211,273,405,561), the value of the acknowledgments that the NATIONAL INFRASTRUCTURE AGENCY - ANI *must make in favor of the* CONCESIONARIA RUTA DEL SOL S.A.S.") (author's unofficial translation).

[79] A separate discussion, which has not been settled at the international level, is the evidentiary standard to be applied by the state judge in reviewing the award when deciding whether the allegations of corruption are sufficient for its annulment. An emblematic and, in the author's view, accurate example is the one established in the final award in the case *Waguih Elie George Siag and Clorinda Vecchi v. The*

The reference to "in accordance with international treaties on the subject matter", imposes an obligation over reviewing courts (and in parallel, implicitly, over the arbitral tribunal) to analyze allegations of corruption with the standpoint of the broad transnational (and not domestic) definition of corruption. As defined in Section II of this paper, such definition would include several practices by both private and public officers, not limited to the promise, offering, giving, or receiving of bribes only, but also to practices of embezzlement, self-dealing, trading in influence, extortion, among many others defined in international instruments.

This proposal, while aimed at reforming the UNCITRAL Model Law and allowing annulments based on this ground, could—and should—also be replicated by each State in an interpretative law of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; such approach would secure a total block on corrupted contracts in arbitration: by means of annulment but also by rejecting recognition and enforcement on the same grounds.

VI. CONCLUSION

There is no denying that it might be burdensome for states to introduce changes to their arbitration laws; and it is also true that arbitration laws will hardly become obsolete simply because of the lack of advanced changes as the one proposed. But the objective of the arbitration community should not be to keep a law from becoming obsolete, but rather to modernize our laws in such a way that justice prevails over bureaucracy. This legislative reform proposal has a very clear objective: to make corruption more expensive for the corrupt.

Arab Republic of Egypt, ICSID Case No. ARB/05/15. The ICSID tribunal held that an intermediate standard should be applied between the two extreme standards that have been applied in the different systems, indicating that: "The Tribunal accepts that the applicable standard of proof is greater that the balance of probabilities but less than beyond reasonable doubt." *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 326. *See id.* at ¶¶ 325-326 ("The standard suggested by the Claimants was the American standard of 'clear and convincing evidence,' that being somewhere between the traditional civil standard of 'preponderance of the evidence' (otherwise known as the 'balance of probabilities'), and the criminal standard of 'beyond reasonable doubt.' The Tribunal accepts the Claimants' submission. … The Tribunal accepts that the applicable standard of proof is greater that the balance of probabilities but less than beyond reasonable doubt. The term favoured by Claimants is "clear and convincing evidence. The Tribunal agrees with that test.") (internal footnotes omitted).

This reform simultaneously achieves two objectives:

i. Deter corrupts from concluding such contracts: there would be a clear message that if they obtain a contract through (any) corruption practices, they will not be able to enforce (any) rights arising from that contract in an arbitration process.

ii. Incentivize state and private companies to enhance controls so as to eliminate corrupted public officials and private employees: the state or private company will not be entitled to enforce an award ordering the private company to perform a work or pay fines or damages arising from corrupted contracts.

Finally, a strong reminder to lawmakers: according to the UN, the global economic cost of not acting is that, every year, an estimated US$1,000,000,000,000 is paid in bribes while the annual cost of corruption on the global economy is US$2,600,000,000,000. Together, this sum represents 5% of annual GWP. As explained by a World Bank report, the direct costs arising out of corruption include loss of public funds by means of misallocations or higher expenses and lower quality of goods, services, and works.[80] Importantly, corrupts frequently seek to recover their capital contributions by "inflating prices, billing for work not performed, failing to meet contract standards, reducing quality of work or using inferior materials, in case of public procurement of works."[81]

It must not be forgotten that corruption is "a key element in economic underperformance and a major obstacle to poverty alleviation and development" and that it "undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."[82]

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[80] *See The costs of corruption: values, economic development under assault, trillions lost, says Guterres*, U.N. NEWS (Dec. 9, 2018), https://news.un.org/en/story/2018/12/1027971.

[81] *See* OECD, *Preventing Corruption in Public Procurement* 7 (2016), *available at* https://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf.

[82] *See* Convention Against Corruption, at 3 (Preface). *See also The costs of corruption: values, economic development under assault, trillions lost, says Guterres*, U.N. NEWS (Dec. 9, 2018), https://news.un.org/en/story/2018/12/1027971.

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DEFENSES AGAINST INVESTMENT TREATY CLAIMS IN PANDEMIC TIMES: FITTING NEW TRENDS INTO OLD STANDARDS

by Myrto Pantelaki

I. INTRODUCTION

Since the beginning of 2020, the world is witnessing an unprecedented health crisis with high death toll and disruptive consequences not only to public health, but also to the global economy. In response, many States have enacted preventive and rehabilitative measures that have significantly impacted business operations, including foreign investment interests in, *inter alia*, the public services, aviation industry, entertainment, and pharmaceutical sectors.

As it has happened many times in the past, when governments exercises its discretion in regulatory measures, tensions have arisen between the public and the private sectors and investment law has demonstrated a serious potential to constrain State autonomy in mitigating adverse effects of emergency situations.[1] In this regard, foreign investors have availed themselves of the various guarantees included in international investment agreements ('IIAs') and have brought claims against States in relation to a wide variety of areas of governmental policies, challenging only individual treatment by host State authorities, but also generally applicable regulations.

Following this vein, with regard to the present COVID-19 pandemic, there is a high likelihood that State measures adopted in response to the virus will give rise to a plethora of investment treaty claims. Specifically, state responses downplaying the risks of COVID-19 and subsequently, either reversing course and imposing drastic measures[2] or interfering disproportionately in light of the public interest pursued[3] may violate the fair and equitable treatment ('FET') standard. As countries followed Spain's lead in taking control of private hospitals and clinics, investors in the healthcare industry could also file indirect expropriation claims,

[1] The Argentinian financial crisis in late 2001 and the cases that arose thereof serve as relevant examples.

[2] Tecmed S.A. v. Mexican, ICSID No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2009).

[3] Occidental Petroleum Corporation v. The Republic of Ecuador, ICSID No. ARB/06/11, Award, ¶ 338 (Oct. 5, 2012).

if turning over control was involuntary.[4] Moreover, bailout measures that only support certain domestic or foreign companies with significant investments, may constitute a violation of the national treatment or of the Most-Favored-Nation ('MFN') standard.[5] It should be noted that, due to already expressed concerns that pandemic emergency measures could result in investor-State disputes, calls are being made for governments to act multilaterally and suspend treaty-based and investor-State dispute settlement ('ISDS') mechanism for all COVID-19 related disputes.[6]

Critically, these measures will render States susceptible to investment claims under the existing investment law regime as the implementation of such measures might trigger the application of a limited set of treaty-based and customary law 'defenses.' Here, the term 'defenses' encompasses a wide-ranging category of arguments which can be put forward by a party to counter claims brought against it and can be analyzed from a range of perspectives.[7] In light of this, this article is organized using the legal basis of the available defenses as a dividing line and adopts the distinction between defenses arising out of customary law and treaty law, respectively.

To this end, the first part analyzes the defenses available under customary international law, including the exercise of police powers, *force majeure*, and necessity. It discusses that according to the police powers doctrine, measures aimed at the protection of public health are considered a prerogative of state powers. Thus, the loss of property resulting from such measures do not constitute expropriation. Nevertheless, this doctrine is not a 'carte blanche' for States to act in an unfettered manner. Only in case they enact *bona fide*, proportional, and non-discriminatory regulations in accordance with due process, with the aim to

[4] Lucas Bento, Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses, KLUWER ARB. BLOG (Apr.8, 2020).

[5] *Id.*

[6] Nathalie Bernasconi-Osterwalder, Sarah Brewin, and Nyaguthii Maina, Protecting Against Investor–State Claims Amidst COVID 19: A call to action for governments, 10 IISD Commentary, (Apr. 10, 2020).

[7] *See*, *e.g.*, Jorge E. Viñuales, Defence Arguments in Investment Arbitration, 18 ICSID Rep. 9-10, 11 (2020).

address the pandemic, may these measures be considered non-expropriatory in the first place.

Nonetheless, if the underlying measure does not withstand the scrutiny of the above test, it may still be justified under the necessity defense. The latter defense is codified in article 25 of the International Law Commission's Articles on State Responsibility ('ILC Articles'). The odds of success of this particular defense seem, however, rather narrow. This is largely due to the fact that the disputed measure must be the only way for the State to safeguard public health. Necessity constitutes a tightly drafted defense, available in principle but hardly ever in practice, while it remains to be seen whether the present pandemic may redefine the scope of its application.

States may also resort to the plea of *force majeure*, as codified in article 23 of the ILC Articles. However, the reliance of States on this defense again falls flat when it comes to proving that the performance of the State's obligations became 'materially impossible' due to the spread of COVID-19. The threshold of impossibility is considerably high. Thus, both in the case of necessity and *force majeure* the strict conditions for their application seem to deprive them of their viability altogether.

Another plea theoretically available under the ILC Articles is that of distress, codified in Article 24. However, it is excluded from the scope of this paper, because it can only be invoked in cases where there is a special relationship between the state organ and the person in danger. It does not extend to more general cases of emergencies, which are exclusively a matter of necessity than distress.[8]

The second part of this paper addresses treaty exceptions, as legal bases for defending the legitimacy of pandemic measures. The first chapter aims at mapping the universe of health-related exceptions in IIAs currently in force, including recently concluded and old-generation IIAs. Statistics illustrate that in IIAs concluded before early 2000s express exception clauses are quite rare, while still today these old-generation IIAs still outnumber those recently concluded IIAs.

[8] Int'l Law Comm'n, Rep. on the Work of its Fifty- Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries U.N. Doc. A/56/10, at art. 80 (2001).

In order to ensure that public welfare measures should not invoke liability, governments are now departing from the short and vaguely worded treaty templates that dominated the first generation of IIAs, so as to include, *inter alia*, clearly drafted and well-defined general exceptions. While the need for a robust re-orientation of the treaty regime is indeed a welcome practice, the second chapter focuses on the difficulties relating to the inclusion of general exceptions in IIAs, finding that the latter are largely missing in action, and concludes that general exceptions is not the right answer to address the challenges posed by the present health crisis.

Finally, the third chapter recognizes the need for rethinking the place of investment liberalization in relation to other values, including health in the long term. It specifically argues that the pandemic reveals the structural weakness of the exceptions-oriented paradigm of justification and proposes a re-orientation of the investment regime, so that it becomes balanced, predictable and in alignment with sustainable development goals.

Before proceeding to further discussions, some disclaimers are necessary. First, the purpose of this paper is to analyze the applicability and viability of potential treaty and customary law defenses, specifically through the spectrum of the pandemic, and to flag the issues that might arise in relation to each of them rather than to clarify every lingering uncertainty on any of them. Second, this paper aims to capture the defenses that are expected to apply and to assess their effectiveness based on previous related jurisprudence and scholarship, without, nevertheless, precluding the application of other defenses as well, tailored to each case at hand.

II. DEFENSES UNDER CUSTOMARY INTERNATIONAL LAW

This section examines the argumentative patterns that States may endorse in investor-State arbitrations related to the pandemic with a focus on defenses available under customary international law. It elaborates upon the current contours of the doctrine of police powers, delves into the strict conditions of application of the plea of necessity and of *force majeure* and finally, draws tentative conclusions for the chances of success of these pleas.

A. *The Police Powers Doctrine: Assessing the Allowable Scope of Regulatory Measures*

In the realm of international investment law, the police powers doctrine denotes the right, which exceptionally permits the host State to regulate in derogation of international commitments it has undertaken by means of an IIA without incurring a duty to compensate.[9] When the State legitimately exercises its police powers, there is no expropriation in the first place and it does not incur international responsibility for the measure enacted. In the midst of the COVID-19 pandemic, governments resorted to unprecedented measures to contain the spread of the virus. It is highly likely that these actions brought economic life to a near standstill and inevitably affected many investors. On the basis that these regulatory measures may give rise to investment claims, the question arises as to whether a State can rely on the police powers doctrine as a defense against State liability? The answer is 'yes,' but only if certain conditions are met.

It should be noted from the outset that, although the status of police powers as a customary law defense was not always clear, tribunals have increasingly acknowledged that police powers is an 'accepted principle of customary international law', [10] while it has even started to make inroads in more recent IIAs that enshrine the doctrine in the treaty text.[11]

The doctrine was first invoked in 1903 by the Claims Commission in the *Bischoff* case to justify the State's seizure of a carriage, where two passengers infected with smallpox had traveled. In that case, the tribunal held that 'during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police powers.'[12] The umpire concluded that the measure was lawful and that the damage to the owner's business was 'not legally recoverable.'[13] Although this case dates many years back, it serves as a useful precedent, since it

[9] Alain Pellet, *Chapter 32: Police Powers or the State's Right to Regulate*, in MEG KINNER (ED), Building International Investment Law: The First 50 Years of ICSID, 447 (Kluwer Law International 2015).

[10] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID No. ARB/10/7, Award, ¶ 294 (July 8, 2016); Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, ¶ 262 (Mar. 17, 2006).

[11] United Sates of America – Lithuania, Bilateral Investment Treaties. Date of signature. 14/01/1998. Date of entry into force. 13/06/2004.

[12] *Bischoff*, German-Venezuelan Commission, Award (1903).

[13] *Id.* ¶ 421.

appears to be the only one explicitly referencing the spread of an infectious disease, where the exercise of police powers was regarded as a legitimate basis to preclude state liability.

More recent cases arising out of measures for the protection of public health are of critical importance, so as to clarify the outer limits of application of this doctrine. One of the landmark cases in this respect is *Philip Morris v. Uruguay*. This dispute was brought under the Switzerland-Uruguay Bilateral Investment Treaty ('BIT') and concerned measures enacted by Uruguay that negatively affected tobacco industries operating in the country. The measures violated, according to the claimants, the obligations not to indirectly expropriate foreign investments and the FET standard. The tribunal rejected the claim on indirect expropriation noting that:

> 290. Article 5 (1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of any relevant rules of international law applicable to the relations between the parties, a reference which includes customary international law.

In other words, the tribunal considered that, despite the absence of any explicit reference to state police powers in the treaty, Article 5(1) on expropriation must be interpreted in accordance with customary international law, including the police power doctrine. It concluded that Uruguay's measures had been adopted *bona fide* for the purpose of protecting public welfare, were non-discriminatory and proportionate, and therefore, legitimate.[14]

As to the alleged violation of the FET standard, the Tribunal recalled that both measures had been implemented for the protection of public health and explained that, in making public policy determinations, Uruguay enjoyed certain margin of appreciation. According to the tribunal:

> [t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith [...] involving many complex factors.[15]

[14] Philip Morris, *supra note* 10, ¶ 305.

[15] Philip Morris, *supra note* 10, ¶ 399.

In light of this approach, the Tribunal rejected the FET claim, being sufficient that the measures were a good faith attempt and 'reasonable'[16] to address a real public health concern.

Where do these findings of the Philip Morris tribunal ('PM tribunal') leave us? Three main clarifications are essential; firstly, with regard to the range of claims, where the doctrine may apply. Secondly, to the applicable test to determine the legitimacy of public health measures adopted on the basis of police powers. Thirdly, to the degree of deference that arbitral tribunals must attribute to regulatory measures on public health.

Starting from the type of claims where the doctrine is applicable, the reasoning of the PM tribunal on the violation of the FET standard is puzzling on a few accounts. It appears to extend the application of the doctrine to claims for FET-related violations. Notably, the tribunal did not subscribe to the exception of 'police power' in the FET analysis, notwithstanding that much of the majority's views concluded that police power measures were 'reasonable' for the purposes of the FET analysis.[17] However, the scope of application of the doctrine is quite narrow as aptly described in the *Suez v. Argentina* award:

> The application of the police powers doctrine as an explicit, affirmative defense to treaty claims other than for expropriation is inappropriate, because if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate. Consequently, a decision on the application of the police powers doctrine in such circumstance would be duplicative and therefore inappropriate.[18]

Therefore, in spite of views to the contrary,[19] the police powers doctrine applies only to claims for expropriation, as a criterion for the determination of whether an expropriation exists in the first place. Further, regarding the criteria that need to be satisfied for the legitimate exercise of police powers, the PM

[16] *Id.* ¶ 409.

[17] Kate Mitchell, Philip Morris v. Uruguay: an affirmation of Police Powers and Regulatory Power in the Public Interest in International Investment Law EJIL: TALK. BLOG (July 28, 2016).

[18] Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, S.A. v. Argentine Republic, ICSID No. ARB/03/19, Decision on Liability, ¶ 148 (July 30, 2010).

[19] Caroline Henckels, Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration, 15 J Int'l Econ Law, 223-225 (2012).

tribunal clearly spelled out the conditions that need to be met: *bona fide*,[20] non-discriminatory and proportionate measures for a public purpose do not incur international state responsibility.[21] Former tribunals have adopted slightly different versions of this test. The tribunal in *Methanex Corp. v. US* upheld that the application of the doctrine as a defense to the ban of harmful additives to fuels and added a due process prong to the test. The tribunal further concluded that 'a nondiscriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory.'[22] Hence, the test so as to determine whether COVID-19 measures may be justified under the doctrine is formulated as follows: only *bona fide*, non-discriminatory and proportionate measures enacted in due process to counteract the pandemic are considered non-expropriatory, and therefore, do not invoke international state responsibility.

Nonetheless, the unprecedented character of the pandemic is expected to give a new dimension to the assessment of the above parameters and especially to the determination of the proportionality of the contested health measures. The proportionality test was first introduced by the *Tecmed v. Mexico* case [23] and subsequently further clarified in the *Chemtura v. Canada* case. In *Chumtura v. Canada*, the tribunal considered that the measures prohibiting the sale of harmful insecticides and 'motivated by the increasing awareness of the dangers presented by lindane for human health and the environment' were proportionate to meet this aim, since they 'did not amount to a substantial deprivation of the Claimant's investment.'[24] In analogy to the pandemic, the measures at hand in the *Chemtura* case were only motivated by 'increasing awareness' of the dangers presented by the specific substance. Thus, the central question is what should be the focus of a proportionality analysis in the context of global health emergency? In the uncertain conditions of a global pandemic, States might be obligated to carry out

[20] SD Myers, Inc. v. Government of Canada, UNCITRAL Partial Award, ¶ 195 (Nov. 13, 2000).

[21] Saluka, *supra* note 10, ¶ 262.

[22] *Methanex Corporation v. United States of America*, UNCITRAL Final Award on Jurisdiction and Merits (3 August 2005) [7] in Part IV.

[23] Tecmed, *supra* note 2, ¶ 122.

[24] Chemtura Corporation v. Government of Canada, UNCITRAL, Award, ¶ 266 (Aug. 2, 2010).

calculated and preventative risk management. In doing so, they should base their determinations upon scientific evidence, which can often present only provisional or contradictory new findings and models, weigh different and competing interests as well as possible collateral damages and continuously draw new conclusions from further developments in science.[25] This is a reality that may redefine the approach of tribunals with regard to the assessment of the proportionality of measures enacted in the context of COVID-19 pandemic.

Lastly, regarding the deference that tribunals should pay to health measures, the PM tribunal noted in its analysis on the violation of the FET standard that the key issue is whether the contested measure was 'reasonable' when it was adopted and not whether the measure actually had the effects that were intended to materialize by the State.[26] The standard of 'reasonableness'[27] is particularly important in the context of the present health crisis, where States should retain the autonomy to address such crises in ways that are politically feasible, even if those responses disproportionately affects investors. Otherwise, if all regulatory changes affecting foreign investors were held to be expropriatory, governments would be deprived of taking precautionary measures that safeguard public interest. In general, it is suggested that tribunals should not engage into second guessing public health state measures but grant States sufficient leeway in determining what measures to undertake to effectively address the ongoing crisis.[28]

However, the fundamental question is what degree of deference will be adequate? It remains to be seen how they tribunal would react to this specific situation. What is certain is that the fact that public health crises may be tackled only with a multitude of measures that should be characterized as general government regulations instead of measures targeted at a particular investor; the duration of the interruption of the investor's business; the aptness of the measures

[25] Tillman Rudolf Braun, *State Responsibility and Investment Protection in the Time of Pandemic*, in Rainer Hofmann and others (ED), Investment Protection, Human Rights, and International Arbitration in Extraordinary Times 1, 14-15 (Nomos 2021).

[26] *Philip Morris* (n. 10) [409].

[27] Marvin Roy Feldman Karpa v. United Mexican States, ICSID No. ARB (AF)/99/1, Award, ¶ 103 (Dec. 16, 2002).

[28] Janice Lee, Note on COVID-19 and the Police Powers Doctrine: Assessing the allowable scope of regulatory measures during a pandemic, 13 Contemp. Asia Arb. J. 229-244 (2020).

adopted; and lastly, the sufficient or insufficient balancing of the reasonable anticipated public health benefits of the measures with their foreseeable impact on the investors are some of the parameters that should be taken into account by the arbitrators, when determining the legitimacy of measures to tackle the spread of the virus.[29]

In conclusion, expropriation claims arising out of measures relating to the pandemic may withstand arbitral scrutiny on the basis of the police powers doctrine, provided that they are adopted *bona fide* in accordance with due process, as well as being non-discriminatory and proportionate. Only under these circumstances and with sufficient deference paid by the tribunals may the obligations of the State towards its citizens with regard to the protection of their health and safety outweigh the obligations of the State towards foreign investors.[30]

B. *Public Health 'Necessity' Defense: Available in Principle, But Hardly Ever in Practice?*

Necessity is one of the circumstances precluding the notion of wrongfulness enshrined in the ILC Articles. In the absence of *lex specialis*, Article 25 is a defense that may preclude the wrongfulness of state conduct otherwise in breach of a 'primary' rule.[31] Thus, it does not function as a parameter to ascertain the existence of a breach of a primary norm as such, as it is the case with the exercise of police powers. The customary basis of the necessity defense is nowadays widely acknowledged. However, in the name of avoiding its abuse by States, it must only be exceptionally admitted, subject to strict cumulative conditions, of which the State invoking the excuse is not the sole authority to determine its viability.[32] These conditions are examined in turn and include (i) the existence of a grave and imminent peril threatening an essential interest; (ii) the fact that the act is the only way to preclude the peril without seriously impairing interests of

[29] Braun, *supra note* 25, at 17-18.

[30] Valentina Vadi, Crisis, Continuity, and Change in International Investment Law and Arbitration, 42 Michigan J. Int'l. L. 321-350 (2021).

[31] As per James Crawford, primary rules govern the content and the duration of substantive State obligations, whereas secondary rules establish a framework setting forth the consequences of a breach of an applicable primary obligation.

[32] Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports 1997, Judgment (25 September 1997) [51].

other States or of the international community; (iii) the lack of contribution of the State to the situation of necessity.

1. Grave and Imminent Peril v. Essential Interest

Firstly, despite its seemingly simple formulation, the concept of 'grave and imminent harm' carries some complexities. To meet this requirement, the State must demonstrate the existence of a *risk* of a grave and imminent *harm* to an *essential interest*.[33]

Starting from the latter, a State can act to protect 'an essential interest', which may include its own interests, those of its people, and those of the international community as a whole.[34] The ILC Commentary (hereinafter: 'Commentary') notes that its existence depends on 'all the circumstances, and cannot be prejudged', introducing a weighing exercise between conflicting interests.[35] The International Court of Justice jurisprudence has shed some light on the interests that could be deemed essential, including not only the survival of the State but also ecological interests within the scope of Article 25.[36] The investments tribunals expanded this interpretation to the existence of a State and the maintenance of public order,[37] as well as the State's ability to provide for the fundamental needs of its population, such as water and sewage facilities.[38] Specifically, in *Suez v. Argentina* the tribunal acknowledged that '[t]he provision of water and sewage services certainly was vital to the health and well-being of [the population] and was therefore an essential interest of the Argentine state.'[39]

The Commentary states that the interest protected must outweigh all other considerations, not merely from the perspective of the enforcing State but from an objective inquiry that draws a reasonable assessment of the competing

[33] ibid [54], where the Court stated that 'the word "peril" certainly evokes the idea of risk.

[34] ARSIWA, *supra note* 8, at 83.

[35] *Id.* at 83.

[36] Gabcíkovo, *supra note* 32, at ¶ 53.

[37] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID No. ARB/10/15, Award, ¶ 628 (July 28, 2015).

[38] Impregilo S.p.A. v Argentine Republic I, ICSID No. ARB/07/17, Award, ¶ 346 (Jun. 21, 2011).

[39] Suez, *supra note* 18, at ¶ 260; see also National Grid P.L.C. v. Argentine Republic, UNCITRAL ,Award, ¶ 245 (Nov. 3, 2008).

interests, whether individual or collective.[40] According to the World Health Organization ('WHO')[41] that classified the outbreak of COVID-19 as a 'Public Health Emergency of International Concern', it seems safe to assume that the wellbeing of a State' s population, or the continued functioning of public services is superior to the interests of investors and/or their home States. Preventing the spread of the pandemic not only does not impair a vital interest of other States but also safeguard the protection of global public health.

Continuing with the other limb of the analysis, the existence of a *risk* of a *grave* and *imminent* harm, the risk can refer to the occurrence of 'triggering events' including the occurrence of natural hazard, such as a pandemic, and it can occur inside or outside the State's boundaries.[42] The threatened harm to the essential interest must be grave, both, in quantitative or qualitative senses. An argument can be made that the loss of millions of lives due to an infectious disease certainly satisfies this threshold.

Furthermore, it must be imminent. The word 'imminent' does not require that the risk is about to materialize (immediacy in temporal terms), rather it has been interpreted as harm not yet having (completely) materialized at the time a state acts in a situation of necessity.[43] This interpretation of 'imminent' requires further elucidation. Firstly, in light of a pandemic that is still evolving giving birth to new variants, when the harm (the spread of the virus) *has commenced* to materialize but continues to progress, the defense should be available to avoid further aggravation, as this minimizes overall harm.[44] In contrast, if the harm is entirely in the past, the plea should not be available.[45] This is in line with the rationale of the defense that allows States to take measures not only to mitigate but also to prevent harm. Secondly, according to the Court, the invoking State must 'sufficiently establish' that the peril was certain and inevitable and not merely

[40] ARSIWA, *supra note* 8, at 83.

[41] WHO, 'Statement on the second meeting of the International Health Regulations (2005)' (WHO website, 30 January 2020) <https://bit.ly/3inpVjn> accessed 19 December 2021.

[42] Sarah Cassella, *La nécessité en droit international*, 159-160 (Martinus Nijhoff, 2011).

[43] Gabcíkovo, *supra note* 32, at ¶ 54.

[44] Federica Paddeu and Michael Waibel, Necessity 20 Years On: The limits of Article 25 ARISWA, 36 ICSID REV. 23 (2021) 1-10.

[45] *Id.* at 7.

apprehended or contingent.[46] This standard seems, however, incompatible with the premise of the plea: to justify state action in the event of risk. Not all risks cannot be established with full degree of certainty: they refer to future threats and harms with high probabilities of occurrences.[47]

To conclude, the ILC recognized the one hand space for risk and uncertainty within necessity, noting that 'a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.'[48] On other hand, this standard fails to clearly explicate the degree of uncertainty beyond which the defense is excluded. Therefore, while States may be able to prove the existence of the *essential interest* of protecting public health against the *grave peril* posed by the spread of COVID-19, they may face difficulties to 'sufficiently establish', in the face of scientific uncertainty about the virus, the element of 'imminence' of the risk. These criteria will carry implications on the various range of measures justified under the defense: the earlier the measures are taken and thus, with less evidence available, the looser the nexus becomes with the imminent risk.

2. The Only Way Criterion

Article 25 para 1(a) states that the act must be 'the only way for the State to safeguard' the relevant interest. Here 'only' means 'only.'[49] Because this rigid condition requires the identification of what constitute 'only' measure that is lawful and safeguards at the same time the essential interest of the State, it has caused the most difficulty in the jurisprudence and is usually the element on which the defense fails.[50] With regard to the pandemic, three aspects of this criterion need to be clarified: firstly, what should be the focus of the assessment in the case of transnational health crises that necessitate the enforcement of a wide range of measures; secondly, from which standpoint should arbitrators evaluate the

[46] Gabcíkovo, *supra note* 32, at ¶ 57.

[47] Paddeu and Waibel, *supra note* 44, at 12.

[48] ARSIWA, *supra note* 8, at 83.

[49] James Crawford, 'Circumstances precluding wrongfulness' in James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 274, 311.

[50] Paddeu and Waibel, *supra note* 44, at 17.

appropriateness of the contested measure; thirdly, how is the availability of better alternatives determined.

First of all, without doubting the need for a strict formulation of the defense with the objective of avoiding its abuse, the 'only way' criterion requires from States to know which measures do not work and to identify the 'only one' that works.[51] Yet most crises, and most importantly the present pandemic, require a package of measures to be tackled efficiently. Investors, however, may consider that only one measure impaired their entitlements under the BIT. The question therefore is: what should be focus of assessment under the plea: the single measure or the package of measures?

The Argentine crisis in the early 21st century illustrates this scenario. In response to its financial crisis, Argentina adopted a wide range of measures. Some tribunals have focused on the specific measure challenged[52] and rejected the plea, noting that there were several policy alternatives available,[53] and others have taken a broader outlook[54] and were able to uphold the plea, granting some discretion to host country and, thus, allegedly inviting abuse.[55]

In this regard, the tribunal in *Urbaser v. Argentina* charts a middle way. Urbaser was a shareholder in a concessionaire that was in charge of the supply of water and sewerage services in Argentina. Argentina's emergency measures resulted into its insolvency with Urbaser filing arbitral proceedings for unlawful expropriation and breach of the FET standard.[56] The tribunal noted that:

> The emergency measures and the state of necessity associated with them were events of nation-wide importance. Therefore, the question whether 'other means' were available has to be captured in both perspectives: the wide one, taking into account the needs of Argentina and its population nation-wide, and the narrower one of the situation of investors engaged in performing contracts protected by the international obligations arising out of one of the many BITs.[57]

[51] *Id.* at 18.

[52] *See*, *e.g.*, Suez, *supra note* 18, at ¶ 238.

[53] CMS Gas Transmission Company v. The Republic of Argentina, ICSID No. ARB/01/8, Award, ¶ 323-324 (May 12, 2005)

[54] LG&E Energy Corp. v Argentine Republic, ICSIDARB/02/1, Decision on Liability, ¶ 257 (Oct. 3, 3 2006).

[55] Michael Waibel, Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E, 20 Leiden. J. Int'l. L. 637, 646 (2017).

[56] Stefanie Schacherer, Urbaser v. Argentina, IISD Investment News, I8 October 2018.

[57] Urbaser SA v The Republic of Argentina, ICSID Case ARB/07/26, Award, ¶716, (Dec, 8. 2016).

Similarly, the pandemic necessitates multipronged responses: travel bans, entry-screening of people coming from affected countries, social distancing. When considered individually, some measures may turn out not to be the 'only way.' Nevertheless, to assess only a single measure of the package is artificial, presupposes the answer and renders the defense illusory.

Secondly, it is suggested that tribunals need to assess the question of the appropriateness of the measure adopted from the standpoint of the State at the time of the decision-making.[58] Provided all the uncertainties in respect of the virus at the time it broke out and the lack of targeted treatments, some form of extreme social distancing measures was all that States could do to mitigate the morbidity and mortality of the virus within their populations.[59] In this respect the tribunal in *Continental* noted that 'this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight.'[60] Hence, it should be made clear that adjudicators should not benefit from hindsight; otherwise they risk considering the projected effectiveness on the basis of what became known only *ex post*.

Thirdly, proving that the measure(s) adopted is the 'only way' to safeguard essential interests involves necessarily a counterfactual, meaning an assessment and rejection of other potential alternatives. Necessity is excluded, if 'there are other (otherwise lawful) means available, even if they may be more costly or less convenient.'[61] Reflecting further on this condition, one can distill three features that an alternative has to possess in order to displace the measure adopted as 'unlawful': Firstly, the alternative measure should be lawful, as it is clearly stated in the Commentary. Secondly, it should be effective in the sense that it sufficiently

[58] See Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, ¶ 372 (July 30, 2010)

[59] Federica Paddeu and Freya Jephcott, COVID-19 and Defences in the Law of State Responsibility: Part II, EJIL:TALK (17 March 2020).

[60] Continental Casualty Company v Argentine Republic, ICSID Case ARB/03/9, Award, ¶ 181, (Sept. 5, 2008).

[61] ARSIWA (n 8) 83; Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, ¶ 8.48 (Aug. 31, 2018).

safeguards the essential interest under threat. Comparisons between projected effectiveness of alternative measures are likely to be complex, particularly under uncertainty.[62] Finally, the alternative measure should be feasible, in the sense that it is available to the relevant State at the time.[63] For instance, States could build temporary hospitals to reduce pressure on existing healthcare structures during the COVID-19 pandemic. This could be a more costly and perhaps less convenient, yet lawful, way to protect lives and the healthcare system, than impose strict lockdowns and wide-ranging business closures.[64] However, this alternative may still not be feasible as the emergency requires an urgent response and there may be too few medical professionals available to staff these additional facilities.[65]

In general, it seems that the 'only way' requirement sets a very high threshold for States to fulfill and calls for a more lenient approach to permit some practical scope of application.[66] In COVID-related cases tribunals need to broaden the focus of their assessment, so as to include the package of measures, instead of focusing on the contested regulation alone, while factors such as the feasibility of alternative time-consuming measures in times when the death toll was rising should constitute key considerations in their reasoning.

3. Lack of Contribution of the State

The plea of necessity is excluded if the State has contributed to the situation of necessity, namely to the risk of grave and imminent harm to its essential interest. This 'lack of contribution' requirement is vague and has given rise to significant interpretive difficulties in practice. For the plea of necessity to be precluded, the contribution must be sufficiently substantial and not merely incidental or peripheral.[67] Recent tribunals have supplemented this definition with a temporal parameter, stating that the contributory event has to take place in chronological proximity for the necessity to be upheld.[68] What amounts,

[62] Enron, *supra note* 58, ¶ 371.

[63] *See*, *e.g.*,Paddeu and Waibel, *supra note* 44, at 21.

[64] *Id.*

[65] *Id.*

[66] August Reinisch, *Necessity in Investment Arbitration*, 41 Netherlands Yearbook of Int'l L 137, 154 (2010).

[67] See generally ARSIWA, *supra note* 84.

[68] Unión Fenosa , *supra note* 61, ¶ 860.

however, to 'substantial' contribution is the thorny question that tribunals dealing with COVID-related claims are called to answer.

Arbitral tribunals have adopted diverging interpretations. For some, well-intended but ill-conceived policies exclude reliance on the plea.[69] For instance, in *Sempra* v. *Argentina*, the parties argued extensively on whether the 2002 economic crisis had been precipitated by endogenous or exogenous factors. The tribunal concluded that both factors were at play and that, although the 'state of affairs [had] not been the making of a particular administration, the State must answer for it as a whole.'[70] Other tribunals have held that only fault can exclude necessity.[71]

In terms of COVID-19 situation, should one categorize delayed responses that prevent a host State from bringing the virus under control and compels them to adopt new or more extended restrictions affecting foreign investors as 'contribution' to the health crisis? Similarly, is the lack of adequate response in terms of testing and tracing that expands contagions also a contribution to the prolongation of the pandemic? Can the underfunding of health care systems also preclude reliance on necessity? Certainty, future investment tribunals will have a hard time providing responses, because they are evaluating host States' omissions given that COVID-19 was unknown, appeared unexpectedly and its potential impact was uncertain.[72] In that respect, statements by representatives of States may be of importance when they themselves accept the role of their country in the crisis.[73]

What is clear, however, is that a very strict reading of this requirement likely makes the plea indefensible. In most cases, the necessity defense could never operate in economic crises or even in situations of armed conflicts or civil unrests. This is because there will always be some conduct of the invoking State that may

[69] *See*, *e.g.*, Impregilo, *supra note* 38, ¶356.

[70] Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 354 (Sept. 28, 2007).

[71] *See*, *e.g.*, Urbaser, *supra note* 57, ¶ 711.

[72] Alberto Alvarez-Jimenez, The international law gaze: COVID-19 and foreign investors, New Zealand L. J. 271, 281 (2020).

[73] EDF International, SAUR and Leon Participaciones Argentinas v. Argentina, ICSID Case No. ARB/03/23, Award, ¶ 1173 (June 11, 2012).

be said to have contributed to the rising situations.[74] In addition, some have taken the extreme position that the peril must be 'entirely beyond the control of the State whose interest is threatened.'[75] Such a high threshold is not only facially unreasonable, but also inconsistent with the distinction drawn between *force majeure* and necessity. The former applies to an 'irresistible force,' typically a natural disaster, that lies wholly beyond the State's control, whereas necessity clearly involves a relative impossibility: a choice is made between suffering the grave and imminent peril and violating an obligation protecting an interest of lesser importance.[76] If that choice alone is qualified as a contribution sufficient to exclude the plea, necessity could never be successful as a ground for a defense.

Therefore, the invocation of the plea of necessity poses many difficulties that States cannot easily, if not at all, overcome. When States act within the limit of necessity, they cannot know how things will turn out and this may cause inherent challenges at the stage of assessment of the claims by a tribunal. Firstly, while States may be able to prove the existence of the essential interest of protecting public health against the grave peril posed by the spread of COVID-19, they may face difficulties to 'sufficiently establish' for all measures, in the midst of scientific uncertainty about the virus, the element of 'imminence' of the risk. Secondly, the 'only way' criterion does not seem fit to accommodate macro-crises, including pandemics, where States need to adopt packages of measures, assessing their effectiveness on the basis of prediction. Additionally, a State cannot know in advance whether a measure was the 'only way' to tackle an emergency up until it has worked in practice. Lastly, the nature of the crisis caused by the pandemic is different from any economic crisis. In the case of an economic crisis, one could argue that such a crisis was triggered by a State's own actions or omissions. The coronavirus pandemic now challenges this traditional interpretive stance, as it requires full use of the flexibilities that international investment law offers. In total, taking into account the current interpretative approach, the conditions of

[74] Unión Fenosa, *supra note* 61, ¶ 8.60 ; see CMS, *supra note* 53, ¶ 329.

[75] Int'l Law Comm'n, Addendum-Eighth Rep. on State responsibility by Roberto Ago, U.N. Doc. A/CN.4/318/ADD, at art. 5-7, ¶ 13 (1980).

[76] *See*, *e.g.*, Sarah Heathcote, Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 491, 495.

the necessity defense seem nearly impossible to meet, with this defense being eventually available only in theory but hardly ever in practice.

C. *The Plea of force majeure in COVID-19 Times: Dead Letter or Viable Defense?*

Force majeure is codified in article 23 of the ILC Articles and constitutes part of customary international law. This rule is based on the premise that no one should be bound to perform the impossible[77] and it concerns a situation, in which a State is 'in effect compelled to act in a manner incompatible with its obligations.'[78] It is this aspect that distinguishes the plea of *force majeure* from the state of necessity that 'does not involve conduct which is involuntary or coerced.'[79] Additionally, *force majeure* is formulated as requiring a material impossibility of performance, if it is not to slide into the concept of necessity, that only requires a relative impossibility.[80] And it is on the basis of this lack of free choice that *force majeure* exonerates.

Given the unprecedented nature of the COVID-19 outbreak, tribunals are expected to be confronted with this plea, as a circumstance precluding the wrongfulness of novel state measures against the virus. The conditions to be fulfilled for the successful invocation of *force majeure* are clearly set out in article 23 and include (i) the existence of an 'irresistible force or of an unforeseen event' that lies beyond state control; (ii) material impossibility of performance; (iii) not due to conduct of the State invoking it.

1. Irresistible Force or Unforeseen Event Beyond State Control

The triggering event of *force majeure* should be an 'irresistible force' or an 'unforeseen event.' It is sufficient if either of these two conditions is met. The irresistible force or unforeseen event may be either natural (e.g., earthquake or drought) or man-made (e.g., war, revolution) or a combination of the two.[81] To determine in which of the two categories the present pandemic may fall, one has to delve into the distinction between the two, with the classification of the

[77] Federica Paddeu, *Justification and Excuse in International Law* (Cambridge University Press 2018) 285.

[78] ARSIWA, *supra note* 80, ¶ 76.

[79] *Id.* at 80.

[80] Paddeu, *supra note* 77, at 322-323.

[81] Int'l Law Comm'n. Rep. on the Force majeure and Fortuitous event as circumstances precluding wrongfulness, U.N. Doc. A/CN.4/315, ¶ 119 (1977).

pandemic as 'irresistible force' posing less difficulties.

Starting from the definition of 'irresistible force', it is plausible that 'force' here implies any event which can cause some constraint or coercion.[82] In other words, the adjective 'irresistible' emphasizes that there must be a constraint which the State was unable to avoid or counter by its own means.[83] The answer to whether the novel virus satisfies this criterion comes up to whether States could have taken measures to prevent the reach of the virus to their territories. The fact that contact tracing and border closure were proven ineffective to prevent the spread is indicative of the presence of a force which a State has no real possibility of escaping its effects.[84] Therefore, not only its inter-State spread but also the transmission of the virus within the country qualify as 'irresistible,'[85] since the means available to the States were inadequate to confine the spread of COVID-19.

Alternatively, another factor bearing on the success of the plea of *force majeure* is the unforeseeability of the fortuitous or unexpected event. The event must not have been foreseen, but it also must not have been 'of an easily foreseeable kind.'[86] Although claims of *force majeure* have been upheld on this basis in the past, [87] the tribunal in *Autopista v. Venezuela* set the bar for foreseeability high. Autopista undertook the construction of one of Venezuela's main highway systems. The project was to be financed primarily through an increase in relevant tolls, which after a series of violent public protests Venezuela refused to increase. Autopista initiated arbitration proceedings and Venezuela defended its failure to perform its contractual obligation by invoking *force majeure* and arguing that, in view of the violent reaction and civil unrest, it had been impossible to further increase the tolls. While Venezuela acknowledged that the prospect of public opposition to its unpopular measure was indeed foreseeable, it contested the foreseeability of the

[82] Paddeu and Jephcott, *supra note*, ¶ 59.

[83] ARSIWA, *supra note* 8, ¶ 76.

[84] *Id.*

[85] The irresistible nature of the virus is already recognized in the context of the International Chamber of Commerce ('ICC'), where the ICC *force majeure* clause includes epidemics in the list of events triggering *force majeure* situations.

[86] ARSIWA, *supra note* 8, ¶ 76.

[87] Affaire relative à la concession des phares de l'Empire Ottoman France v. Greec, PCA Award , ¶ 219-220 (July 24, 1956)

magnitude and form of such resistance.[88]

The tribunal found that the plea of *force majeure* is available once the following conditions are met: impossibility, unforeseeability and non-attributability.[89] However, on the ground that the protests had been foreseeable it dismissed the plea of *force majeure*.[90] According to the tribunal, for the event to be foreseeable, it does not have to be probable or likely to occur – it is enough that it could not be ruled out as a possibility.[91] The fact that Venezuela anticipated some public disagreement over the toll increase indicated that the possibility of a 'very violent protest' could not have been excluded. The Tribunal also resorted to the country's previous record of conflict as the ultimate yardstick for the determination of foreseeability. Although it had been almost a decade since the last similar upheaval in 1989, these prior incidents of social unrest led the tribunal to conclude that present protests could also have been foreseen.[92] Where does this conclusion leave us? Within the same realm of thought, past health emergencies, such as the SARS outbreak in 2003,[93] could render the current pandemic foreseeable, precluding the plea of *force majeure* on the alternate basis of the existence of an 'unforeseeable event.'

Nevertheless, the jurisprudence evolved since *Autopista*. In *RSM v. Central African Republic* ('CAR') RSM obtained an oil exploration permit in the CAR and due to civil turmoil and armed conflict in the area, it invoked the *force majeure* clause in the contract to suspend its obligations under the latter.[94] The CAR did not accept RSM's request for suspension and RSM submitted the dispute to ICSID. In its reasoning the tribunal departed from the interpretation of the *Autopista* tribunal. Instead of focusing on the past record of violence on the country's territory, it compared the general political and security atmosphere at the

[88] Autopista Concesionada v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Award, ¶ 111 (Sept. 23, 2003).

[89] *Id.* ¶ 108.

[90] *Id.* ¶ 118.

[91] *Id.* ¶ 117.

[92] *Id.* ¶ 115.

[93] Jill Seladi-Schulman, COVID-19 vs. SARS: How Do They Differ?, HEALTHLINE (2 April 2020).

[94] Although the plea of *force majeure* was based on a clause in the contract, the requirements to be fulfilled are the same with the ones of article 23 as noted in [179] of *Autopista*.

relevant time with the type and magnitude of the past civil unrest in order to determine the foreseeability of the event. Eventually, it found that the occurrence of the past unrest could not have foreshadowed the occurrence of a security situation that would have made the performance of the contract impossible, and thus upheld the plea.[95] The approach followed by the *RSM* tribunal introduced additional prong for the application of foreseeability; the type and the magnitude of the event. In terms of COVID-19, this interpretative stance would allow for the consideration of the unprecedented character of the pandemic taking into account its magnitude and disruptive nature and could lead to the characterization of the pandemic as an 'unforeseen event.'

With regard to the analysis on foreseeability, it should be noted that this issue also requires a per State analysis. This is by virtue of foreseeability requiring a subjective element. In other words, its success depends on the circumstances of a subject invoking the defense.[96] Following this vein, one could argue that the initial outbreak of the virus was not foreseen, especially taking into account its nature and magnitude. Taking this requirement as a starting point, it should be noted that the virus did not spread to all the States at the same time. Some States could have benefited from the relative delay in the spread of the virus, from the guidelines of WHO and from the experience of other States already struggling to contain it.

In the first COVID-related case, *Julio Miguel v. Bolivia*, the claimants followed this exact line of argumentation to reject the plea of *force majeure* raised by the respondent State. In response to Bolivia's request for suspension of the time-limit for the submission of its Statement of Defense, the claimants noted that the spread of COVID-19 was not an unforeseen event to Bolivia to the extent that 'the disease and its consequences were known to governments since at least January of 2020.'[97] The tribunal held that it did not need to rule on the plea, stating that

[95] RSM Production Corporation v. Central African Republic, ICSID Case No. ARB/07/2, Award, ¶ 180, 185-211 (July 11, 2011).

[96] Andrea K. Bjorklund, *Emergency Exceptions: State Necessity and Force Majeure*, in Peter Muchlinski, Federico Ortino and Christoph Schreuer (ED), Oxford Handbook of International Investment Law, 459, 490 (OUP 2008).

[97] The Estate of Julio Miguel Orlandini-Agreda and Or v. Bolivia, PCA Case No. 2018-39, Procedural Order No 7, ¶ 28 (Apr. 10, 2020).

'the proceeding can move forward, albeit with some delay, in a socially responsible manner by adapting to the new reality of communicating remotely.'[98] Hence, whether the temporal advantage of the relative delay in the spread of the virus precludes some States from relying on this limb, because the event would not qualify as 'unforeseeable,'[99] remains open for subsequent debates before future tribunals. What appears to be certain in these circumstances is that the argument on the unforeseeability of the virus becomes exceedingly harder the longer the pandemic spreads.

Therefore, the characterization of the spread of COVID-19 as an 'unforeseeable event' is not free from difficulties: arbitral tribunals have not always considered the magnitude and character of the event as decisive factors in the determination of its foreseeability, while, in view of the pandemic, this determination necessitates a per State analysis. However, even if the pandemic is not considered 'unforeseeable', one can argue that it fulfills the conditions of the alternate basis of article 23 and can still be characterized as an 'irresistible force.'

1. Materially Impossible Performance

The 'irresistible force' or 'unforeseen event' must be causally linked to the situation of material impossibility, as indicated by the words 'due to *force majeure* making it materially impossible.' There is no universal standard of the exact threshold of material impossibility in the Commentary. The following paragraphs aim at delineating the outer limits of this notion and inquire whether the impossibility in performance resulting from the spread of COVID-19 falls within the ambit of material impossibility required for *force majeure* to apply.

It is quite clear that difficulty in performance, for example due to some political or economic crisis, does not meet the threshold set for the plea or ground of this kind.[100] Moreover, the tribunal in *Rainbow Warrior* concluded that:

> New Zealand is right in asserting that the excuse of force majeure is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of force

[98] *Id.* ¶¶ 39, 40.

[99] Paddeu and Jephcott , *supra note* 59.

[100] ARSIWA (n 8) 76; *see*, *e.g.*, Sempra, *supra note* 10, ¶ 246; *see*, *e.g.*, Russian Claim for Interest on Indemnities (Russia v. Turkey), PCA Award ¶ 6 (Nov. 11, 1912).

majeure.[101]

In its reasoning, the tribunal read in the material impossibility requirement of article 23 an implicit 'absolute' threshold. 'Material' refers to the kind of impossibility at issue: there must be a physical inability to perform the obligation.[102] 'Absolute' refers to the degree of this impossibility: the State must have no way to perform the obligation in question, it must have no options open to it.[103] This is confirmed by the rationale of the plea, which lays in the fact that the non-performance of the obligation is 'involuntary or involves no element of free choice.'[104]

Whether the coronavirus outbreak results in material impossibility of performance, as defined in the *Rainbow Warrior* case, cannot be answered in general terms: it will depend on the obligation at issue and the underlying circumstances of each case. Nevertheless, it is hard, in general terms, to see how this threshold could be satisfied, when it remains possible for States to continue to run as usual and to let people continue to move and work. In the *Julio Miguel case*, the claimants asserted that the health crisis did not make the filing of the Statement of Defense on behalf of Bolivia 'materially impossible' and that 'all communications services in Bolivia remain available and operating without interruptions.'[105] The claimants further rejected Bolivia's reliance on its difficulties in retaining and liaising with potential witnesses and experts arguing the availability of telephone and internet services, and noted that 'all international arbitral institutions are continuing to operate and administer their cases with no delays or suspensions, suggesting that the system and its participants should adapt to the current circumstances.'[106] Although the tribunal did not rule on the plea, it implicitly agreed with the claimants noting that 'the proceeding can move forward, albeit with some delay, in a socially responsible manner by adapting to

[101] Rainbow Warrior Affair (New Zealand v. France), France- New Zealand Arbitration Tribunal ILR 500, Award, ¶77 (Apr. 30, 1990).

[102] Paddeu and Jephcott, *supra note* 59.

[103] *Id.*

[104] ARSIWA, *supra note* 8, at 76.

[105] Julio Miguel, *supra note* 97, ¶ ¶ 29-32.

[106] *Id.* ¶ 30.

the new reality of communicating remotely.'[107] Therefore, since the conduct of the proceedings remains possible through remote communication, this could also be the case for obligations borne by States to foreign investors under the condition that these obligations could be fulfilled in a manner consistent with the new reality.

One may conclude that state emergency measures against the spread of COVID-19 are voluntary choices that involve an element of free choice. The plea of *force majeure* is available however, when the internationally wrongful act at least involves no element of free choice.[108] If States have choices – as limited as these may be – then they only face a relative and not a material impossibility of performance. And this places States outside of the scope of the plea of *force majeure* and slides them into the defense of necessity that only requires a relative impossibility.[109]

2. Not Due to the Conduct of the State Invoking It

The plea of *force majeure* is excluded in circumstances where the situation of *force majeure* is 'due', either alone or in combination with other factors, to the conduct of the State invoking it.[110] It is not enough that the State has merely contributed to the situation of material impossibility; the situation must be 'due' to its conduct.[111] This threshold is not negligible, but it is lower than the similar provision precluding States from invoking the necessity defense, because it requires that the State 'has caused or induced' the situation of material impossibility. As it stands, for the situation to be 'due' to the state's conduct, its role in the occurrence of the latter must be determinative.[112] It, thus, allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but was decided in good faith and did

[107] *Id.* ¶ 39-40.

[108] ARSIWA, *supra note* 8, at 76.

[109] Paddeu, *supra note* 77, at 322-323.

[110] ARSIWA, *supra note* 8, ¶ 78.

[111] See Libyan Arab Foreign Investment Company and the Republic of Burundi, Award, ¶ 55 (Mar. 4, 1991)

[112] ARSIWA, *supra note* 8, at 78.

not itself make the event any less unforeseen.[113]

In the framework of the COVID-19 pandemic a question that may arise is the following: How far back in the past can contributing causes be found? Would everything ranging from slow reactions in preventing or containing the spread of the disease to chronic under-funding of public healthcare be relevant to the assessment of determinative contribution?[114] As to the prevention and containment of the virus, the answer varies from State to State, however, when it comes to austerity policies, generally measures adopted in good faith only affect the vulnerability of the healthcare systems to provide medical support to the population, thereby increasing the mortality rate of the virus.[115] Bearing that in mind, it seems difficult to argue that the poor financing of healthcare systems has 'induced' or at least had a determinative role in contributing to the outbreak of the health crisis.

After scrutinizing all the requirements for the successful invocation of *force majeure*, it appears that the pandemic may constitute an irresistible force, if not an unforeseen event as well, which could hardly be 'due' to conduct of the State invoking it. Nevertheless, States' possibility to rely on *force majeure* falls flat when it comes to the existence of material impossibility, because this threshold is extremely difficult to meet. The satisfaction of this condition may well depend on the specific obligation at issue, but in most of the cases States are likely to have a choice in respect of compliance (even if a difficult one) and it is this parameter that renders the plea non-viable.[116]

To conclude this first part of the paper the following considerations are due: Firstly, expropriation claims arising out of measures relating to the pandemic may stand arbitral scrutiny on the basis of the police powers doctrine, only if adopted *bona fide* in accordance with due process, are non-discriminatory and proportionate. Further, the analysis of the defenses of necessity and *force majeure* reveals that their current understanding in international law and the reliance on a high threshold seemingly defeats the very purpose of the respective provision

[113] *Id.*

[114] Paddeu and Jephcott, *supra note* 59.

[115] *Id.*

[116] *Id.*

itself, meaning the availability of viable options for States to excuse non-performance in certain unique circumstances. To prevent these defenses from becoming dead letter of the law, their restrictive character should be ensured by their cumulative requirements and not by the restrictive interpretation of each of those requirements by arbitral tribunals. Lastly, the pandemic may become a catalyst for change in the interpretative approaches to these defenses. Customary law as crystallized in the ILC Articles will seep into the framing of challenges and defenses by States, shaping characterization of conduct and being shaped by widespread state practice in turn.[117]

III. DEFENSES UNDER TREATIES

Part II focuses on defenses based on treaty law, meaning treaty exceptions. In the universe of more than 3000 BITs, exceptions included therein may serve as treaty-based safety valves for States seeking to avoid responsibility for COVID-related measures. The first chapter of Part II maps the universe of public health provisions in IIAs that attempt to balance investors' protection with the regulatory autonomy of host States in the health sector. The second chapter stresses out the need to strengthen the 'health' of the system itself and concludes that the inclusion of general exceptions does not provide a satisfactory response to the call for reform. Lastly, the third chapter reflects on the direction towards which a reform attempt should take place, having as the ultimate yardstick the sustainability or non-sustainability of an investment regime that is based on exceptions as the only means to accommodate emergency situations.

A. *Public Health Provisions in IIAs: Contemporary Paradigms and Practice*

The relationship of public health and international investment arbitration is usually framed as one of conflict instead as one of complementarity, with the protection of foreign investors viewed as a constraint to the regulatory power of governments. The COVID-19 pandemic has contributed to the deterioration of this conflict putting into the spotlight the inability of old-generation BITs to achieve an equilibrium between the promotion of foreign investment and the right of States to regulate for the protection of public health. The following paragraphs

[117] Martins Paparinskis, COVID-19 Claims and the Law of International Responsibility, 11 J. Int'l Humanitarian L. Studies, 311, 329-330 (2020).

aim at mapping the available techniques under old-generation and recently concluded BITs that attempt to reconcile these notions through the inclusion of exceptions in the treaty text.

More than 3000 BITs, representing more than 90 per cent of all BITs were signed between 1959 and 2011, with the majority of them being in force today.[118] These treaties generally contain very few provisions that preserve States' regulatory space, with or without explicit reference to health. For example, the preamble of old-generation IIAs references social investment aspects, such as human rights and health, in less than 7 per cent of the agreements, while general public policy exceptions are equally found in less than 7 percent of these IIAs.[119] Also carve-outs for general regulatory measures are featured in the expropriation provisions of less than 2 per cent of old-generation IIAs.[120] Hence, old-generation IIAs fail to explicitly make room for regulatory action in the public interest, including public health.

The proliferation of IIAs and investor-State arbitrations has given rise to concerns that the investment protection function of the IIA regime might unduly fetter a State' s ability to pursue health policies which should be balanced against investor protections. To mitigate the uncertainty about the outcome of protracted litigation as well as fears of regulatory chill, States engaged into a review process of their IIAs with the aim to exclude public health regulations from the range of measures that can be challenged in ISDS proceedings or to acknowledge public health as a legitimate regulatory objective. As indicated in figure 1 below, more than 92 per cent of the IIAs concluded since 2018 contain at least one explicit reference to health in the operative part of the treaty.[121]

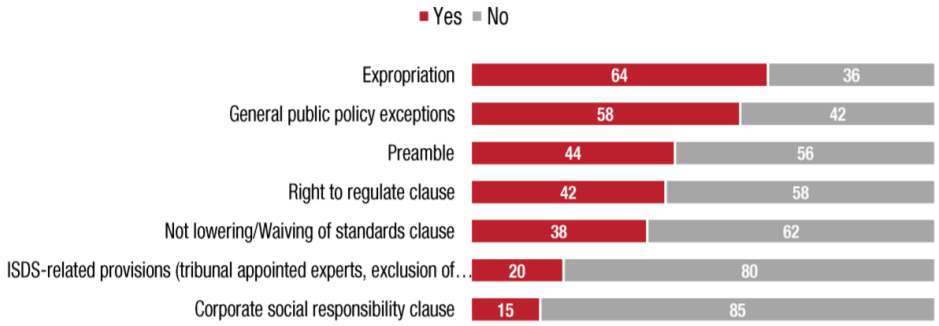
[118] United Nations Conference on Trade and Development (UNCTAD), International Investment Policies and Public Health, 1.2 (UN Publication, July 2021).

[119] *Id.*

[120] *Id.*

[121] *Id.*

Figure 1. Public health provisions in IIAs concluded between 2018-2020 (Per cent)



Source: UNCTAD, 'International Investment Policies and Public Health' <https://unctad.org/system/files/official-document/diaepcbinf2021d5_en.pdf> accessed 02 December 2021.

According to the graph, health-related aspects are covered in recent IIAs mostly in expropriation provisions, where it is explicitly stated that measures adopted in the pursuit of public health do not constitute regulatory takings. Paragraph 3 (b) of Annex 9-B of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') is an indicative example of this type of carve-out, which provides that 'non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.'[122] The practical impact of these clauses however, is very limited, as discussed in section two.

Other health provisions are in the form of general exceptions, meaning exceptions that serve to justify measures adopted in pursuit of health policy objectives, otherwise incompatible with protection standards under the respective IIA. An indicative example is Article 22.1.3 of the Canada-Korea FTA, which provides that 'this Agreement is not to be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health [...].' According to some commentators, the more compelling reasoning for including general exceptions is that they make express the exceptions for legitimate objectives already reflected in IIA jurisprudence and operate as an insurance policy against overreaching interpretations of obligations

[122] Similar provisions can be found in article 12.8 of the Netherlands Model IIA (22 March 2019).

under IIAs by the tribunals.[123] Nevertheless, the inclusion of these clauses remains full of legal difficulties, which will be analyzed in detail in section two.

B. *Assessing New Trends and Proposed Reforms in* IIAs: *Can General Exceptions Enhance the Health of the Investment Regime?*

The present section first, underlines the need for a robust re-orientation of the treaty regime. It will then emphasize the uncertain consequences of including general exceptions in IIAs as an answer to the need for rebalancing the system. It will finally conclude that proposed reforms are not the ideal way in which States should inject deeper levels of flexibility for public regulation into IIAs.

1. The need for reform

Existing IIAs were not designed to undermine the legitimate regulatory function of States, especially in emergency situations, but they were concluded, for the most part, during a different era. IIAs concluded 20 to 60 years ago do not reflect today's global challenges relating to sustainable development, including public health.[124] Broadly drafted provisions found in IIAs resulted in expansive interpretations by arbitral tribunals, which reduced the capacity of host States to regulate, even when such regulations were taken in the public interest.[125] Taking into account that the number of old-generation treaties far outweighs the number of more recent IIAs and health regulations by governments have already generated, and will, in view of the pandemic, increasingly trigger ISDS disputes, one may realize that the need for treaty reform becomes more urgent than ever.[126]

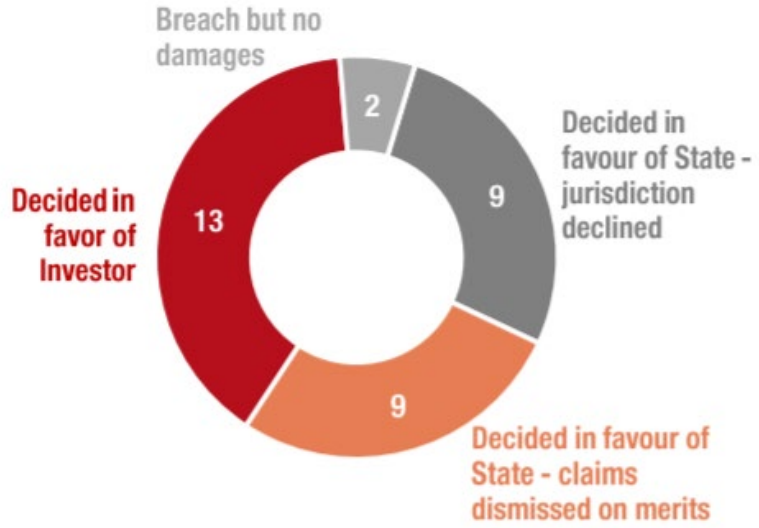
[123] Andrew Newcombe, *General Exceptions in International Investment Agreements*, (BIICL Eighth Annual WTO Conference, May 2008) 1, 3.

[124] UNCTAD, Investment Policy Responses to the COVID-19 Pandemic, 1, 12 (UN Publication, May 2020) 1, 12.

[125] *Id.*

[126] UNCTAD, *supra note* 118, at 2.

Figure 2. Outcome of proceedings in health-related cases



Source: UNCTAD, 'International Investment Policies and Public Health' <https://unctad.org/system/files/official-document/diaepcbinf2021d5_en.pdf> accessed 02 December 2021.

The survey above reveals that at least 33 known ISDS cases directly related to public health have been initiated on the basis of old-generation BITs, with 13 of them filed against developed countries.[127] Although figure 2 indicates that there is a track record of respondent host nations succeeding in health-related cases, the outcome of the proceedings is not always related to the health aspect of the dispute. For example, in 2011 Australia's parliament passed more stringent tobacco packaging laws with the aim to alert citizens to the health risks associated with the use of tobacco. Phillip Morris challenged the rule under the ISDS provision of the Australia-Hong Kong BIT but the claim was ultimately unsuccessful. However, this ended up being only half the story. The reason why the tribunal dismissed the claim was based on the determination that Philip Morris's arbitration claim constituted an abuse of rights under the relevant BIT. Philip Morris underwent a corporate restructuring several years before the passing of the stricter tobacco laws in Australia, so as to bring the dispute under the Australia-Hong Kong BIT as a beneficiary.[128] This case endorses the conclusion that the lower success ratio of host States in health-related disputes reveals a gap in treaty language. Most

[127] *Id.* 6.

[128] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 585 (Dec.17, 2015).

importantly, it highlights the need for inclusion of clear provisions in the treaty text that would afford States the legal bases to successfully defend themselves against investors' claims on COVID-related measures.

To address this need, governments are departing from the vaguely worded treaty templates that dominated the first generation of investment agreements up to the 1990s and early 2000s and include, among others, clearly drafted general exceptions and expropriation provisions (58% and 64% of new IIAs respectively according to figure 1) as a backstop to make abundantly clear that public welfare measures should not attract liability. However, clarifying the language of exception clauses, adding new flexibilities, or reining in arbitrator discretion is not necessarily the panacea for the realization of the equilibrium between investors' protection and public health that the present pandemic calls for.

2. Are General Exceptions the Answer to the Need for Reform?

Although on their face general exceptions may appear to offer a holistic solution to legitimacy and sustainability concerns regarding the scope of foreign investors' rights under IIAs, this chapter questions the insertion of general exceptions as the preferred paradigm to balance private rights and public health.[129]

As noted above, statistics indicate that in recently concluded BITs the most popular technique among States to safeguard their regulatory space is the inclusion of clauses that define the scope of indirect expropriation and of general exception clauses. Starting from the expropriation clauses, as analyzed in the previous chapter the aim of these provisions is to explicitly exclude certain types of regulations from the definition of an indirect expropriation. The fact that such elements of clarification are being provided for arbitrators is a positive step towards achieving a more accurate definition of indirect expropriation. The effect of these clauses, however, is simply to create a presumption in favor of legitimate regulations, which may be excluded from the definition of an indirect expropriation. And this is because once a regulation designed to protect

[129] *See* Caroline Henckels, Should Investment Treaties Contain Public Policy Exceptions, 59 BC L. Rev. 2825, 2841(2018), where the author notes that 'it is arguable that exceptions still have a role to play even where the substantive obligations are drafted with greater precision'; Gabriele Gagliani, 'The Interpretation of General Exceptions in International Trade and Investment Law: Is a Sustainable Development Interpretive Approach Possible' 43 Denver. J. Int'l. L. and Pol'y 559, 587 (2015).

legitimate objectives such as public health is deemed to fall within a State' s police powers, it may no longer be construed as indirect expropriation.[130] And in the case the regulation does not fall within police powers, for example because it is discriminatory, it will also not fall under the indirect expropriation clause for the very same reason, its discriminatory nature. Thus, clauses regarding the scope of indirect expropriation are rather futile in view of the police powers doctrine that exonerates a measure on the basis of a public welfare objective in the first place.

The most important challenges are, however, posed from the inclusion of general exceptions in IIAs, which are the focus of this chapter. Firstly, there is significant uncertainty about how general exceptions clauses operate in international investment law. The fact that arbitral tribunals predominantly read the balancing of investment and non-investment concerns directly into primary obligations has led scholars to note that the inclusion of general exceptions may actually reduce rather than expand States' policy space.[131] The risk lies in the fact that, since general exceptions provide a closed list of legitimate policy objectives, their inclusion might have the unintended consequence of limiting the range of legitimate objectives generally available to the State.[132]

Indeed, some tribunals have interpreted these exception clauses to counteract implied flexibilities in other provisions. For example, in *Bear Creek v. Peru* the tribunal found that the existence of a general exception clause in the applicable IIA forestalled recourse to the police powers doctrine. Specifically, it noted that the presence of the general exception clause meant that 'no other exceptions [e.g., police powers] from general international law or otherwise can be considered applicable in this case.'[133] That is to say that the factors that would otherwise have been taken into account in the determination of whether a measure was an

[130] *See* Suzy Nikiema, Best Practices: Indirect Expropriation, Institute of Sustainable Development, Best Practices Series 1, 11 (2012).

[131] Wolfgang Alschner and Kun Hai, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' in Lisa Sachs, Jesse Coleman, Lise Johnson (eds.), *Yearbook on International Investment Law and Policy*, (OUP 2018) 363, 376.

[132] *Id.* at 376-7; *see* Andrew Newcombe, *The use of general exceptions in IIAs: increasing legitimacy or uncertainty?*, in Armand de Mestral and Céline Lévesque (ED), Improving International Investment Agreements, 267, 279 (Routledge 2013).

[133] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017) ¶ 473.

indirect expropriation or an exercise of police powers were only relevant insofar as they were embodied in the exception clause.[134] Relatedly, the presence of exceptions in some treaties but not others may send a signal to tribunals that treaties without exceptions do not permit tribunals to examine whether a challenged measure is directed to promoting public welfare at all when determining whether a State has complied with its investment treaty obligations.[135]

Secondly, in light of that interpretative uncertainty, the normative interaction between exceptions and other norms of investment law needs to be clarified. General exceptions and primary obligations often share overlapping conditions that can give rise to confusion.[136] Measures in violation of national treatment or FET are likely to be deemed arbitrary or discriminatory. Equally, most public policy exceptions contain a chapeau, which only exempts from wrongfulness measures that 'are not applied in an arbitrary or unjustifiable manner' or that are 'non-discriminatory' in application.[137] Hence, measures that fall foul of investment law's primary obligations also seem unlikely to be saved by its exceptions, as confirmed by recent jurisprudence.[138] As general exceptions only come into play after a finding that a measure is contrary to a treaty standard, the finding of a violation would automatically preclude the application of the general exception.[139]

Thirdly, paradigms from practice are indicative of the conundrum around the precise operation of these exceptions also among treaty drafters, the States themselves. Specifically, there have been instances, where States failed to raise those exceptions. In *Gold Reserve v. Venezuela*, Venezuela did not raise the general exceptions clause in the annex of the BIT and the tribunal concluded that the

[134] Henckels, *supra note* 129, at 2835-6.

[135] *Id.* at 2836.

[136] Alschner and Hai, *supra note* 131, at 378.

[137] *Id.*

[138] Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2, Award, ¶ 6.67 (Aug. 15, 2016) where the tribunal found that the arbitrariness in Ecuador's withdrawal of a mining license rendered Article XVII of the BIT (general exception) inapplicable, because it only exempted measures 'not applied in an arbitrary or unjustifiable manner' from liability; See Newcombe, *supra note* 123, at 11.

[139] Newcombe, *supra note* 132, at 281; *see* Camille Martini, Avoiding the Planned Obsolescence of Modern International Investment Agreements: Can General Exception Mechanisms Be Improved and How, 59 BC L. Rev, at 2877, 2886 (2018).

State's responsibility to preserve the environment does not exempt it from its international obligations,[140] sidestepping the exception and basing its reasoning on cases decided under treaties that do not contain general exceptions. Similarly, in *Crystallex International Corporation v Venezuela* and in *Rusoro Mining Ltd. v Venezuela*, Venezuela did not raise the general exceptions and the tribunals did not consider the clauses on their own initiative.[141] Last but not least, in the recent *Infinito Gold* award Costa Rica sought to justify the revocation of a mining license based on environmental protection concerns. But rather than invoking an exception from the Canada-Costa Rica BIT, Costa Rica raised the treaty's 'right to regulate clause', which permitted environmental measures 'otherwise consistent' with the treaty. The tribunal made clear that the clause 'is not a carve-out from the BIT's protections, but rather a reaffirmation of the State's right to regulate.'[142] All these cases represent missed opportunities to clarify the intended role of general exceptions in the balancing of rights and obligations in the investment regime.

To conclude, if general exceptions operate as replacements rather than complements to the flexibility already offered under customary international law, such as the police powers doctrine, they will provide little additional policy space or may even detract from it. Similarly, if they are inapplicable on the same grounds that give rise to a violation of the primary obligations in the first place, they will rarely save respondent States from liability.[143] Thus, instead of serving as legal bases for the defense of States against pandemic claims, general exceptions rather reveal the structural weaknesses of the exceptions-oriented formulation of the investment regime.

3. Evaluation of Reform Proposals

Given the strong asymmetries in old-generation IIAs and the uncertainties in the application of general exceptions, international fora urge States to prioritize

[140] Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 595 (Sept. 22, 2014).

[141] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 591 (April 4, 2016); Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, ¶¶ 407- 409 (Aug. 22, 2016).

[142] *See*, *e.g.*, Infinito Gold, *supra note* 29, ¶ 777.

[143] Tarald Laudal Berge & Wolfgang Alschner, Reforming Investment Treaties: Does treaty design matter? International Insitute Sustainable Development, Investment News, (October 2018).

and accelerate the holistic reform of all existing IIAs. The proposals for the reform of the existing regime may be organized in two main streams of argumentation: a first one suggesting the inclusion in IIAs of a general exception clause on health with clear language; and a second one suggesting a carve-out from ISDS for specific health-related measures.

The first of the suggested reforms regards the inclusion of a general exception clause in the IIAs, which would specify that the pursuit of public health is a legitimate objective under the treaty and no compensation would be provided for regulatory measures during health emergencies.[144] Within the same realm of thought are also proposals for revision of the language of general exceptions. Specifically, the United Nations Conference on Trade and Development ('UNCTAD') proposes that, instead of providing that the measure must be 'necessary' to achieve the policy objective (according to the typical wording of the exception), the text could require that the measure be 'designed' to achieve or 'related' to the policy objective, thus lowering the burden of proof for States.[145] Similar more lenient nexus requirements offer allegedly more leeway to host States than the more frequently used and much stricter 'necessity' threshold.[146] However, the more lenient the nexus, the more it risks being circumvented by measures that are protectionist or otherwise hostile to foreign investments.[147] Similar formulations may rather pose risks to investors' protection than safeguard the regulatory autonomy of States, because they create loopholes for misuse of the general exception.

The second stream of reform proposals is directed at ISDS. A carve-out of tobacco measures from ISDS in the CPTPP emerged following the Philip Morris dispute over Australia's tobacco plain-packaging legislation.[148] According to some

[144] UNCTAD, *supra note* 14; *see* Caroline Henckels and others (ED), 'Australia's Bilateral Investment Treaties' (Monash Law School, September 2020) at, 1, 10.

[145] UNCTAD, 'Investment Policy Framework for Sustainable Development' (UN Publication, 2015) 1, 104.

[146] Levent Sabanogullari, 'The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice' IISD Investment News (21 May 2015); Simon Lester and Bryan Mercurio, Safeguarding Policy Space in Investment Agreements, 12 IIEL Issue Brief, at 1, 10 (2017) .

[147] Henckels, *supra note* 129, at 2842.

[148] CPTPP (signed 8 March 2018, entered into force 30 December 2018) Art 29.5 excludes claims challenging tobacco control measures from ISDS or enables the State party to deny the benefits with respect to such claims.

commentators, this could pave the way for more extensive inclusion of health-related carve-outs in forthcoming treaties.[149] This approach is, however, undesirable. Excluding certain types of claims from the scope of the treaty obligations implicitly ranks some public welfare measures above others and singles out a single industry.[150] It also suggests that but for the clause, these measures would be vulnerable to being found to be inconsistent with the State's treaty obligations,[151] while with ISDS taken away, the respective sector would be the lone sector in which foreign investors will have rights under the treaty but no avenue to enforce those rights.[152] The carving out of a specific industry is unnecessary to protect governments' ability to regulate and promote public welfare measures. As will be seen, there are better ways to accomplish this objective.

Generally, the thrust of these reform proposals is the strengthening of the constant and piecemeal update of IIAs, either via the inclusion of health-related exceptions or via the introduction of carve-outs of health-related measures from ISDS. Is, nevertheless, the inclusion of precise exceptions and carve-outs the right path to follow in the present health crisis, as well as to the many yet to come? With 'path' meaning merely perpetuating the reform of exception clauses so as to tailor them to the type of crisis that each time comes up? For example, the slow-moving climate emergency is another area, where the flexibilities of treaty-based exceptions could soon be put to the test. An affirmative answer does not seem persuasive at all, because it provides short-term and shortsighted solutions, missing the forest for the trees. Instead, by re-calibrating away from a reactive model of dispute settlement and endorsing an ISDS model where health and sustainability parameters are built into the system, instead of being its exceptions, investment institutions may yet serve as sources of strength in times of need.[153]

[149] Ashley Schram , Public Health over private wealth: rebalancing public and private interests in international trade and investment agreements, 29 Public Health Res Pract. at 1, 3 (2019).

[150] Lester & Mercurio, *supra note* 146, at 7.

[151] Henckels, *supra note* 144, at 4.

[152] Lester & Mercurio, *supra note* 146, at 7.

[153] Julien Arato, Kathleen Claussen and J. Benton Health, The Perils of Pandemic Exceptionalism, 114 American J. Int'l. L. 627, 636 (2020).

C. *Rebalancing Investor and State Interests through Treaty Exceptions on Public Health: Where does the Limit of Exceptionalism Lie?*

International investment law's responses to the pandemic are likely to accelerate an already existing tendency towards exceptionalism – a paradigm of justification according to which deviations from primary rules are absolved by way of 'exceptions', and in which claims of exception can be expected to proliferate.[154] Which are, however, the consequences of a novel accelerating turn to exceptions, this time in light of the global pandemic? And what could be the way forward so as to enhance the health of the system as a whole?

In the short run, recourse to exceptions provides States with latitude and demonstrates the system's flexibility.[155] But exceptionalism also calls into question the ability of the investment regime to respond adequately to crises. First of all, it posits that the existing system of rules and exceptions is sufficiently flexible to handle crises and need not bend any more than it already does to accommodate urgent governmental interventions into the health sector.[156] While this argument seems logical and justifiable at first glance, it is well-equipped to handle only the occasional extraordinary event for which the exception was tailored. It falls short though of accommodating new forms of national policy or intervention that might emerge from the crisis. Specifically, the crisis-orientation of exceptions can make forward-looking preventative regulations difficult to justify.[157] Moreover, the exhaustive lists of permissible objectives and overly rigid prerequisites may even limit existing flexibility, if the present pandemic represents the threshold, below which any lesser disruption does not fall within the ambit of the exception.[158]

Secondly, the extensive inclusion of public health exceptions into IIAs may lead to an overreach of international investment law to other international law regimes, including the one of international health law. Respondent States to pandemic-related disputes are signatories to international instruments, including

[154] *Id.* at 628.

[155] *Id.*

[156] *Id.* at 632.

[157] *Id.*

[158] Sabanogullari, *supra note* 146.

the International Health Regulations ('IHR') of the WHO.[159] The IHR enable States to 'implement health measures [...] in response to specific public health risks or public health emergencies of international concern' as long as they are not 'more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives.'[160] In that way the IHR share a similar normative orientation with general exceptions under IIAs towards minimizing burdens on international commerce, a fact that makes it likely for parties to economic disputes to refer to the IHR, opening the door for tribunals to pronounce on their scope and interpretation.[161] The Regulations' preoccupation with avoiding undue restrictions on international commerce could, if imported into the hotly contested world of investment arbitration, have negative consequences for the right of States to regulate to attain the highest achievable standard of health.[162] Therefore, this result should be avoided, although proliferating invocations of public health reinforces the opposite.

Taking into consideration the significant weaknesses associated with the currently suggested path of reform focusing on treaty exceptions, a structural reappraisal is urgently needed. While there are still important disagreements among key actors on how to reform ISDS, there is a broad consensus among governments on the directional power of most States' agendas to more narrowly circumscribe and define the rights which investment treaties grant to foreign investors.[163] A precisely drafted norm that is clear about the conduct that is and is not permitted removes the need to have recourse to an exception.[164] As such, a preferable approach would be for treaty parties to clarify the substantive obligations included in the IIAs, so as to achieve a balance between regulatory freedom and investment protection.[165]

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[159] International Health Regulations (adopted 23 May 2005, entered into force 15 June 2007) 2509 U.N.T.S 79 ('IHR 2005').

[160] IHR 2005, Art. 43 (1).

[161] Arato, *supra note* 153, at 632.

[162] Benton Heath, Suspending Investor-State Arbitration During the Pandemic, Int'l. Econ. L. & Pol'y Blog, (May 12, 2020).

[163] Lauge N. Skovgaard Poulsen and Geoffrey Gertz, Reforming the investment treaty regime, Brookings Press, (Mar. 17, 2021).

[164] Henckels, *supra note* 129, at 2838-9.

[165] *Id.* 2839.

Specifically, treaty reform could be directed towards defining with a fair deal of precision the substantive obligations of the State under the respective IIA via the inclusion for example, of an exhaustive list of conduct that could breach the FET standard or constitute indirect expropriation, particularly when legitimate regulations of general applicability are at issue.[166] These sorts of lists have the benefit of tightly constraining the circumstances in which regulatory measures in the public interest may be found unlawful.[167] Additionally, more precise norms place greater constraints on the decision-making criteria employed by the tribunals.

Yet, greater precision in drafting of the obligations under the IIAs will not (and cannot) prescribe a specific outcome in a given dispute, nor always steer adjudicators towards interpretations of provisions that are acceptable to the negotiating parties and their constituencies.[168] The challenge that this proposal poses to the drafters is to provide precise criteria as to when a measure will be in breach of the IIA, but also not impose rigid conditions that will be unable to adapt to all possible contingencies.[169] In any case, nevertheless, this approach does not come with the interpretative uncertainties associated with the dyadic rule-exception structure of the investment regime. In short, a more precise definition of the substantive rules included in the IIAs could obviate the need for exceptions, without limiting the regulatory autonomy of States.[170]

IV. CONCLUSION

They say, '*Desperate time calls for desperate measures.*' However, some of the measures taken for the protection of public health during the COVID-19 pandemic are expected to expose governments to arbitration claims. The risk of investment arbitrations over public health regulations intensifies the difficulty to strike a balance between the obligations of the host nation towards its investors and the obligations of the same nation towards its citizens with regard to the protection

[166] Nikiema, *supra note* 130, at 21; *see*, *e.g.*, Newcombe, *supra note* 132, at 269.

[167] Henckels, *supra note* 144, at 4.

[168] Caroline Henckels, Protecting Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP, 19 J. Int'l. Econ L. 27, 33 (2016).

[169] Henckels, *supra note* 129, at 4.

[170] *Id.*

of their health and safety.

As a first line of defense, States may justify exceptional measures taken during the pandemic of the basis of the police powers doctrine. Especially public health measures can be broad and invasive, but rest on the solid legal basis that recognizes the unique capacity of governments to exercise their police powers in times when global threats pose society-wide risks and collective actions are needed. Nevertheless, police powers should be exercised with caution and care, otherwise a blanket exception for regulatory measures would create a gaping loophole in international protections afforded to investors against expropriation.

States may also seek to justify contested measures on the basis of necessity or *force majeure*. A high threshold for the invocation of these defenses is welcome, in the sense that it should not be easy for States to rely on them to preclude wrongfulness for conducts which would ordinarily constitute as a breach of an international obligation. Nevertheless, tightly drafted conditions of application should not deprive the defenses of their usefulness altogether. On the one hand, one may be tempted to say that under the high standard of the 'one way' criterion any measure adopted would fail the test of necessity, because there will always be an alternative measure potentially available, especially in times of a worldwide health emergency where different States adopted diverse measures to tackle the crisis. On the other hand, States are practically precluded from relying on *force majeure* due to the high threshold of material impossibility, because in most of the cases States have a choice in respect of compliance, even if the choice necessitates the utilization of remote modes of communication and work and no matter how difficult this compliance may be.

In general terms, the jurisprudence on customary law defenses indicated areas where these pleas fall short to be upheld, particularly when applied to macro-crises, such as pandemics that affect various aspects of the States' functioning and require multilevel and multi-faceted measures to be implemented. The reveal of the lack of sufficient regulatory space nudged States towards including exceptions in their IIAs. Nevertheless, although increasingly included in recent IIAs, general exception clauses give rise to interpretative dilemmas that may render existing safeguards, as construed by the arbitral practice, inoperative, and result in even reducing States' regulatory space. What matters however the most, is that viewing

laws and other government actions taken to promote public welfare as exceptional, rather than something that takes place in the ordinary course of governance, undermines the objective pursued.

What should then be the way forward, if not the expansion of the exceptions-oriented paradigm of justification, as it already stands? At a moment when governments around the world are seeking to address mounting pressures on the investment regime, it offers a practical and politically feasible option for them to revisit one of the most contentious corners of international economic law. The pandemic has created new challenges for the ISDS: if tribunals choose to hold States liable for regulations aimed at preventing the spread of the virus, this may permanently damage public trust in investment arbitration and in the long run, it could further strengthen the backlash against it. Nevertheless, by revealing the structural weakness of the status quo, the pandemic also presents a unique opportunity to develop a sustainable response that places a greater emphasis on health issues. A universal panacea probably does not exist, but it is possible to move towards a better balance between public health and investment protection. Through more sophisticated treaty drafting of substantive rules, the international regime of ISDS could provide greater certainty and confidence for both investors and States to commit to long-term investments for the sustainable development of its sovereign actors.

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Myrto is the 1st Runner-Up of 2022 Young ITA Writing Competition. The author would like to thank in particular Prof. Gabrielle Kaufmann-Kohler for her guidance and valuable insight.

ADDRESSING COUNSEL-ARBITRATOR CONFLICTS OF INTEREST IN ICSID ARBITRATION

by Juan Felipe Patiño

I. INTRODUCTION

The evolution of democratic societies settled a number of principles to ensure peace among human communities and between communities by themselves. One of the most prominent principles is the separation of public powers, according to which no authority may accumulate the powers vested to the states by the people: the power to say the law, the power to execute the law, and the power to judge under the law. In that sense, *western institutional theorists have concerned themselves with the problem of ensuring that the exercise of governmental power, which is essential to the realization of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote.*[1]

Arising from that cornerstone, several principles apply to each branch of public power, principles that guarantee balance and stability for prosperous societies. Among those principles, fairness and impartiality of the judiciary stands out, initially applied to domestic but later transferred to international dispute resolution mechanisms.

However, the practice of dispute resolution across history has shed light on a number of conflicts of interest that arise from its participating actors (disputing parties, adjudicators, and counsel). Conflicts of interest are not creatures with "an only parent"; one cannot have a conflict of interest with himself. To exist, conflicts of interest require a relationship between two individuals. In that sense, conflicts of interest are relative.

The evolution of domestic procedural systems has set a number of solutions to deal with those conflicts of interests, which have been (fortunately or unfortunately) transplanted to international disputes resolution mechanisms, like international arbitration. Some of these remedies comprise excluding a conflicting adjudicator,

[1] M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS, 2 (1998).

excluding a conflicting party counsel, disregarding the arguments of a party-appointed expert witness, and so on.

This article will address how ICSID arbitration currently deals with a specific conflict of interest: counsel-arbitrator conflict of interest. However, neither the applicable standards to disqualify party counsel or arbitrators, nor other conflicts of interest scenarios (party-arbitrator; party-counsel) will be discussed here. Instead, the objective is to analyze the procedural mechanisms and the existing remedies to address conflict of interest between party counsel and arbitrators. In that sense, Part I will address the origin of an alternative remedy to deal with counsel-arbitrator conflict of interest. Part II will set the current status of remedies for such conflicts of interest under several arbitration rules. Part III will argue why the alternative remedy created by case law is beneficial for the ICSID dispute resolution mechanism. Part IV will discuss some issues that arise from the current remedy structure. Finally, Part V will propose some conclusions on this topic and solutions that may benefit the management of counsel-arbitrator conflict of interest in ICSID arbitration as well as arbitration under other institutional rules.

II. THE ORIGINS OF AN ALTERNATIVE REMEDY

Conflict of interest is a common concern in adjudicative dispute resolution mechanisms, whether litigation or arbitration. In that sense, "*a conflict of interest can be defined as a situation where a person entrusted with the function of determining the outcome of a case has a personal interest in that outcome. Conflicts of interest of international arbitrators typically are identified by a lack of independence or a lack of impartiality.*"[2]

The essential interest that disputes be decided by independent and impartial adjudicators places the adjudicators in the center of the analysis of conflict of interest. In that sense, a relevant conflict of interest exists as long as the adjudicator (or one of the members of the adjudicative body) is involved:

- Party-adjudicator conflict of interest

[2] James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30 ARB. INTL, 2, 189, 193 (2014).

- Counsel-adjudicator conflict of interest
- Expert-adjudicator conflict of interest

Thus, in adjudicative dispute resolution mechanism, the figure of the adjudicator is central to any analysis of conflict of interest:

> In fact, the dispute-settlement mechanism revolves around the entity that decides the case. It does not matter if the case is decided either by a single judge or by a tribunal, or if it is a case brought before a domestic court or an international one. In all cases, those who are in charge of deciding the case are going to be the ones who will have the last word in a controversy. Therefore, although the parties and counsel are essential to the proceedings, their performances, pleadings and the evidence provided by them are chosen so as to convince the adjudicator that their claims are well founded.[3]

Both the text of the ICSID Convention of 1968 ("ICSID Convention") and the text of the ICSID Arbitration Rules ("ICSID Rules") offer a unique remedy to deal with relevant conflicts of interest: disqualification of the conflicting arbitrator. None of these instruments provide an alternative remedy.

In this regulatory scenario, the tribunal in the case *Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia*[4] ("*Hrvatska* case") found before itself a request to exclude counsel who had an apparent conflict of interest with one arbitrator from participating in the arbitration proceedings. Here, the challenged counsel was a barrister at the same court chamber as the president of the tribunal. According to the challenging party, this circumstance created a possible lack of impartiality to the said arbitrator, which may, in the end, compromise the conduct of the whole arbitration proceeding. Note that the challenge was not against the conflicting arbitrator, nor was the remedy sought the disqualification of the said arbitrator. Rather, the interested party challenged the conflicting counsel and sought his exclusion from participating in the arbitration proceedings. Due to such request, the tribunal had to answer a seminal question: do ICSID tribunals have the power to

[3] Pablo Agustin Alonso, *Impartiality and Independence of Arbitrators in International Arbitration: Issue Conflicts as Grounds for Disqualification with Special Regard to ICSID Arbitrations*, 20 MAX PLANCK YRBK. UNL, 537, 538 (2016).

[4] Hrvatska Elektroprivreda d.d. v. Republic of Slovenia. ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (May 6, 2008).

remove party counsel in events of conflict of interest with an arbitrator? First, the tribunal identified a lacuna in both the ICSID Convention and the ICSID Rules in that regard. Then, the tribunal held that there might be conflicts of interests between party counsel and arbitrators. Then, interpreting Article 44 of the ICSID Convention, the tribunal held that ICSID tribunals have the power to resolve an existing counsel-arbitrator conflict of interests by removing the challenged counsel. That was the first time in ICSID adjudication history that a tribunal vested in itself the power to remove a conflicting party counsel from further participating in the arbitral proceedings.

Before that case, it was clear that the only procedural remedy for dealing with conflicts of interests relating to an arbitrator and any participant in the arbitration was challenging and eventually removing the conflicting arbitrator. However, the *Hrvatska* case opened the door to a brand-new remedy for—exclusively—counsel-arbitrator conflicts of interests: challenging and eventually removing the conflicting counsel.

Given its novelty, not many ICSID arbitrations have dealt with challenges against conflicting counsel. One of the few cases dealing with a challenge against a conflicting counsel was *The Rompetrol Group N.V. v. Romania*.[5] Here, the law firm representing the claimant assigned the leadership of the case to a partner who had previously worked at the same law firm with one of the arbitrators. For the respondent state, this circumstance created a conflict of interest between the said counsel and the arbitrator and, in consequence, requested the tribunal "*to remove Mr. Legum* [the conflicting counsel] *from the case and to forbid him from participating in it in any way*." Addressing this request, the arbitral tribunal analyzed three issues: (i) whether ICSID tribunals have an inherent or implied power to control party representation; (ii) what is the applicable standard to remove a party counsel in case of conflict of interest; (iii) whether the standard was satisfied in the present case. First, the tribunal noted that the texts of both the ICSID Convention and the ICSID Rules do not provide for the challenge of party counsel and that the only source of

[5] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel (Jan. 14, 2010).

authority in this matter was the *Hrvatska* case. Additionally, the tribunal remarked that such a power should ideally be expressly comprised "*in the legal texts governing the tribunal and its operation.*"[6] Second, the tribunal did not set the applicable standard to exercise the power to exclude party counsel in a clear manner. However, one may consider that the tribunal intended to set a high substantive standard, which is not satisfied by "*the mere subjective claim by one party to an arbitration that a professional association between counsel and an arbitration might be misunderstood*,"[7] but it requires "*some objective and dispassionate assessment of the circumstances of the individual case*,"[8] especially considering the lack of sufficient legal authority and the principle of liberty of the parties to select their legal representation. Finally, the tribunal found that the alleged facts did not constitute a material conflict of interest that could affect the integrity of the arbitration proceedings, *i.e.*, that the high standard was not satisfied in that set of events.

In the *Bridgestone Licensing Services, Inc. and Bridgestone Americas Inc. v. Republic of Panama* case,[9] the claimant investor requested the tribunal to exclude an expert in Panamanian domestic law appointed by the respondent due to an apparent conflict of interest with the respondent's counsel. Here, the alleged conflict of interest did not relate an arbitrator. The interested party tried to extend by analogy the application of the *Hrvatska* case (*i.e.*, the power of the tribunal to exclude conflicting party counsel) to exclude a party-appointed expert. The tribunal considered that general standards on evidence granted a sufficient remedy for conflicts of interest involving an expert but not an arbitrator: "*it falls within our competence to rule that his evidence is not to be admitted.*"[10] So, the tribunal did not resort to the ruling of the

[6] *Id.* ¶ 16.

[7] *Id.* ¶ 15.

[8] *Id.*

[9] Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34, Tribunal's Ruling on Claimants' Application to Remove the Respondent's Expert as to Panamanian Law (Dec. 18, 2018).

[10] *Id.* ¶ 13.

Hrvatska case. In the end, the tribunal dismissed the request due to a lack of a current conflict of interest affecting the expert appointed by the respondent state.

The scarcity of decisions dealing with challenges against a conflicting party counsel somehow demonstrates that the power to exclude such a counsel is not deeply rooted in ICSID arbitration yet.

III. STATUS QUO – TWO SEPARATE REMEDIES IN ICSID ARBITRATION

A. *ICSID Arbitration*

Before the *Hrvatska* case, several tribunals dealt with challenges against arbitrators due to alleged conflict of interest with party counsel. The only remedy at hand was challenging and removing the conflicting arbitrator.

However, the *Hrvatska* tribunal created a brand-new remedy for counsel-arbitrator conflicts of interest (*i.e.*, challenging and eventually removing the conflicting party counsel). Nevertheless, it is clear that an arbitral tribunal does not have the authority to modify either the ICSID Convention or the ICSID Arbitration Rules. Thus, one may preliminarily conclude that the power to remove party counsel is a kind of *equitable remedy* in ICSID arbitration.

In that sense, two separate remedies to resolve counsel-arbitrator conflict of interests exist and are available to the parties: (i) disqualification of arbitrators under Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules; (ii) disqualification of counsel under the *Hrvatska* case guidelines. The differences between those remedies will be discussed in Part IV.

B. *Other Arbitration Rules*

The power to remove party counsel due to conflicts of interests with arbitrators is not exclusively present in ICSID arbitration. Other renowned arbitral institutions have granted, in their arbitration rules, powers for the arbitral tribunals to deal with the discussed conflicts of interest.

1. London Court of International Arbitration

That is the case of the London Court of International Arbitration 2020 Arbitration Rules ("LCIA Rules"). These rules grant the arbitral tribunal ample powers to take measures against conflicting party counsel:

> 18.6 In the event of a complaint by one party against another party's authorised representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that authorised representative a reasonable opportunity to answer the complaint, whether or not the authorised representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the authorised representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.1(i) and (ii).[11]

It is remarkable that the counterparty need not be the complainant against a party counsel. The arbitral tribunal may also raise such complaint *ex officio*. It is also the arbitral tribunal in full that decides whether there exists a violation of the LCIA General Guidelines or a conflict of interest that may impair the proceedings. These guidelines are contained in an annex to the LCIA Rules and establish a set of fair standards of conduct applicable upon party counsel "*to promote the good and equal conduct of the authorised representatives of the parties appearing by name within the arbitration.*"[12] Finally, LCIA tribunals have broad discretion in sanctioning improper conduct from party counsel. Even though removing conflicting counsel is not expressly provided for in the rules, one may consider that LCIA tribunals have such power under Article 18.6(iii).

However, the LCIA tribunals have other competences to control party representation and, in consequence, avoid counsel-arbitrator conflicts of interest. After the constitution of the tribunal, any change on party representation must be informed to all the participants in the proceedings, including the tribunal. Then, the tribunal has the power to reject a modification in party representation due to a conflict of interest or other grounds.

> 18.4 The Arbitral Tribunal may withhold approval of any intended change or addition to a party's authorised representatives where such change or addition could

[11] LCIA Rules, art. 18.

[12] LCIA Rules, Annex, General Guidelines for the Authorised Representatives of the Parties.

> compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict of interest or other like impediment). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including: the general principle that a party may be represented by an authorised representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition.[13]

Thus, it is clear that the LCIA is heavily concerned about the effectiveness of its arbitration proceedings as it has granted arbitration tribunals the power to control counsel-arbitrator conflict of interest in advance. In that way, one may consider that LCIA tribunals seldom exclude party counsel due to conflicts of interest because of the prevention authority they have under Article 18.4 of the Rules.

The other remedy existing to deal with counsel-arbitrator conflict of interest– and other circumstances affecting the independence and impartiality of arbitrators– under the LCI Rules is challenging the conflicting arbitrator, the traditional remedy.

> 10.1 The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator, to be copied to all parties and all other members of the Arbitral Tribunal (if any); (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.[14]

The LCIA Court of Arbitration is the deciding authority of challenges against appointed arbitrators. The origin of the complaint may be either the LCIA Court of Arbitration on its own initiative, the co-arbitrators, or the parties. The arbitrator may be excluded from the proceeding if he or she "*(i) acts in deliberate violation of the Arbitration Agreement*; *(ii) does not act fairly or impartially as between the parties*; *or*

[13] LCIA Rules, art. 18.

[14] LCIA Rules, art. 10.

(iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry."[15]

Here, one may notice that the decision-making authority is different for both remedies. In case of challenges against a conflicting counsel, it is the arbitral tribunal in full. In case of challenges against a conflicting arbitrator, it is the LCIA Court of Arbitration.

2. ICC International Court of Arbitration

The International Chamber of Commerce 2021 Arbitration Rules ("ICC Rules") provide a similar approach to counsel-arbitrator conflict of interest, granting the arbitral tribunal the power to exclude the conflicting counsel from participating in the proceedings.

> 17.2 The arbitral tribunal may, once constituted and after it has afforded an opportunity to the parties to comment in writing within a suitable period of time, take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings.[16]

The ICC Rules are unclear regarding the origin of the complaint against a conflicting counsel, *i.e.*, whether exclusively the counterparty may present the complaint, or the arbitral tribunal may originate the complaint *motu proprio*. In that sense, a conservative approach would consider that only the counterparty may raise such complaints. Additionally, the text of Article 17.2 grants the arbitral tribunal in full the competence to decide on the existence of a counsel-arbitrator conflict of interest and whether the conflicting counsel must be excluded from the proceedings. Finally, it appears that the only remedy available is excluding the conflicting counsel; no other remedy is contained in the ICC Rules.

In this point, another difference between ICC and LCIA arbitration is that, under the ICC Rules, the arbitral tribunal does not have any controlling power over party

[15] LCIA Rules, art. 5.

[16] ICC Rules, art. 17.

representatives' appointment as far as preventing their appointment, unlike under LCIA Rules.

The alternative remedy existing for dealing with counsel-arbitrator conflicts of interest is the traditional challenge against an arbitrator.

> 14.1 A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based. (…).
> 14.3 The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.[17]

Under the ICC Rules, the decision-making authority for challenges against conflicting arbitrators is the ICC International Court of Arbitration ("ICC Court"). Besides, the parties of the arbitration proceedings are the origin of the challenging complaint. However, the ICC Court *motu proprio* may revoke the appointment of an arbitrator when he or she "*is prevented de jure or de facto from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.*"[18]

As noted for the LCIA Rules, the decision-making authorities for both remedies are different under the ICC Rules: In case of challenges against a conflicting counsel, it is the arbitral tribunal in full. In case of challenges against a conflicting arbitrator, it is the ICC Court.

3. International Bar Association

Parties who submit their disputes to non-institutional arbitration (so-called *ad hoc* arbitration) may select the *International Bar Association 2013 Guidelines on Party Representation in International Arbitration* ("IBA GPR") to apply in their arbitration proceedings. In such cases, the parties would grant the arbitral tribunal the power

[17] ICC Rules, art. 14.

[18] ICC Rules, art. 15.

to exclude from participating in the arbitration proceedings a counsel who has a current conflict of interest with an arbitrator.

> 5. Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.
> 6. The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.

However, this power may be vested by parties on tribunals constituted under institutional arbitration rules, as long as Guidelines 5 and 6 do not contradict mandatory provisions of those institutional rules.

> 1. The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings. (...).
> 3. The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative's primary duty of loyalty to the party whom he or she represents or a Party representative's paramount obligation to present such Party's case to the Arbitral Tribunal.

In that sense, the deciding authority for challenges against a conflicting counsel would be the arbitral tribunal, whether under institutional or non-institutional arbitration. The decision-making authority for challenges against arbitrators may, from case to case, differ depending on the applicable arbitration clause, that is, it is either the arbitral tribunal, the arbitrator, the arbitral institution, or another authority that excludes the challenged arbitrator.

Despite its apparent procedural advancement, the remedy of excluding conflicting counsel is not harmonized and may generate further issues in international arbitration. This issue will be addressed in Part IV.

IV. WHY AN ADDITIONAL REMEDY TO DEAL WITH COUNSEL-ARBITRATOR CONFLICTS OF INTEREST IS NECESSARY FOR INTERNATIONAL ARBITRATION

Several actors participate in international arbitration proceedings (conflicting parties, arbitrators, counsel, expert witnesses, among others). However, not all actors are equally necessary to the proper resolution of the case. Hence, in the presence of a conflict of interest between some actors, the concept of fungibility is relevant.

Fungibility is *the quality or fact of being fungible*; *interchangeability*. Applying this concept to the issue addressed in this paper, not all participant parties in arbitration proceedings parties are equally fungible in the presence of a conflict of interests. The fungibility level of the parties to the dispute is, for clear reasons, zero. The parties of a dispute cannot be removed or replaced: the parties grant jurisdiction to the arbitral tribunal, and the conflict of legal interest between them is the subject matter of the arbitration proceedings. Hence, the remedy for conflicts of interest between a party and another participant should be resolved in favor of the relevant party, excluding or taking measures against the conflicting participant (either arbitrator, counsel, or expert witness). The fungibility level of arbitrators is low. After all, the appointment of arbitrators by the parties is a cornerstone of international arbitration and a broadly recognized guarantee for the parties. Besides, the ICSID Convention recognizes the principle of immutability of the arbitral tribunal: "*After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged.*"[19] Besides, when removing an appointed arbitrator, "*the principal consequences, both for the parties and the arbitration system, are the increased cost of the dispute and the length of the proceedings.*"[20]

Regarding party counsel, their fungibility is medium or, at least, higher than the fungibility of arbitrators. The liberty of parties to select their representatives for arbitral proceedings is a guarantee established in most legal systems around the

[19] ICSID Convention, art. 56.

[20] Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview*, 13 LAW & PRAC. INTL. CTS. & TRIBUNALS 153, 175 (2014).

world and is tied to the principle of procedural fairness. However, as the *Hrvatska* case demonstrated, this principle may be restricted to guarantee a more fundamental principle, the effectiveness of the arbitration proceedings.

The mentioned guidelines allow reaching a reasonable resolution to conflicts of interest between international arbitration actors. In this sense, in case of conflict of interest between a party and an arbitrator, the arbitrator must be removed. In case of conflict of interest between an arbitrator and a party counsel, the tribunal must remove the conflicting counsel in most cases. This conclusion allows us to understand why the power to exclude party counsel in events of conflict of interest with an arbitrator is a necessary remedy for international arbitration.

In the same way, arbitration rules must offer alternative remedies to conflicts of interest between any participant of arbitration proceedings and an arbitrator beyond the disqualification of the conflicting arbitrator. Considering the fungibility criterion noted above, in some cases, it would be more cost-effective to remove a fungible participant in the arbitration proceeding (*i.e.*, a party counsel or an expert witness) instead of an arbitrator. Remedies to resolve such conflicts of interest may eventually prevent both the annulment or the denial of recognition and enforcement of arbitral awards, as occurred in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. the Kingdom of Spain*.[21] In this ICSID case, the annulment committee set aside the arbitral award upon finding an undisclosed conflict of interest between a party-appointed expert witness and a member of the arbitral tribunal. According to the annulment committee, the demonstrated conflict of interest "*deprived Spain from seeking the benefit and protection of an independent and impartial tribunal which the right to challenge is intended to provide. This affected Spain's right of defense and fair trial, as well. This failure cannot be regarded as a mere inconsequential error or omission or something insignificant having no bearing on the outcome of the*

[21] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Decision on Annulment (June 11, 2020).

proceedings before the Tribunal. Accordingly, the Committee cannot but conclude that there has also been a departure from a fundamental rule of procedure."[22]

The *Eiser* case demonstrates that any kind of conflict of interest affecting an arbitrator may have disastrous effects on the effectiveness of international arbitration and the rule of law when they are not dealt with in a proper manner during the arbitration proceedings.

V. ISSUES ARISING FROM THE CURRENT REMEDY STRUCTURE FOR COUNSEL-ARBITRATOR CONFLICTS OF INTEREST

As Alan Scott notes: "*The abstract 'power' of an arbitral tribunal to 'exclude,' or 'disqualify,' counsel of one of the parties from the proceedings, should not be doubted. But the Devil, as usual, is lurking in the details.*"[23]

The current structure of counsel-arbitrator conflicts of interest management–notwithstanding its perceived necessity for the investment dispute system–brings with it certain issues or difficulties that affect other principles or prevent the effectiveness of this new remedy. The issues identified are (A) lack of uniformity and (B) lack of fairness.

A. *Lack of Uniformity*

The International Centre for Settlement of Investment Disputes ("ICSID") was created in the 1960s to offer a neutral international dispute resolution mechanism focused on investment disputes between private parties and sovereign states. As Sergio Puig notes, "*prior to the ICSID Convention, the cases involving property of aliens abroad were initially treated as domestic conflicts, unless the parties had agreed on compulsory arbitration. Only after spending economic, diplomatic, or military resources could international adjudication follow in a mercantilist (state-to-state) mode.*"[24]

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[22] ¶ 241.

[23] Alan Scott, *Arbitrators Without Powers? Disqualifying Counsel in Arbitral Proceedings*, 30 ARB. INTL., 457, 457 (2014) [hereinafter Scott].

[24] Sergio Puig, *Recasting ICSID's Legitimacy Debate Towards a Goal-Based Empirical Agenda*, FORDHAM INTL. LAW J., 36, 2, 465, 478 (2013).

However, the ICSID is not a permanent international court, as the International Court of Justice or other specialized regional courts (*e.g.*, the Inter-American Court of Human Rights). The ICSID is an international organization that exclusively administers international investment arbitrations, either applying the ICSID Convention, the ICSID Additional Facility Rules, or other arbitration rules (like the UNCITRAL Arbitration rules). For some authors, the ICSID Convention "*constitutes a self-contained machinery functioning in total independence from domestic legal systems*."[25]

Due to its structure, every ICSID arbitration case is settled in an isolated manner, without formal or obligatory consideration to previous decisions rendered in the same system. For that reason, ICSID arbitration lacks a system of binding precedent or *stare decisis* principles. The doctrine is simply that it is the duty of judges and courts to follow established precedents, to adhere to settled law; in other words, to administer the law, *jus dicere*; and not to legislate, *jus facere* or *jus dare*.[26]

In that sense, one may affirm that, in essence, all ICSID arbitration cases are *ad hoc*. As noted by some commentators:

> At any rate, there is no rule of binding precedent in investment treaty arbitration. There is nothing in the ICSID Convention itself or in its travaux préparatoires to indicate the existence of such a doctrine. The decentralized structure of investment treaty arbitration is not well suited to the application of stare decisis. There are over 3000 distinct investment treaties currently in force. There is no hierarchy as between ICSID tribunals, and no mechanism of appeal. There are limited grounds for annulment and the annulment mechanism is not designed to provide consistency or predictability. And the publication of investment arbitration awards is subject to party consent. These factors have occasionally led to divergent and even conflicting awards on the same points of law or similar facts.[27]

[25] Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AJIL, 4, 784, 787 (1983).

[26] DANIEL H. CHAMBERLAIN, DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT, 6 (1885).

[27] Abdulqawi Ahmed Yusuf & Guled Yusuf, *Precedent & Jurisprudence Constante* in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 72 (Meg Kinnear, Geraldine R. Fischer ed., 2015).

As noted above, the power of ICSID tribunals to deal with counsel-arbitrator conflicts of interest by removing the conflicting counsel has been recognized in only a handful of cases. In that sense, such power is not fully consolidated within the ICSID dispute resolution mechanism. However, several authors have identified a kind of *de facto stare decisis*, according to which arbitral tribunals tend to follow previous landmark arbitral decisions: "*Despite these structural limitations and the absence of a textual basis for the doctrine of stare decisis, previous decisions by arbitral tribunals are regularly referenced and relied upon by ICSID tribunals in their holdings*."[28] The issue here is that ICSID tribunals are not compelled to apply rules and standards arising from previous arbitral decisions. Those decisions partake only the nature of an auxiliary source of international law, as recognized by the Statute of the International Court of Justice:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (...) d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[29]

Thus, the lack of *stare decisis* principles ICSID arbitration, the lack of express rules in this sense in both the ICSID Convention and the ICSID Rules, and the scarcity of ICSID arbitrations following the *Hrvatska* case, are reasons that prevent the power to remove conflicting counsel from crystallizing in ICSID arbitration. This, in turn, creates a source of uncertainty. For example, there could be a case with similar facts to those presented in the *Hrvatska* case (a recently appointed party counsel who is a member of the same chamber as one of the members of the arbitral tribunal) where the opposing party raises a challenge due to the alleged existence of a counsel-arbitrator conflict of interest. In this hypothetical case, the arbitral tribunal may consider that it does not have the power to remove said counsel due to a lack of an express rule in either the ICSID Convention or the ICSID Rules. As one may see, this is a totally different yet equally plausible outcome compared to the *Hrvatska* case.

[28] *Id.*

[29] Statute of the International Court of Justice, art. 38, ¶ 1(d).

In conclusion, the current state of ICSID arbitration regarding the removal remedy to deal with counsel-arbitrator conflicts of interest may create uncertainty, diminishing the effectiveness of that remedy in the ICSID dispute resolution mechanism.

To address that situation, a modification of the ICSID Rules is required to expressly grant ICSID tribunals the power to decide on challenges against and eventually exclude from the arbitration proceedings counsel who generates a conflict of interest involving an arbitrator. That would eliminate the uncertainty identified in this paper within the ICSID Arbitration system. This modification is not addressed by the current amendment proceedings that are taking place in ICSID.

On the other hand, an additional solution may arise from the consent of the parties. If parties agree to apply to their arbitration proceedings the IBA GPR, the arbitral tribunal would have ample authority to exclude a conflicting counsel, and it would be mandatory for the tribunal to rule on the merits of a challenge against a conflicting counsel. In that sense, Scott opines that: "*The beginning - and really, I think, the end – of any inquiry into the 'power' of arbitrators is to be found in the scope of the consent of the contracting parties - an inquiry into what they have chosen to submit themselves to. Such a power may be granted to arbitrators through an express submission – or may be granted in the institutional rules that the parties may have voluntarily adopted.*"[30]

B. *Lack of Fairness – Who Should Decide?*

Most arbitration rules confer the decision to disqualify a challenged arbitrator to an appointing authority, usually the arbitral institution administering the arbitration proceedings. On the other hand, the ICSID mechanism confers this decision to the unchallenged arbitrators and, only in the absence of a majority decision, to the Chairman of the arbitral institution.

In that sense, the ICSID Convention provides the following:

> Article 58. The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided

[30] Scott, *supra* note 25, at 459.

> that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

That power to deal with challenges against an arbitrator, as the commentary notes, is an exercise of the *kompetenz - kompetenz* principle:

> The jurisdiction of the co-arbitrators to decide challenges is an application of the Kompetenz Kompetenz principle according to which each tribunal is entitled to decide matters concerning its own competence. Therefore, the Tribunal, or at least the non-challenged members thereof, has the competence to decide whether an arbitrator should be disqualified and thus removed or whether the arbitrator can continue serving. One advantage of giving jurisdiction to the co-arbitrators is that no unnecessary time is lost by submitting the file and briefing an external body. In addition, the coarbitrators have seen the challenged arbitrator in action and may therefore be better placed to evaluate his/her morality, competence or reliability to exercise independent judgment.[31]

On the other hand, as noted above, the LCIA Rules, the ICC Rules, and the IBA GPR grant the arbitral tribunal in full, not the arbitral institution, the power to disqualify a conflicting counsel. Notwithstanding the non-existence of an express rule, as of the *Hrvatska* case, ICSID arbitration tribunals in full decide on the disqualification of the challenged counsel.

Then, under the analyzed arbitration rules, the decision-maker is different for both remedies. For the disqualification of an arbitrator, in ICSID arbitration, the unchallenged arbitrators decide the issue or, in the absence of a majority decision, the Chairman of ICSID. In LCIA and ICC arbitration, the appointing authority decides on the challenge. For the disqualification of counsel, in either ICSID, LCIA, ICC, or IBA rules, the tribunal in full, including the conflicting arbitrator, decides the challenge against the conflicting counsel.

As one may see, in either arbitration rules discussed here (ICSID, LCIA, ICC, IBA), the conflicting arbitrator (*i.e.*, the arbitrator with whom the challenged counsel has

[31] KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION, 170 (2011).

an alleged conflict of interest) participates in the decision-making process to determine: (i) whether there exists a counsel-arbitrator conflict of interest, that is, the conflicting arbitrator decides whether he or she has a conflict of interest with the conflicting counsel, and (ii) whether the proper remedy for dealing with such conflict of interest is to disqualify the challenged counsel, that is, the conflicting arbitrator decides whether excluding the challenged counsel from the proceeding is a better remedy instead of recusing him or herself.

In this sense, an interested party to the conflict of interest (the conflicting arbitrator) intervenes in the resolution of such conflict. As such, allowing the arbitral tribunal in full to decide the challenge against a conflicting party counsel generates a new (second level) conflict of interest. In that scenario, two conflicts of interest exist: a) the primary conflict of interest (*i.e.*, the basis of the challenge against either a counsel or an arbitrator); b) the secondary conflict of interest (*i.e.*, the conflict of interest in deciding the challenge).

Even though party counsel, as analyzed above, are highly fungible participants in the arbitration proceedings, removing a conflicting counsel from further participating in a case directly affects the right of a party to select its legal representation before the tribunal—an aspect considered in the *Hrvatska* case—and indirectly, the right of defense of said party. "*It deprives a party of the sacrosanct 'right to counsel of his choice.' For in a complex civil litigation or arbitration, a party's attorney 'can be just as much an essential part of a properly constituted court as the judge or jury.*"[32]

Further, "*the duties of impartiality and fairness protects the legitimacy of the arbitral process, it maintains the parties' confidence in the functions of the tribunal and, ultimately, in the arbitral award that is rendered. Conversely, a failure to observe these fundamental requirements may be used to challenge either the arbitral award or seek*

[32] Scott, *supra* note 25, at 461.

the court's permission to remove the arbitrator during the arbitral proceedings on the grounds of actual or apparent bias."[33]

Because the removal of a conflicting counsel imposes heavy burdens upon those essential values, the requirements of impartiality, independence, and fairness of the decision-maker must be extended to the application of that remedy. To grant that level of fairness, it is necessary to exclude the conflicting arbitrator from the decision-making body.

It is important to bear in mind that "*any legal system that purports to respect the rule of law must ensure the fair and impartial adjudication of disputes under the law. . . . In any event, no one could claim that courts or entities by that name are always fair and impartial. All legal systems need a guarantee of fair and impartial adjudication that applies to all forms of dispute resolution under law*,"[34] including the decision on ancillary issue like removing party counsel due to conflicts of interest with a member of the arbitration tribunal.

As William Park eloquently opines: "*No one with a dog in the fight should judge the competition. Nor should anyone serve as a referee in a game after having decided which team will win. At least as an aspirational model, legal claims should be decided on their merits, rather than according to a predisposition or interest in the outcome. Consequently, few tasks present the vital urgency of establishing standards for evaluating the independence and impartiality of arbitrators.*"[35]

In that sense, the author does not propose leaving the decision to remove a challenged counsel to an appointing authority, adopting the LCIA Rules and ICC Rules model for challenges against arbitrators. Instead, the author proposes leaving the decision to the non-conflicting arbitrators, excluding the conflicting arbitrator from the discussion, adopting the model of ICSID arbitration for challenges against

[33] Masood Ahmed, *Judicial Approaches to the IBA Guidelines on Conflicts of Interest in International Arbitration*, 28 EUR. BUS. L. REV. 649, 650 (2017).

[34] Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897 (2019).

[35] William W. Park, *Rectitude in International Arbitration*, 27 ARB. INTL., 3, 473, 474 (2011).

arbitrators. Even a conflicting counsel deserves fair and impartial treatment from the tribunal.

VI. CONCLUDING REMARKS

Conflicts of interest are always relative. One cannot have a conflict of interest with him or herself. A conflict of interest exists between at least two individuals. Several conflicts of interest may arise in every adjudicative dispute resolution mechanism (party-adjudicator; counsel-adjudicator, expert-adjudicator). All adjudicative dispute resolution mechanisms must resolve those conflicts of interest by removing one of the conflicting individuals, adopting fungibility criteria.

ICSID arbitration nowadays has two remedies to deal with counsel-arbitrator conflict of interest. First, removing the conflicting arbitrator under Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules. Second, as of the Hrvatska case, to exclude the conflicting counsel from further participating in the arbitration proceedings. For removing the conflicting arbitrator, the unchallenged arbitrators take the decision or the Chairman of ICSID in the absence of a majority decision. On the other hand, for removing the conflicting counsel, the arbitral tribunal in full (including the conflicting arbitrator) decides on the request to remove.

The LCIA Rules, the ICC Rules, and the IBA Rules all have the same remedies and decision-making structure. However, in these rules, the arbitral institution (not the unchallenged arbitrators) decides on the challenge against an arbitrator.

Although removing the conflicting counsel is a cost-effective remedy to deal with counsel-arbitrator conflict of interest, its current structure in ICSID arbitration generates two separate issues. On the one hand, the lack of *stare decisis* principles in ICSID arbitration allows future tribunals to disregard the *Hrvatska* case ruling and consider that ICSID tribunals do not have the power to remove party-appointed counsel. This circumstance eventually generates conflicting decisions in that regard, creating uncertainty in ICSID arbitration.

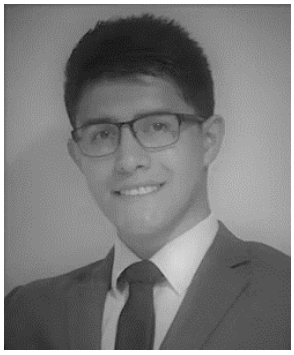
On the other hand, leaving the decision to remove a conflicting party counsel to the arbitral tribunal in full, including the conflicting arbitrator, affects the principles

of impartiality, independence, and fairness against both the conflicting counsel and the appointing party.

To deal with those issues, the author proposes:

(i) Amending the ICSID Rules in order to expressly grant the power to the arbitral tribunal to decide on challenges against party counsel due to conflicts of interest with an arbitrator. The ICSID is not currently addressing this amendment. An alternative and effective remedy is for the parties to select the IBA GPR to apply in their arbitration proceedings. However, this alternative exclusively operates where parties agree on that matter.

(ii) Excluding the conflicting arbitrator from participating in the deliberations about and decision-making of challenges against conflicting counsel. This is applicable to the LCIA, ICC, and IBA rules, as well as to ICSID arbitration.



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INTERNATIONAL ARBITRATION AND THE RULE OF LAW: ARBITRATION AND PEACE

by Lucy F. Reed

Keynote address delivered at the Celebrating the 75th Anniversary of The Center for American and International Law

You know, we're usually not competitive people personally, but I've been a best friend of Deborah for 30 years. So, there you go. It is a bit dark up here, so I might have to hold my notes up. I apologize. I want to thank CAIL[1] for inviting me to give this very short lecture and celebrate and congratulate CAIL on the 75th anniversary. That reminds me that CAIL started the center right in the peacetime that followed the end of World War II, which is appropriate for the theme of their 75th anniversary.

Tom Sikora and Charles H. "Chip" Brower invited me to give this talk on the 24th of January, and so I started by harkening back to my Hague lectures and my Brower lecture,[2] (Thank you Charlie (Charles N. Brower)), on arbitration of crisis cases. But standing here, how my thinking and our thinking has changed on the rule of law and peace in the few months since then, with the Russian invasion of Ukraine. I have done some rewriting, but not as much as you might think, because arbitration and peace is only a subset. It is, however, an important subset, for people here, of the rule of law and peace.

As I originally discussed with Tom and Chip, I want to start with a look back, in specific to the 1872 *Alabama* Claims arbitration. It is true that we can actually trace the modern history of international arbitration to the 1794 *Jay* Treaty Commission, set up after the US Revolutionary War, and as Chip has written, "the Jay Treaty afforded the first prominent example of arbitration by collegial tribunals issuing reasoned awards based on the application of legal principles."[3] I think however, it is

[1] The Center for American and International Law.

[2] Lucy F. Reed, *Mixed Private and Public International Law Solutions to International Crises*, 306 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 177 (2003); Lucy Reed, Ninth Annual Charles N. Brower Lecture: Crisis Cases - Not Reconceiving International Dispute Resolution (Mar. 26, 2021).

[3] Charles H. Brower II, *The Functions and Limits of Arbitration and Judicial Settlement under Private and*

safe to say that for those of us here today, our livelihood in international arbitration dates back to the *Alabama* Tribunal. This was the first tribunal with a majority of third-party appointed arbitrators rather than quasi-diplomats appointed by the warring states. That *Alabam*a tribunal, not without some drama that has been described quite elegantly by Johnny Veeder at an ASIL meeting in his Brower Lecture,[4] applied agreed principles of the Law of neutrality, albeit retroactive application of new laws of neutrality, to the facts of the British construction of armed ships sent to the Confederacy during the US Civil War. We know we can say with certainty that it was the *Alabama* Claims arbitration that inspired President Teddy Roosevelt and the Czar of Russia to convene the Hague Conferences of 1899 and 1907 to further international arbitration as a method of peaceful dispute resolution.

Less well known though, and I'll come back to it later, is that it also inspired Gustav Moynier's proposal to establish an international court to rule on breaches of the 1864 Convention on the Treatment of Wounded Combatants.[5] We can also trace *Alabama* to the creation of the Permanent Court of Arbitration, as well as the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). The journey always focused on the rule of law; to quote John Collier and Vaughan Lowe in their treatise on the settlement of disputes in international law, at this time:

> [a]rbitration was seen as a move away from the power-based system of negotiated settlements towards a more principled system. It is, in the broadest [sense], an attempt to bring the Rule of Law into international relations and to replace the use of force with the routine of litigation (or, in our case, arbitration).[6]

We can keep tracing through the world wars to Article 33 of the UN Charter,[7] of course, which expressly includes arbitration as one of the methods of peaceful

Public International Law, 18 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 259, 270 (2008).

[4] V.V. Veeder, Inaugural Annual Charles N. Brower Lecture: The Historical Keystone to International Arbitration - The Party-Appointed Arbitrator—From Miami to Geneva (Apr. 5, 2013).

[5] Christopher Hall, *The First Proposal for a Permanent International Criminal Court*, 322 INTERNATIONAL REVIEW OF THE RED CROSS, 57-74 (Mar. 31, 1998).

[6] JOHN COLLIER & VAUGHAN LOWE, *Methods of Settlement of Disputes*, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 33 (1st ed. 1999) [hereinafter Collier & Lowe].

[7] U.N. Charter, art. 33.

dispute resolution to maintain international peace. For present purposes, what is most noteworthy about *Alabama* is that this arbitration tribunal was established in the wake of an armed conflict, the US Civil War, and it avoided an impending armed conflict between Great Britain and the US. I dare say that most of our commercial and treaty arbitrations cannot be so directly connected to armed conflict or even to conflict *per se*.

As I have always told my students, Collier and Lowe at the opening of their treatise, on page one, make the difference between disputes and conflicts, or they distinguish those two. They define conflict as a general state of hostility between the parties, and dispute as "a specific disagreement relating to a question of rights and interests in which the parties proceed by way of claims, counterclaims, denials, and so on."[8] As we watch what's unfolding in Ukraine with horror, it is important for us as arbitration lawyers to remember, with realism and with humility, that arbitration does not resolve conflicts. It does not make peace. Arbitration resolves legal disputes. However, as was the case with *Alabama*, an arbitration process can be a critical piece, a part of peace negotiations, usually with a third state mediator bringing peace to conflict. I have personally been very privileged to be involved in several post conflict arbitration tribunals and I plan today to go through some of them. What I have added is an audit of sorts, of what models might make sense going forward, depending on the unknown outcome of what is happening in Ukraine.

I will now take a look forward, but before I do, I want to put up some book ends, just to distinguish the models that I will not be discussing. At one end of the bookshelf are international courts, and the ICJ has already issued its provisional measures order in Ukraine v Russia.[9] I am sure you all know this, but creatively Ukraine latched on to Russia's assertion that the invasion was to stop genocide against Russians in Ukraine by arguing that Ukraine has a right under the Genocide Convention not to be subject to a false claim of genocide as justification for armed conflict. And I think we will see

[8] COLLIER & LOWE, *supra* note 6, 1.

[9] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order on Provisional Measures, (March 16, 2022).

prosecutions at the International Criminal Court (ICC) for war crimes and crimes against humanity. There may also be a Nuremberg style international criminal tribunal because the ICC does not have jurisdiction over the international crime of aggression. Philippe Sands, among others, is propounding this, and for ASIL members here, you will remember Ben Ferencz, as always, a fixture in our meetings, fighting after his time at Nuremberg to have the crime of aggression be recognized. The other bookend that I am not discussing is investment treaty arbitration cases that may be brought by individual investors against Russia. These will come, I'm sure, but personally I am not comfortable talking about this or seeing pitches for such work when the carnage and the refugee crisis continue. In any event, individual economic arbitrations are not part of peace keeping.

With those bookends set, what models should we look at? First, might there be an Iran-US claims tribunal type arbitration system set up? I think not, because that was a bilateral situation and started under unique circumstances. Second, in comparison though, a mass claims commission like the UN Compensation Commission is possible. I underscore *possible*. As background for some of you, the UNCC was established in 1991 after Iraq's illegal invasion of Kuwait and defeat. So, it was victors justice. The UNCC operated as an administrative arbitral tribunal really, using sampling of different categories of claims. It was successful. No doubt about it. Iraq ultimately paid over US$50 billion to over US$1.5 million individual, government, international organization (IO) and corporate claimants. But it wasn't fast, at least overall, as the last payment was not made until January 2022. That was 30 years later. But, and this is important, this is very important, the most vulnerable claimants who were guest workers who had to flee Iraq with nothing, were paid first, and they were paid in modest fixed amounts, but they were paid quickly. We could see something like this as compensation to Ukrainian refugees who can't return or who have to rebuild when they return.

The UNCC worked because the UN funded it and the UN Oil-for-Food Program was used to pay the compensation. And Russia is on the Security Council. My bottom line is that while it is possible that we would see a claims commission tribunal, it

would take an extraordinary peace agreement with Russia or involving Russia, or perhaps worked around Russia, and perhaps with access to frozen Russian assets. If this path opens, although I am not optimistic that it will, we do have excellent blueprints for arbitration mechanisms in the handbook that our friends Dr. Norbert Wühler and Dr. Heike Neibergall wrote at the end of the Holocaust Arbitration tribunals run by the International Organization for Migration.[10]

How about a real property commission like the *Dayton* Commission? The formal name of that is the 'Commission for Real Property Claims of Displaced Persons and Refugees', and it was set up as part of the 1995 Dayton Accords at the end of the armed conflict between Bosnia, Croatia, and Serbia. That Commission is not too well known, even though it issued 300,000 decisions, covering property of displaced persons during the war in the former Yugoslavia. Depending on the outcome in geographic Ukraine or maybe Ukraine overall, there might be a role for such a real property commission, and if the displacement patterns justify it.

Finally, what about an international humanitarian law arbitration tribunal like the Eritrea Ethiopia Claims Commission (hereinafter EECC or Claims Commission)? As background, the Claims Commission and the parallel Boundary Commission were set up by agreement reached through Algeria as part of the peace process after the ceasefire in the Eritrea-Ethiopia civil war back in 2000.[11] Both were, I would say, imperfect arbitral processes, but nonetheless the construct of having these arbitral commissions, was critical in bringing peace to the region and saving lives. I see John Crook here, who was a commissioner with me on the EECC. We are particularly proud of the impact of our decisions on Prisoners of War (POWs) in the Claims Commission,[12] leading to the freeing of POWs who had been held far longer than they should have been. And we were pleased to see the ICJ cite to the Claims Commission's

[10] Norbert Wühler & Heike Niebergall, INTERNATIONAL ORGANIZATION FOR MIGRATION, PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMS 35, (2008).

[11] The Eritrea-Ethiopia Claims Commission was an independent body established and operated pursuant to Article 5 of the Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia.

[12] Eritrea-Ethiopia Claims Commission (EECC): Partial Award On Prisoners Of War (Ethiopia's Claim 4), 42 INTERNATIONAL LEGAL MATERIALS, , no. 5, 1056–82 (2003).

damages awards in the recent Democratic Republic of Congo (DRC) v. Uganda case.[13]

So should such a Commission be tried now? Well, we certainly have plenty of evidence. It is easy to get evidence, you can see it in the media of attacks by Russia on schools, hospitals, maternity wards, etc. And there are also reports that Ukrainians are shooting Russian combatants rather than taking them as POWs. So maybe, *maybe*. But standing here today I am not at all sure that Ukraine and Russia and other states would see their way to arbitrating International Humanitarian Law (IHL) violations. And even if they did, the challenge of funding remains.

With that, my audit is over and I hasten to add that even in discussing such arbitration avenues, we have to be very cautious. Post conflict arbitration tribunals have to be tailored to the specific conflict, the specific peace and the specific disputes going forward that need resolution. And we can't know what will happen in Ukraine. We do not know who will win, who will lose, or some other verb to use, and we do not know the terms of any truces or peace agreements that will follow. Just because some of us lawyers know how to set up a post conflict arbitration tribunal does not mean that they will be welcomed or needed and we have to, again with humility, remember that well-meaning efforts to make peace through arbitration have failed. For example, the Israeli-Palestinian Jerusalem Arbitration Center, and so was the case, by the way, with the high minded '*Bryan* Treaties' of 1913 and 14, which was a set of 50 bilateral treaties entered into by the US to set up standing commissions of inquiry to maintain the peace and avoid conflict, which led nowhere, with the exception, 80 years later, of the one Chile-US Letelier-Moffitt Compensation Commission.[14]

To conclude, I return back to *Alabama*. Lord Bingham, in his truly wonderful description of those arbitrations in the 2005 International Comparative Law Quarterly, wrote this:

> Gladstone considered the award 'harsh in its extent and punitive in its basis' [but] 'as dust in the balance compared with the moral example set' of two proud nations going 'in peace

[13] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment of 9 February 2022, paras 107, 110, 123, 164, 189, 214, 382, 384, 392.

[14] Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt 30 ILM 412 (Chile-U.S. Commn for Settlement of Disputes 1991); 31 ILM 1 (1992).

> and concord before a judicial tribunal' rather than 'resorting to the arbitrament of the sword'. One may question whether even the most ethical of foreign policies could accommodate such grandeur of vision today. The *Alabama* arbitration did not, regrettably, herald a century in which judicial arbitration of international differences became the norm.[15]

Lord Bingham went on to quote the words of the PCIJ President, Gustavo Guerrero in 1939, "[i]n the last resort, recourse to international justice depends on the will of governments and on their readiness to submit for legal decision all which can and should be preserved from the arbitrament of violence."[16]

As much as we, or at least some of us, understandably want to use our judicial arbitration skills to further peace and the rule of law in specific, perhaps to play a role in a post conflict arbitration mechanism at the end of Russia's special military operations, we have to be realistic and patient and modest. To borrow President Guerrero's words, this all depends on the will of governments. It depends on some semblance of political will of Russia and Ukraine and other states to use arbitration for peace and the will, where we could offer our assistance, to negotiate the necessary and complicated protocols and procedures that underlay the creation of any standing arbitral tribunal and the will to pay for it, to contribute a fortune for operations and for payment of successful victim claimants.

Thank you.

LUCY F. REED is an arbitrator based in New York, specializing in investor-State and complex international commercial disputes. She is President of the Singapore International Arbitration Centre Court (SIAC) and President of the International Council for Commercial Arbitration (ICCA), and formerly served as a Vice President of the ICC Court, President of the American Society of International Law, the Chair of the Institute for Transnational Arbitration (ITA), and a member of the LCIA Court and the HKIAC Board.

[15] TOM BINGHAM, '*The Alabama Claims Arbitration*, 54 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 24 (2005) [hereinafter Bingham].

[16] BINGHAM, *supra* note 15, at 25.

KEYNOTE ADDRESS: THE TRANSITION ROLLERCOASTER

by Peter Cameron

Keynote address delivered at the 10th ITA-IEL-ICC Joint Conference on International Energy Arbitration held on January 20-21, 2022.

I. INTRODUCTION BY MARK STEFANINI

Good morning ladies and gentlemen. It is my great privilege to introduce our keynote address by Professor Peter Cameron. Peter is a leading authority in the field of energy who has looked at the practice of energy arbitration from every conceivable angle.

Peter is professor of international energy law and director of the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee where he is responsible for inspiring around 250 graduate students each year from around the world. He is a barrister who has worked as an advisor to governments, companies, and international organizations, including the World Bank, the United Nations and the European Commission. In addition, he has sat as an arbitrator in ICSID arbitrations that have addressed renewable energy disputes and is regularly asked to act as an expert witness in international arbitration proceedings.

Peter is also a prolific author of energy law issues and has just published a new edition of his book with Oxford University Press titled, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY. This is a comprehensive and up-to-date analysis of stability in long-term energy contracts, which, apart from its very wide scope, examines a number of awards in energy disputes that Peter was able to locate, which other scholars have not yet discussed. The book examines many aspects of the energy transition, which Peter is going to discuss in his keynote address this morning. Peter has harnessed these many perspectives and sources of expertise to take a look at what we know and what we can extrapolate regarding questions about the energy transition for all participants and how it will affect international arbitration. It is aptly titled *The Transition Rollercoaster*.

II. KEYNOTE ADDRESS

Thank you for the introduction. I want to begin by thanking David Winn and the organizing committee for the invitation to join you today at this event. I am

sorry we cannot be together, in the same room. But I hope that this way of reaching you makes our short time together almost as pleasant as a face-to-face meeting. I was asked to talk to you today about the potential impacts of the so-called "energy transition" on international arbitration in the energy sector.

You might ask, what is the energy transition? It is the process in which the modern economies of the globe are shifting the balance of their energy consumption away from fossil fuels, such as oil, coal, and gas, to sources of energy that are significantly less carbon emitting. It refers to the subset of measures in the energy sector that are specifically designed to address climate change. The overall aim of the energy transition is to reduce global warming and the respective damage to the planet. Behind this process, you have the multilateral instrument called the "Paris Agreement" made under the United Nations Framework Convention on Climate Change (UNFCCC), which has been ratified by 193 nations as of the end of 2021.

In the last couple of years, pressure has increased significantly on governments, companies, and lenders to take action to support the Paris Agreement's aims. The energy sector has become a focal point in this effort—some would say that it is a target. The title of my talk, *The Transition Rollercoaster*, makes it clear that I think that this will be a bumpy transaction. However, some people find a rollercoaster quite exciting. So the metaphor also allows me to send a signal that however bumpy a ride, it could still be understood in a positive way.

Some of the challenges are already beginning to emerge in the field of international energy disputes. The first is the expansion of the state in relation to the energy sector. Although it has always had a very significant role in the energy sector, it is even more so now. The energy transition is, after all, the creation of policy and not the market. Unlike privatization and other state-driven policy, liberalization, or deregulation, the energy transition is not about how to make the market work better. At least not primarily. Rather, its justification is more ambitious than that. It claims to be about saving the planet. But there is a caveat here.

The expanded draw of state regulation is accompanied by an acknowledged need to rely on the private sector as a source of investment capital. For example, the International Energy Agency (IEA), based in Paris and part of the Organization

for Economic Co-operation and Development (OECD), has recently estimated that around 70% of the clean energy investment will have to come from the private sector. So, given the way the modern economy works, the expansion of state roles will be accompanied by efforts to secure very large-scale funding from the private sector. This is something of a paradox about the energy transition. There will be more state involvement in the energy transition and, at the same time, there will be more reliance on private capital.

Another aspect of this is the imbalance between states in the energy sector. For many states with national oil companies, like the Nigerian National Petroleum Corp. (NNPC) and the Saudi Arabian Oil Co. (Saudi Aramco), there will be a need to adapt their role to a new world that seems to threaten their very existence. That is a big subject, and it is one for another talk. But it is also an area where the state role is likely to expand. Among other things, I anticipate that states will seek new relationships with the private sector.

For lawyers and policymakers in the energy field, the challenge will be to adapt existing protections for investors, especially foreign investors, to encourage investment in the energy transition. But what about existing energy investments? These will tend to be predominately in fossil fuels. What will happen with those investments? The energy transition has the potential to be highly disruptive for existing investments.

The energy transition may also affect international arbitration in several ways. First, there is the novel, untested character of transition policies that will generate disputes with respect to cleaner forms of energy. Although we have already seen many disputes in this area, I anticipate that we will see more. This is highly significant since it is the very area in which organizations like the IEA are telling us that more investment is urgently needed. I will have more to say about this in a moment.

Second, governments are likely to come under pressure to change policies for existing and planned oil and gas projects, and perhaps coal projects as well, to cause new waves of disputes between investors and states, similar to disputes associated with resource nationalism. Indeed, the national origin of these measures, albeit justified in terms of international contributions to net zero goals, creates a kind of climate nationalism for the resources sector.

I am now going to sketch out how these two aspects of the energy transition might impact international energy arbitration, drawing largely on previous investor-state arbitrations. A starting point is to analyze previous energy disputes involving "new" forms of energy and how they might apply to disputes arising from the energy transition. For example, some commentators have classified wind and solar energy as new forms of energy, but they have been around in commercial use for several decades. Where disputes have emerged in this sector, and there have been many, the geographical origin has been very different from that in traditional energy disputes. Many of these arbitrations have arisen in Europe. It is already clear, beyond any doubt, that these forms of energy have the potential to deliver as many arbitrations as any of the more established forms of energy.

The important role that government subsidies play in this sector of so-called new forms of energy means that, where policies are adopted to roll back the incentives that were originally offered, claims have been largely for compensation. That could sometimes constitute indirect expropriation. Disputes of this kind involving Spain and Italy have led to more than sixty known arbitrations so far. These are examples of the expanded state role deliberately aimed at promoting cleaner forms of energy and doing so by attracting large investment from foreign and domestic investors. However, when the same state, perhaps a different government, realigns its policies in ways alleged to be unfavorable to existing investors in a style that is almost classical in the world of international energy investment, then disputes are likely to arise.

The disputes that we have seen so far related to clean energy are treaty-based disputes in the vast majority of cases. Many of the arbitration awards for these disputes are in the public domain. One may ask about the kinds of protection claimants and respondents can expect from investment treaty arbitration when applied to the kinds of energy that are central to the energy transition. Based on the cases that we have seen so far, there are several. First, there are dozens of cases arising out of the much-publicized rollbacks of legislation aimed at promoting renewable energy investments. These have largely occurred in Europe so far, although similar measures have been taken or are under discussion in countries such as Mexico, Ukraine, and probably quite a few others.

Second, there have been cases arising from measures taken by sub-federal

entities. For example, in *Windstream Energy LLC v. Canada*,[1] the claims relate to a moratorium on offshore wind energy that was imposed by the provincial government of Ontario. We have also been hearing of similar claims originating from local communities and indigenous peoples.

Among the many cases arising from European measures, such as the PV *Investors v. Spain*[2] or *Eskosol S.p.A. v. Italy*,[3] are issues that will be familiar to many of you. For example, the kind of stability that an investor can reasonably expect to benefit from in a long-term agreement and whether such stability is indeed granted by a specific statutory instrument to the investor. Another example is whether an investor's legitimate expectation can be based on a host state's legal order or a subset of it, such as a dedicated regime to regulate renewable energy. Another issue is the meaning of a stable legal, business framework in, for example, Article 10(1) of the Energy Charter Treaty (ECT).

There have also been interesting discussions about due diligence and the kind of signals that investors ought to consider when making their final decision to invest. Ignoring them may mean that the expectations that they relied on are deemed unsound by a tribunal. So far, arbitrators in these many cases have taken widely different positions on the questions or the issues that I have mentioned above.

The second aspect of the energy transition that I want to consider today concerns the more established sources of energy, especially oil and coal. According to Rystad Energy, which is a specialist consultancy firm, the amount of investment estimated to go into the global oil and gas industry in 2022 is going to be $628 billion.[4] It seems to me to be a pretty large figure. All of that will be based on contracts that provide certain forms of legal protection. These mechanisms of legal protection have been tried and tested many times. And many of these contracts will contain stabilization clauses.

In that context, how might the energy transition affect this huge amount of

[1] Windstream Energy LLC v. Canada, PCA Case No. 2013-22, Award (Sept. 27, 2016).

[2] PV Investors v. Spain, PCA Case No. 2012-14, Award (Feb. 28, 2020).

[3] Eskosol S.p.A. in liquidazione v. Italy, ICSID Case No. ARB/15/50, Award (Sept. 4, 2020).

[4] *Global oil and gas investments hit $628 billion in 2022, led by upstream gas and* LNG, RYSTAD ENERGY (Jan. 11, 2022), https://www.rystadenergy.com/newsevents/news/press-releases/Global-oil-and-gas-investments-to-hit-628-billion-in-2022-led-by-upstream-gas-and-LNG/.

existing activity? So far, we have seen examples of arbitrations arising out of attempts by governments to adjust the energy mix in their countries, involving mandatory closures and phase-outs. These measures have mostly related to coal-fired power generation and eroding the value of assets already created or investments already made. These are alleged to have become stranded assets, that is, they no longer serve a commercial purpose.

Compensation claims have followed in at least two recent Dutch cases: *RWE AG v. Netherlands*[5] and *Uniper SE v. Netherlands*.[6] These cases concerned the accelerated timetable for phasing out coal-fired power plants. In Canada, the moratoria on hydrocarbon exploration in Alberta and Quebec provinces have also led to arbitrations: *Lone Pine Resources Inc. v. Canada*[7] and *Westmoreland v. Canada I & II*.[8]

However, the impacts of the energy transition on the oil industry are potentially much wider than this. The short-term impacts may be limited, but they need to be weighed very carefully against the creation of a new, unfamiliar set of risks to the investor-state relationship. For example, possible decisions not to develop a discovery due to projected falls in demand may lead to disputes with host governments or national oil companies, attempts to secure an early exit or to terminate an agreement with the host state, changes in decommissioning timing, and even, perhaps, reviews of existing contract terms in light of national contributions on the climate change rules. Indeed, decommissioning is already leading to quite a few investor-state arbitrations in Southeast Asia. There are thousands of long-term contracts in place with terms that pre-date the energy transition discussion and that envision, even only implicitly, an endless horizon of demand for fossil fuels. That world is definitely gone. If this transition is supposed to be just one, then we will not see a number of bodies like international development banks, international NGOs, and so on, all lining up to assist governments, especially in the newer oil-producing countries, in reviewing their contract terms. We have seen quite a lot of this in the international mining sector

[5] RWE AG v. Netherlands, ICSID Case No. ARB/21/4 (pending).

[6] Uniper SE v. Netherlands, ICSID Case No. ARB/21/22 (pending).

[7] Lone Pine Resources Inc. v. Canada, ICSID Case No. UNCT/15/2 (pending).

[8] Westmoreland Mining Holdings LLC v. Canada, ICSID Case No. UNCT/20/3, Award (Jan. 31, 2022).

in recent years, but perhaps similar attention will soon be directed to the international oil industry. The energy transition is in its early days, but, if it happens, we can expect that it will trigger future disputes between states and investors.

For the international oil and gas industry, there is also a question that was asked in some of the recent renewable energy cases. That is, at the time you took the decision to invest, were there any signals that a prudent investor would have interpreted as giving a warning that the host state may well make significant, possibly sweeping changes to its laws? This very important question can also arise in cases about allocating decommissioning costs. Perhaps it is time to look carefully at any public documents that could be construed by a cautious tribunal as conveying that kind of signal, especially if the investment is high value, which is very common in the international oil and gas industry.

Relatedly, it is worth mentioning those cases that have arisen indirectly through the application of environmental restrictions, justified by reference to the promotion of climate change-related goals. The ECT case, *Rockhopper Italia S.p.A. v. Italy*[9] arises from the reintroduction of a moratorium on oil and gas projects when the investor was engaged with a permitting process for the development of a field offshore, leading to a claim for compensation. It is also worth mentioning the North American Free Trade Agreement (NAFTA) case, *TransCanada Corp. v. United States*,[10] which is another example of a compensation claim arising out of environmental permitting decisions. This arose from a denial of a presidential permit for the Keystone XL Pipeline. This category of disputes is interesting because it shows the potential influence of local communities and activist groups in promoting claims. So far, where that has been evident, it has tended to be more visible in the courts rather than in arbitration.

I am now going to go over my conclusions. What I have tried to do today is to share with you some tentative, provisional thoughts about a complex and unprecedented process that will have many implications for the management of disputes in the energy sector. Of course, not all disputes in the energy sector will

[9] Rockhopper Italia S.p.A. v. Italy, ICSID Case No. ARB/17/14 (pending).

[10] TransCanada Corp. v. United States, ICSID Case No. ARB/16/21 (discontinued).

be directly or indirectly related to issues arising from the energy transition, but in my view, a growing number will be.

The energy transition may cause sudden policy shifts by governments and raise new concerns about how to apportion liability for the costs of mitigation or adaptation to climate change. Unlike the rollercoaster in the title of this talk, this process will not be guided by some controlling body. It will be a multi-speed process with different countries taking different actions according to different timetables and using different methods to achieve a common set of targets.

Given the long-term character of most energy investments, this is not a good sign. However, in terms of dispute potential and the future of investor-state arbitrations, the dynamics of cases today do not, at least as far as I can see, suggest any deep-seated concerns about the system or a reluctance to activate it.

Finally, let me remind you that the underlying relationship between investors and host states is a cooperative one aimed at achieving mutual benefits and mitigating the risk of disputes arising later on. Indeed, advisory relationships can result from this dynamic. It is that cooperative spirit that is going to be needed more than ever in the coming years as this energy transition unfolds.

Thank you for your attention.

PETER CAMERON is Professor of International Energy Law and Policy and Director of the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee. A graduate of the University of Edinburgh, Peter joined the Department of Public International Law at the University of Leiden in The Netherlands, and subsequently was Professor at the Robert Schuman Centre for Advanced Studies at the European University Institute in Florence, Italy. Peter played a leading role in establishing the International Energy Arbitration Centre in Edinburgh and also the UK Association of Energy Law and Policy. He is a Fellow of the Chartered Institute of Arbitrators; a long-time member of the International Bar Association and has served on several of its committees; and is a member of the Association of International Petroleum Negotiators. He qualified as a barrister (England and Wales, Middle Temple), and has regularly been asked by governments and investors to testify in litigation and international arbitral proceedings as an expert.

INTERNATIONAL ARBITRATION AND THE RULE OF LAW: *THE LIBYAN OIL ARBITRATIONS*

by Sir Christopher John Greenwood, GBE, CMG, QC

Delivered at the 10th ITA-IEL-ICC Joint Conference on International Energy Arbitration held on January 20-21, 2022

It is a great honor to be asked to be here today. I was asked to talk about the three Libyan oil arbitrations as a historical landmark. That is a little nerve racking for me, because the first extended piece of writing I ever produced was an article on the three Libyan oil cases at the beginning of my career, at a time when they were regarded as the most important new development. It is perhaps rather daunting to find that I am now being asked to talk about my own past as if it were an area of history. When I listened to Claudia Salomon at the beginning, talking about the sculpture of the past, I felt as if I were looking into a mirror of the old man staring at the ground. However, I will try to show you that, far from being a museum piece, the three Libyan arbitrations are in fact groundbreakers in terms of the way that international law on investment was developed.

There are, of course, three of these cases, one brought by BP,[1] one by Texaco Calasiatic,[2] and one by the Libyan American Oil Company ("LIAMCO").[3] They all concern the concessions that the Libyan government had given in relation to its oil industry during the 1950s and 60s. It is worth keeping in mind two features of the period—the late 60s and early 70s—that were really quite radically different from today. The first is that the standard form of investment, in the oil industry at least, still took the form of the concession whereby the country in question granted investors the right to explore for and exploit oil resources over a defined area, often

[1] BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Rep., Ad hoc, Award on Merits (Oct. 10, 1973).

[2] Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Rep., Ad Hoc, Award on Merits (Jan. 19, 1977).

[3] Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Rep., Ad Hoc, Award of Merits (Apr. 12, 1977).

for quite a long period of time—fifty years in the case of these concessions—in return for a percentage of royalties. In effect, the concessionaire controlled what was done, the price that was charged, and the return, both to itself and to the country, while also assuming the risks. The second is that by the time these cases arose, that model, and indeed the whole idea of investor protection, was under very considerable challenge internationally. The UN General Assembly was passing resolutions about the new international economic order. There was a sense that these concessions and all forms of direct investment in the Third World were a form of economic colonialism that had to be resisted. There was very considerable tension between the investor-exporting countries and the importing states at the time.

All three of the cases arose out of the concession in broadly the same language, a model concession laid down by Libya's petroleum law. The question that faced the oil companies during the early 1960s was essentially how to provide some form of protection and security for their investment over an extended period.

By 1966, these concessions evolved with greater protection in return for a higher royalty to Libya. Three forms of protection existed, which are closely interlinked. The first was a stabilization clause designed to preclude the Libyan government from making unilateral changes. It is worth quoting that clause. Clause 16 reads: "The government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by this concession. The contractual rights expressly created by this concession shall not be altered except by mutual agreement." This clause was specifically designed to preclude unilateral nationalization by the state. Whether it was effective to do so, however, was problematic.

Only forty years or so before, the arbitration clauses designed to protect investors and bond holders against currency risks—the Gold Clauses of the 1920s—had been abrogated by virtually every state, including the US and the UK. That illustrated the fact that the state whose law is the proper law of the contract is able to change that law and, thereby, effectively override the provisions of the contract.

To avoid that problem, we come to the second limb of the protection that was laid down, the internationalization clause. Clause 28.7 of the concession reads:

> This concession should be governed by and interpreted in accordance with the principles of law in Libya common to the principles of international law. And in the absence of such principles, then by and in accordance with the general principles of law including such of those principles as may have been applied by international tribunals.

That clause gave rise to a considerable amount of difficulty. It was a private international lawyer's nightmare.

The third element of protection that was offered was that each concession included an arbitration clause which, rather different from the BITs of today, could be invoked by either party and which contained various safeguards to ensure that neither party could frustrate the arbitration by refusing to take part.

It is against that background that the three arbitrations took place. They all involved unilateral nationalization by the Libyan government. The concessions had been granted by the old royal government of Libya, which was overthrown in 1968 by Colonel Gaddafi's revolutionary regime and took a radically different view of how the oil industry in Libya should be managed.

In December 1971, the new government moved against the first of the concessionaires, BP. The BP case is slightly different from the other two because BP was nationalized in a single go in December 1971, avowedly, in retaliation for the failure of the British government to prevent Iran from occupying some island in the Gulf. What happened here was that Britain had been the protecting state of what we now call the United Arab Emirates for many years. On the 30th of November of 1971, the UK withdrew its presence in the Gulf. The UAE became a fully independent state. One of the emirates that made up the UAE claimed three islands in the Gulf; Abu Musa, Greater Tunb, and Lesser Tunb, but so did Iran. Iranian forces occupied those islands on the night of the 29th to the 30th of November, the day of the British withdrawal. Ten days later, Libya nationalized BP in reprisal. There was no compensation. There was an offer to BP, as there was later to the other companies, to meet a Libyan committee, which would, in the terms of the Libyan legislation, be there to determine the amount of compensation due to or from the company following the nationalization. You will, of course, appreciate that this was not an offer

that was particularly attractive to any of the companies.

The two American companies, Texaco and LIAMCO, were dealt with slightly differently. In 1973, Libya nationalized 51% of the oil concession held by seven foreign companies. Then, when LIAMCO and Texaco commenced arbitration, the remaining 49% of their concessions was also nationalized.

In none of these three cases did Libya take part. It did, however, write to the president of the International Court of Justice to try and prevent the appointment of a sole arbitrator to hear the case. We have some glimpse of Libya's views in those memoranda and the one or two letters it sent to the tribunals, but there was no full argument by the Libyan state. Indeed, so hostile was Libya to the arbitrations themselves that . . . we wrote to the parties in the *BP* case to ask them permission to publish the award in the International Law Reports. The Libyan government replied saying they could neither give nor refuse permission, because they didn't accept that the award had any valid existence. We took that as permission and went ahead and published anyway.[4]

Of the three arbitrations, the first one, *BP*, was decided by Judge Gunner Lagergren, a Swedish judge, famous international arbitrator, and later president of the Iran-US Claims Tribunal. Judge Lagergren gave two awards, the 1973 main award and then a short supplementary award in 1974. *Texaco* was decided by Professor René-Jean Dupuy, one of the great figures of international law at the time. Professor Dupuy was a French professor who gave an award on jurisdiction in 1975 and a final award in 1977. *LIAMCO* was decided by Dr. Sobhi Mahmassani, a Lebanese jurist in 1977.

All three of these awards found for the companies. They did so in rather different ways and I just want to pick on three aspects of this. The first is the governing law. Interestingly here, Judge Lagergren decided that the governing law for the arbitration, the *lex arbitri*, was Danish law because the arbitration was seated in Copenhagen, but both Professor Dupuy and Dr. Mahmassani found that the

[4] *See BP Exploration Company (Libya) Limited v. Government of Libyan Arab Republic*, 53 INT'L L. REP. 297 (1979).

proceedings in front of them were governed by public international law. That is an important step forward.

On the *lex contractus*, the three tribunals got themselves into some considerable difficulty. You remember the rather convoluted clause I read to you a moment ago. Judge Lagergren in the *BP* case decided that the parties were able, if they wished, to remove the contract from the scope of Libyan law—from the scope of the national law of the State party—and that they had intended to do so in the case. He then held that the result of what they had done was to make the proper law of the contract: general principles of law. Now of course, that raises a question of whether the general principles of law are capable of being a proper law. They are not a legal system in their own right. Eli Lauterpacht who was counsel to BP once told me that he and Frances Mann, who was his co-counsel, had argued for ages about how to do this. With Lauterpacht wanting to argue general principles and Mann, who was something of a purist in private international law, insisting international law was the proper law. In the end the arbitrator followed Lauterpacht.

In *Texaco*, the arbitrator decided that the proper law of the contract was public international law. In *LIAMCO*, Dr. Mahmassani decided that it was Libyan law, but moderated by international law. However, the key point was that they all followed the notion of internationalization.

Then on the stabilization clause, *BP* says very little about this. The arbitrator simply assumed that the nationalization was a repudiation of the contract. That is easier to do because of the special facts of the *BP* case.

In *Texaco*, you have a detailed analysis by Professor Dupuy, which rejected the idea that the new international economic order had become part of customary international law and found that there had been a clear breach of the stabilization provision. There is a very interesting analysis in the award of how General Assembly resolutions do or do not affect customary international law. It was picked up by the International Court obliquely in the nuclear weapons advisory opinions in 1975.

LIAMCO was the least enthusiastic about the stabilization clause, but it held that the nationalization was illegal because of the absence of any compensation.

In *BP*, Mann argued that the repudiation of the contract had not been accepted by BP and, therefore, the contract was still in force. BP sought specific performance, clearly thinking about the possibility of bringing pursuit actions in national courts to try and seize shipments of oil from their oil field. That argument was rejected by the arbitrator. He found that the nationalization was unlawful, but that specific performance could not be ordered. The nationalization had terminated the contract and all that was left was an action for damages. We will never know how he would have dealt with damages because the case then settled out of court.

In *Texaco*, the arbitrator decided that specific performance could be awarded, although he seems to have thought of this more in terms of the effect on damages if specific performance ended up not being provided by Libya.

In *LIAMCO*, the arbitrator, having spent some twenty pages analyzing detailed submissions by the claimants on the measure of damages, said in a single paragraph he thought the appropriate measure was an equitable one and that equitable damages would be sixty-six million US dollars. He never explained what was equitable about that or how he arrived at that figure.

Now very briefly, are these cases museum pieces or groundbreakers? In one respect, they are undoubtedly museum pieces. The idea of internationalizing a contract as a form of legal protection is now largely a thing of the past. Instead, investors look to bilateral investment treaties and multilateral agreements like the Energy Charter Treaty for protection. These mechanisms have superseded the need for internationalizing a contract. I suppose the nearest you would come to that today would be the use of the umbrella clause.

Also, Dr. Mahmassani's approach, which everybody trumpeted at the time as an idea of the future of equitable damages, has given way completely to damages calculated on the basis of discounted cash flow or other methodologies. Although, I have to say, as an arbitrator, I have seen a number of claimants' assessments and damages which are just as fanciful and difficult to justify as those of Dr. Mahmassani in the *LIAMCO* case.

Of course, the debate has moved on. The new international economic order is

now very much a dated thing of the past. The idea of investment flows is much more readily accepted than it used to be and you have less of the old style concession. But in one respect, at least, I think there really is a groundbreaking element to these three cases and that is the emphasis on the stability of the contractual framework and the stability of the investment generally.

It is done differently these days and it is done more comprehensively, with prohibitions not only of expropriation, but also the insistence on compliance with contracts, fair and equitable treatment, full protection. and security. I think it is possible to see elements, especially in the *Texaco* case, of what paved the way for this later jurisprudence. Of course, at the time of the three cases, there was no shortage of bilateral-investment treaties. It is just that nobody ever thought of using the arbitration provisions in them. It is also because an arbitration from the past is sometimes a rebuke to those of us in the present. Every time I write an award, I remember the fact that none of the awards in the three Libyan cases, complicated as they were, was longer than a hundred pages. I'm ashamed to say I very seldom manage to live up to that brevity.

Thank you very much for inviting me to take part in the conference. I wish you all success with the remaining two days.

SIR CHRISTOPHER JOHN GREENWOOD, GBE, CMG, QC is Master of Magdalene College, Cambridge, where he was awarded a BA (Law) (First Class Hons) in 1976, LLB (International Law) (First Class Hons) in 1977 and became an MA in 1981. Elected a Fellow of Magdalene College in 1978, he taught law there and at the Cambridge University Law Faculty for nearly twenty years. He was appointed Professor of International Law at the London School of Economics in 1996, where he remained until becoming a Judge of the International Court of Justice. On 6 November 2008, Sir Christopher was elected a judge at the International Court of Justice, where he served from February 2009 to February 2018, when he joined the Arbitrators at 24 Lincoln's Inn Fields as an arbitrator specializing in public international law, including Investor-State disputes. Sir Christopher was appointed Companion of the Order of St Michael and St George (CMG) in 2002 and knighted in 2009 for services to international law. In 2018 he was created GBE (Knight

Grand Cross) for his services to international justice. He sits as a Member of the Iran-US Claims Tribunal and is a Member of the ICSID Panel of Arbitrators.

THE UKRAINE CONFLICT – WHAT IS AT STAKE?

by Papito Francis Ojok

I. INTRODUCTION

To understand what is at stake in the Russia-Ukraine conflict, the Institute for Energy Law, in conjunction with Center for American and International Law, on March 9, 2022, organized a panel discussion entitled, "*The Ukraine Conflict - What is at Stake*?" Professor Frederic Sourgens ("Prof. Sourgens"), Senator Robert J. Dole, Distinguished Professor of Law and Director of the Washburn Oil and Gas Law Center of Washburn University School of Law, moderated the panel. The following distinguished international lawyers and arbitrators spoke at the panel:

1. *Professor Harry W. Sullivan, Jr.* ("Prof. Sullivan, Jr."), international energy attorney based in Dallas, Texas, Executive Professor at Texas A&M School of Law, and Adjunct Professor at SMU's Dedman School of Law.
2. *Dr. Leila Nadya Sadat* ("Dr. Sadat"), James Carr Professor of International Criminal Law at Washington University School of Law, director of the Whitney R. Harris World Law Institute, Special Adviser on Crimes Against Humanity to the International Criminal Court Prosecutor, and President of the American Branch of International Law Association.
3. *Mr. Baiju Vasani* ("Mr. Vasani"), Senior Fellow in International Law at SOAS University of London, served as lead counsel and arbitrator in cases under the auspices of the International Centre for Settlement of Investment Disputes and the International Court of Arbitration, and served as counsel to the Russian Federation.
4. *Dr. Danae Azaria* ("Dr. Azaria"), Associate Professor at the Faculty of Laws of University College London, Principal Investigator of a Starting Grant of the European Research Council (ERC), and Director of a research project entitled "State Silence."

This article analyzes the issues discussed during the panel, including: (1) the humanitarian crisis as a result of the Russia-Ukraine conflict, and legal actions being

taken against the Russian Federation; (2) the impact of the conflict on the oil and gas sector; (3) sanctions against the Russian Federation and Russian oligarchs; (4) a hold on the certification of the Nord Stream 2 pipeline by the German government; (5) potential actions of the Russian Federation in response to these actions and sanctions; and (6) potential investment disputes arising out of the conflict.

II. HUMANITARIAN CRISIS AND LEGAL ACTIONS AGAINST RUSSIA

Dr. Sadat commenced the discussion by giving an overview of the response of states and the international community to Russia's invasion of Ukraine on February 24, 2022. Article 2(4) of the Charter of the UN ("UN Charter") commands all Members of the UN to refrain from the threat or use of force against the territorial integrity or political independence of any state. According to her, Ukraine's response to the conflict was to institute a claim with the UN Security Council, the body vested with the primary responsibility to maintain international peace and security, for an emergency session condemning Russia's actions. Dr. Sadat explained that, out of the fifteen Security Council members, eleven voted in favor. China, India, and the United Arab Emirates abstained. Russia, a permanent member of the UN Security Council, overruled the majority.[1] The General Assembly, however, condemned Russia's incursion into Ukraine, and by an overwhelming vote, demanded that Russia immediately end its military operations in Ukraine.

Dr. Sadat continued that Ukraine also instituted a claim with the International Court of Justice against Russia under Article VIII of the Genocide Convention. According to her, Ukraine accused the Russian Federation of violating the Convention and asked the court for provisional measures to stop the violence. At the time, Ukraine already had another case pending against Russia under the Terrorism Financing Convention.

According to Dr. Sadat, the European Court of Human Rights ("ECtHR") has also issued provisional measures against Russia, ordering it to "refrain from military

[1] UN Charter art. 27, ¶ 3 ("Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.").

attacks against civilians and civilian objects." Meanwhile, the European Union has levied sanctions consisting of restrictions on finance, energy, technology, dual-use goods, industry, transport and luxury goods against Russia and Russian nationals. Individual States, such as the US, Canada, and Switzerland have imposed similar sanctions.

III. IMPACT ON THE OIL AND GAS SECTOR

The Ukraine conflict has caused a significant impact on the oil and gas industry. According to Prof. Sullivan, Jr., Russia is a major, if not the largest, exporter to global markets. In Europe alone, for instance, the EU imported over 155 billion cubic meters of natural gas from Russia in 2021, accounting for around 45% of EU gas imports and close to 40% of its total gas consumption.

Prof. Sullivan, Jr. noted that a quarter of Russian gas flows through pipelines that ran from Ukraine into Europe. He pointed out that, at the start of the conflict, there was some hesitation at the prospect of Ukraine shutting off these gas pipelines on which a significant population of the rest of Europe depended. According to him, to reduce the EU's reliance on Russia's natural gas, the EU will have to substantially develop its oil and gas infrastructure and look to other sources.

There are in total 36 LNG import terminals across Europe, many of which are in Spain but are not well-connected to the rest of the continent. As such, Prof. Sullivan, Jr. believes that gas supply from Spain could only marginally contribute to address any supply shortage. Europe can increase natural gas imports from the US, but that will prove challenging as that would entail building more pipelines.

He suggested that the alternative is to liquify natural gas. This process requires extracting natural gas and shielding it down to a very low temperature until it turns into liquid form. In 2020, global liquefied natural gas ("LNG") trade volume reached nearly 500 billion cubic meters. Prof. Sullivan, Jr. estimates that Europe will need 150 million tons of LNG to make up for the amount of gas that it would no longer be importing from Russia. This also poses a challenge because not even the US would have enough supply of LNG for this purpose, and after liquefying natural gas, there

must exist infrastructure to receive it, store it, and then reconvert it into gaseous form.

Prof. Sullivan, Jr. suggested that another alternative entails increasing reliance on fossil fuels. He points out, however, that this will likewise prove problematic considering not only because a substantial part of fossil fuels used in Europe comes from Russia, but also because of environmental concerns tied to their use. He mentioned that many European states are transitioning into renewable energy sources and many international oil companies are divesting and moving assets to more environment-friendly options. He said it is likely that many of these developments would be put on hold to satisfy energy demand through fossil fuels.

Prof. Sullivan, Jr. concluded that one thing is clear: amid the difficulty of finding other sources of energy supply outside of Russia, the disruption of the oil and gas market has resulted in higher prices of goods and services, affecting households worldwide.

IV. SANCTIONS

Dr. Danae noted that Russia's use of force against Ukraine has given rise to unprecedented and increasing unilateral restrictive measures against Russia. Several Member States of the World Trade Organization ("WTO"), such as Canada and the UK, have closed their ports to Russian vessels.

According to Dr. Danae, the US has adopted an import ban on crude oil, certain petroleum products, liquefied natural gas, and coal from Russia. She continued that, as of the date of the panel discussion, there had been no showing that the US had invoked the security exceptions under Article 21 of the General Agreement on Tariffs and Trade ("GATT") to justify its trade measures against Russia. Under Article 21 of the GATT, each WTO member can take any action it considers necessary for the protection of its essential security interests, in times of war or other emergency in international relations. According to her, Russia could challenge the invocation of a security exception under Article 21 of the GATT. However, if the exception meets the corresponding requirements, the measure would not violate the imposing Member State's obligations under the GATT. There is no rule of stare decisis in WTO dispute

settlement. Dr. Danae, however, cautioned that adopting overbroad interpretations of the GATT security exceptions may undermine the object and predictability of the WTO legal framework.

In the context of the Ukraine conflict, Dr. Danae opined that the security exceptions appear to be a more tenable justification to take unilateral restrictive measures for GATT Member States directly affected by or involved in the conflict, such as EU countries. For other GATT Member States, not as directly affected by or involved in the conflict, such as the US, some other connection of their essential security interest affected by the war must be established. For Dr. Danae, the restrictions imposed by the US may be prima facie inconsistent with its obligations under the GATT.

Dr. Danae explained that in case a WTO Member State is unable to meet the requirements to invoke the security exceptions under the GATT, there are non-punitive countermeasures available. Examples of these countermeasures are trade restrictions in response to breaches of general international law outside the WTO context, the purpose of which is to induce Russia to comply with its international obligation to cease acts of aggression. Be that as it may, she explained that these countermeasures raise two concerns: (1) whether under general international law, third-party countermeasures are even permissible; (2) if so, what the conditions for their lawfulness are. Countermeasures must, in any event, be proportional to the injury suffered.

Dr. Danae concluded that unilateral sanctions are a way by which one state can protect its essential security interests, enforce international obligations, and even break its silence and ensure the normative integrity of fundamental rules of international law. Still, reasonable care must be observed in resorting to these unilateral measures which, by their nature, are prone to abuse and can further aggravate disputes.

V. NORD STREAM 2

Nord Stream 2 is an $11-billion gas pipeline in the Baltic Sea that connects Russia to Germany. The project was designed to double the flow of Russian gas directly to

Germany. In February 2022, Germany halted its certification. According to Dr. Danae, since the project is not yet operational, the stoppage does not raise any immediate energy security concern for Germany or the rest of EU.

However, Germany's actions may be a basis for foreign investors to seek claims under their respective home State's BITs with Germany. If the BIT does not include a security exception, Germany may struggle resisting an investment treaty claim against it. Dr. Danae cited the award in ADM *v. Mexico*[2] as an example. According to her, a similar claim was brought in ADM under the North American Free Trade Agreement and the tribunal found such a countermeasure to be disproportionate because it affects an individual investor's rights rather than the State against which the countermeasure was intended.

VI. POTENTIAL RUSSIAN RESPONSE TO SANCTIONS

Sanctions against the Russian government and Russian individuals have been in place since the start of the Crimea conflict in 2014, according to Mr. Vasani. In his opinion, it is unclear whether Russia would be justified under international law in imposing its own retaliatory measures against the states that imposed those sanctions. Diplomacy is one way to get those sanctions lifted, whether by the Russian government on its own behalf or through diplomatic espousal of its nationals' interests.

Another option is for affected Russian individuals or entities to bring legal actions in foreign domestic courts to challenge the foreign governments' sanctions against them and their assets. Another approach may be to petition the ECtHR on the ground that sanctioned individuals and their families could no longer enjoy basic human rights.

VII. INVESTMENT TREATY PROTECTION

Mr. Vasani analyzed the Ukraine conflict from the lens of investment protection and argued that the conflict will likely trigger two kinds of investment disputes. First, foreign investors in Russia whose assets have been taken by the Russian government

[2] Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007).

may expose Russia to direct expropriation claims. Those who were forced to cease operations but continue to hold title to their investments may file indirect expropriation claims.

Second, if Russia takes over and exercises de facto control over parts of Ukraine, it is arguable that Ukrainian investors in those areas can bring claims under the Ukraine-Russia BIT. On the other hand, foreign investors from third states can potentially seek protection under investment treaties between Russia and their home states.

Yet, according to Mr. Vasani, instituting investment disputes on the theory of Russia's de facto control has met some resistance. A contrary interpretation is that, since Russia's occupation of certain parts of Ukraine was done through force and is, by that nature, considered annexation prohibited under international law, those parts unlawfully occupied by Russia remain to be Ukrainian territory which, in turn, prevents the institution of an investment treaty claim against Russia.

VIII. CONCLUSION

It remains to be seen whether Ukraine's "lawfare" strategy to hold Russia accountable would have any significant effect to stop the conflict. Thousands have died since the war began, and more and more people from all walks of life are displaced from their homes as the conflict grows. As the international community continues to impose economic pressure on Russia, and governments around the world, especially in Europe, scramble to find alternative sources of energy, even households that are miles and oceans away from the conflict are impacted.

The conflict in Ukraine has put international law to the test. We can only hope that the tools to restore peace in our current international legal order have matured enough from the last world war lest we end up in another.

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COMMENTARY ON "ORAL ARGUMENT—WHAT IS IT, WHY DO IT, AND WHAT CAN GO WRONG"

by Lindsey Mitchell

I. INTRODUCTION

The Institute for Transnational Arbitration hosted its 34th Annual Workshop and Meeting from June 15–17, 2022 in Austin, Texas. The conference focused on various aspects of the arbitration hearing. This commentary explores the panel discussion, "Oral Argument—What Is It, Why Do It and What Can Go Wrong." The panel was moderated by Klaus Reichert of Brick Court Chambers in London. Panel participants were:

1. Alexander Gunning QC of One Essex Court in London,
2. Yoshimi Ohara of Nagashimi Ohno & Tsunematsu in Tokyo,
3. Babatunde Fagbohunlu of Aluko & Oyebode in Lagos, and
4. Anne Veronique Schlaepfer of White & Case in Geneva.

In his opening remarks, Reichert described the panel as a "masterclass in oral advocacy," considering the diverse experience of each member of the panel. Each panelist spoke on a different aspect of the oral argument, but several recurring themes emerged that were common to each of their perspectives.

II. THE WELL-PREPARED TRIBUNAL

One prominent theme concerned the preparedness of the tribunal. The panelists asserted that counsel should not take for granted that a tribunal has thoroughly considered the entirety of their written submissions, nor should they assume that they are intimately familiar with the nuances of their arguments. Schlaepfer specifically referenced that some arbitrators may prefer to arrive at oral argument "totally fresh," having spent very little time familiarizing themselves with the content of the written submissions.

Ohara focused heavily on this point, highlighting that the prominence of "American style" oral argument is often a cause for concern in civil law jurisdictions. The fear is that tribunals may overlook carefully crafted written submissions in an

effort to avoid pre-judging the case. She emphasized how concerning this practice is, especially when the case involves exceptionally complex facts or is reliant on detailed figures and data that are not easily conveyed orally. An arbitrator who arrives at the hearing having intentionally not meaningfully engaged with the written submissions may make decisions based on their intuition, overlooking critical information best expressed in written form.

The preparedness of the tribunal also understandably affects the style and structure of the oral argument. Tribunals who have digested the contents of the written submissions may treat the hearing as an opportunity to hear arguments regarding the critical issues of the case, rather than as a summary session. Ohara pointed out that tribunals who expect to have the case summarized for them at the hearing may have less incentive to engage with the written submissions beforehand. She suggested that tribunals could be encouraged to focus more on written submissions if the parties invited the tribunal to prepare a list of issues and questions to be addressed during the oral argument after having read the written arguments. This would help focus the structure of the oral argument towards points most concerning to the tribunal while also ensuring that parties need not treat the oral argument as merely an opportunity to summarize their positions.

Reichert described Ohara's plea for greater balance between the weight given to written submissions and the emphasis placed on oral argument as a "considerable challenge to the orthodoxy" of the way in which oral hearings are conducted, especially from the common law perspective. He posited that it may be worth reconsidering the exact purpose of oral advocacy and whether it is the best vehicle by which to express the subtleties present in many complex arbitration disputes.

While I am aware of the emphasis placed on oral argument, especially in the United States, I am surprised to learn that Ohara's statements may be considered controversial by members of the arbitration community. Striving for balance between the oral and written components of the case seems to better fulfill the often-cited, but increasingly elusive, benefits of arbitration—efficiency and cost-effectiveness.

The proposition that a written submission, into which hundreds of hours have been spent meticulously crafting, may only be given cursory consideration by an arbitrator seems like a gross waste of time and client resources. Further, the idea that an arbitrator may have chosen this method of preparation intentionally in an effort to avoid developing preconceived notions about the case seems to defeat the very purpose of providing written submissions.

My research has not revealed what the prevalence of arbitrators who prefer to arrive at the hearing underprepared is. However, as this issue was mentioned by multiple members of the panel, I must assume that there are at least a few who subscribe to this method of preparation, or lack thereof.

One must wonder why a party would select such an arbitrator during the arbitrator selection process? It is challenging to imagine a case in which an arbitrator's lack of preparation would be considered beneficial to one of the parties. Considering that at least some information on arbitrators can be obtained during the due diligence stage, one way this type of attitude towards oral hearings could be reduced is by simply refusing to nominate arbitrators who adopt such a method of preparation. If an arbitrator interview is conducted, parties may ask a prospective arbitrator how they prepare for oral argument. Such questions fall within the types of inquiry considered appropriate by the IBA Guidelines on Party Representation in International Arbitration as well as the Chartered Institute of Arbitration Practice Guidelines.[1] Of course, it still may be difficult to gather concrete information on arbitrators considering the lack of publicly available resources providing this type of insight. However, as resources such as Arbitrator Intelligence continue to develop, parties should take advantage of the information that is out there when trying to discern the method by which specific arbitrators typically prepare.[2]

[1] IBA Guidelines on Party Representation in International Arbitration, Guidelines 7–8 (2013), *available at*, https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F; Chartered Institute of Arbitrators, International Arbitration Practice Guideline: Interviews for Prospective Arbitrators, Art. 2 (2016), *available at*, https://www.ciarb.org/media/4185/guideline-1-interviews-for-prospective-arbitrators-2015.pdf.

[2] ARBITRATOR INTELLIGENCE, htttp://www.arbitratorintelligence.com.

A well-prepared tribunal benefits both parties, as each could be more confident that the tribunal has engaged with the nuanced arguments expressed in their written submissions. The parties would have the opportunity to expand on the more complex aspects of the case at the hearing, rather than spending the majority of their allotted time providing the tribunal with a summary of the case. Any concern common law lawyers have regarding the deemphasis of the oral hearing would be misplaced, as the hearing would still remain an undoubtedly critical part of the process. Rather than merely summarizing, counsel actually may have a greater opportunity to impress the tribunal at the hearing by clarifying the most complex portions of the case.

As Ohara suggested, such an approach requires not only a well-prepared tribunal, but one that is actively involved in managing the case. Experts in the field have also highlighted the advantages of such approach, remarking that holding case review conferences to discuss preliminary issues would enable the tribunal to "focus on those issues and evidence that will be material to the outcome of the case" at the evidentiary hearing.[3]

III. TENSION BETWEEN CLIENT EXPECTATIONS AND PRESENTATION STRATEGY

The need to weigh the expectations of the client against the most effective oral argument strategy was another recurring theme of the panel discussion. One of the reasons given to explain why common law lawyers focus so heavily on oral argument is because clients expect to see an impressive "pro-client" performance at the hearing. Again, I was a bit surprised by the panelists' comments as I would have assumed these dual goals were more easily and often aligned. However, the potential ways in which they can diverge became clear.

Gunning outlined two potential strategies that he has seen employed by counsel during the opening of the oral argument. He referred to the first as "grandstanding" and described it as a presentation of the case in a completely lopsided fashion that is delivered with a heavy pro-client bias. This strategy may include presenting the tribunal with the evidence most damaging to the other side during the opening statement. In Gunning's view, such an approach was neither particularly effective

[3] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 6.64 (6th ed. 2016).

nor persuasive but instead, could easily backfire. While it is true that a client would undoubtedly enjoy hearing an impassioned opening statement that presents their case in the light most positive to them, Gunning clarified that the role of counsel is not to be nakedly biased, but rather to persuade the tribunal that their client's position is the most reasonable. Persuasion is not best achieved via grandstanding, as the lopsided version of the case presented during the opening statement is vulnerable to being dismantled over the remainder of the hearing, rendering the opening statement ineffective.

Instead, Gunning recommended an alternative approach which he referred to as an "instructional method." According to this approach, counsel focuses on providing assistance to the tribunal to help them better understand the more complex and nuanced issues in the case. They do so by taking advantage of the deep knowledge that they have gained over the course of preparing the written submissions. Gunning recommended that while preparing, counsel should take note of any issues they found particularly hard to understand so they can be ready to clarify these points in a way that the tribunal can most easily grasp. Rather than adopting an obviously pro-client bias, counsel who pursues this strategy adopts a more neutral tone that is focused on creating a favorable context in which the tribunal can best understand the case and the evidence presented to them.

While I can understand from a client's perspective why the grandstanding approach may seem more immediately appealing, the pragmatic quality of the instructional method ultimately does seem like the more effective approach. As Gunning pointed out, there is not much evidence to support the assertion that clients demand a more performative, lop-sided presentation of their case. Even if they were to make such a demand, it clearly seems like the job of counsel to steer clients toward the most effective strategy to achieve a satisfactory outcome. Others have also advocated for a strategy similar to the one Gunning described. They emphasize the importance of using the hearing as an opportunity to persuade the tribunal to view the case through a specific framework, while neither understating nor overstating

the merits of the case.[4]

Assuming the role of a guide through the complexities of the case allows counsel the ability to direct the tribunal in the way most favorable to their client without neglecting their duty of helping the tribunal understand the critical issues of the case. By adopting such a strategy, perhaps the dual goals of fulfilling client expectations and effectively presenting the case would be more perfectly aligned.

IV. NIMBLE USE OF VISUAL AIDS

The panel also suggested that counsel should take advantage of visual aids when presenting their case to the tribunal, both in written submissions and during the hearing. Given the main purpose of the oral argument is persuading the tribunal, Fagbohunlu reminded attendees that visual aids can often be used as psychological tools to help achieve this goal. He highlighted that while it is challenging to quantify the degree to which non-rational factors, like an arbitrator's intuition, ultimately affect the outcome of the final decision, visual tools can be very helpful in the development of an arbitrator's impressions of the case.

Graphs, timelines, charts, and diagrams, among other visual aids, can be used to effectively simplify and convey complex sets of facts. Points that the arbitrators may have struggled to grasp in written form can be brought to life through compelling visuals that are tailored to the type of information that needs to be expressed. The effectiveness of visual aids in terms of increased recall, understanding, and persuasion is widely accepted in other realms of the legal world.[5] The panel suggested that the same general principles apply in the international arbitration context when visual aids are used appropriately.

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[4] *See generally* Franz Schwarz, *Opening Submissions*, The Guide to Advocacy, GLOBAL ARBITRATION REV. 51, 51–68 (2019); Simon Batifort et al., *Psychology in Oral Advocacy: Using Science to Persuade International Tribunals*, KLUWER ARBITRATION BLOG (Sept. 6, 2021), http://arbitrationblog.kluwerarbitration.com/2021/09/06/psychology-in-oral-advocacy-using-science-to-persuade-international-tribunals/.

[5] *See* David Errickson et al., *The Effect of Different Imaging Techniques for the Visualization of Evidence in Court on Jury Comprehension*, 134 INT'L. J. LEGAL MED., 1451, 1451 (2020) (finding that the format in which evidence is presented improves a jury's understanding of the technical importance of that evidence as well as the language used to describe the evidence during trial); *see also* Neil Feigenson & Jaihyun Park, *Effect of a Visual Technology on Mock Juror Decision Making*, 27 APPLIED COGNITIVE PSYCH., 235, 243–46 (2013) (finding that PowerPoint presentations increased mock jurors' recall of evidence, enhanced persuasion, and influenced their judgment).

However, Fagbohunlu was quick to caution overly zealous advocates against the use of too many demonstratives, as some arbitrators may have a cultural bias against the use of such devices if they are uncommon in their home jurisdictions. Too many visuals or the ineffective use of visuals could hinder a case rather than advance it forward.

Schlaepfer also cautioned against an overreliance on visual aids. While PowerPoint presentations may be useful in some circumstances, she noted they may also inhibit counsel from being nimble and flexible enough to respond to the tribunal's questions as they arise. Being held captive by the order of the slides in a PowerPoint presentation is sure to disappoint the tribunal, especially if they are told that their immediate concern will be addressed in 20 minutes.

If counsel were to adopt the instructional method described by Gunning, it seems the purpose of any visual aid must be to assist the tribunal in understanding the complexities of the case. With this ultimate goal in mind, incorporating visual aids into the oral argument presentation may help limit the length of presentations, especially if they were used as a tool to help simplify the most critical issues, rather than a visual summary of the entirety of the case. Ohara also pointed out that visual aids can be very usefully incorporated into the written submissions as well and then further emphasized during the hearing as necessary.

V. CONCLUSION

Reichert's characterization of the panel discussion as a masterclass on the hearing proved true. The panelists highlighted a number of strategic challenges regarding the hearing that are likely not immediately apparent unless one has sat both before and on a tribunal.

Common to all three of the themes that the panelists addressed is the overarching concept of balance—balancing the emphasis placed on written submissions with the oral argument, balancing client expectations with the most effective case presentation strategy and balancing the use of visual aids throughout the written submissions and the hearing. While not explicitly stated, all the panelists seemed to be encouraging counsel to strive for a balanced approach, not only at the hearing, but

throughout the entire arbitration process in order to assist the tribunal most effectively in understanding the case and achieving favorable outcomes for clients.

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BETWEEN ACCURACY AND CREDIBILITY: THE PROBLEM WITH A WITNESS

by Anna Isernia Dahlgren

I. INTRODUCTION

This article considers the panel discussion that took place on June 16, 2022 at the 34th Annual ITA Workshop and Annual Meeting in Austin, Texas and focused on the nature of human memory and its impact on witness testimony in international arbitration proceedings. "The Problem with a Witness" featured Kate Davies QC (Allen & Overy LLP, London)[1] moderating a panel made up of Professor Kimberley Wade (University of Warwick, Coventry),[2] Professor Maxi Scherer (WilmerHale, London),[3] and Ed Williams QC (Cloisters, London).[4]

Finding its roots in the Kaplan Lecture on the Fallacy of Witness Evidence given by Toby Landau QC in 2010,[5] Davies guided the panel through a discussion on the fallibility of human memory, its impacts on international arbitration proceedings, and how the arbitral process can exacerbate or mitigate the effects thereon.

This review begins by highlighting the problems with witness accuracy by examining both Professor Wade's findings in the International Chamber of Commerce

[1] Kate Davies QC is a partner in Allen & Overy's International Arbitration practice group, with extensive experience with both institutional and *ad hoc* arbitration proceedings in both the commercial and investment treaty contexts.

[2] Professor Kimberley Wade is a psychologist who focuses her work on human memory and cognition with a particular interest in how psychology can inform the practice and policy of legal settings. In 2015, she was asked to join the ICC's Witness Memory Task Force, where she served as a scientific advisor.

[3] Professor Maxi Scherer serves as special counsel at WilmerHale, and professor of law at Queen Mary, University of London, and is regularly ranked as a leading arbitration practitioner. Professor Scherer attended the panel virtually.

[4] Ed Williams QC has a trial and appellate practice that focuses on employment-related commercial and discrimination law. Williams also acts as a mediator and co-founded a firm that mediates large-scale legal disputes with a focus on those containing a political element.

[5] *See* Toby Landau QC, The Kaplan Lecture at the Hong Kong Club, *Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration* (Nov. 17, 2010) (write-up available at, https://static1.squarespace.com/static/5fc4c63ed27ff856c265d945/t/5fd03d52ab2d482295d7e0a2/1607482708302/2010+-+Toby+Landau+QC+%E2%80%93+Tainted+Memories%EF%BC%9AExposing+the+Fallacy+of+Witness+Evidence+in+International+Arbitration+.pdf).

("ICC") Task Force on Witness Evidence Report[6] (the "ICC Report") and her remarks about witness confidence as a proxy for accuracy. It then shifts to a review of witness credibility issues before discussing whether it is worth mitigating these issues in witness evidence and how to do so. Finally, it concludes with a few suggestions.

II. THE ACCURACY OF A WITNESS

"*Remembrance of things past is not necessarily the remembrance of things as they were.*"

–MARCEL PROUST, IN SEARCH OF LOST TIME

While often thought of like instantly retrievable film reels stored in the recesses of our psyche, memories are less concrete than we like to imagine. In fact, human memory is extremely malleable, influenced by things like misinformation, personal bias, the phrasing of a question designed to get us to recall something or elicit a specific response, discussions with a co-witness, and the retelling of the event from a different perspective. Yet human memory plays a central role in the procedure of international arbitration, primarily through the introduction of witness evidence in the form of written and oral testimony.

This tension was brought to the forefront of the arbitration community's attention by Toby Landau QC, who followed up his 2010 Kaplan Lecture with his 2015 guest speech, entitled *Unreliable Recollections, False Memories and Witness Testimony*, at a meeting of the ICC Commission of Arbitration and ADR.[7] The ICC responded to Landau's call-to-arms by putting together a task force, focused on "Maximising the Probative Value of Witness Evidence." In November 2020, the task force published the ICC Report, entitled "The Accuracy of Fact Witness Memory in International Arbitration," parts of which Wade discussed during the panel, as elaborated further below.

[6] Int'l Chamber of Com. (ICC) Task Force 'Maximising the Probative Value of Witness Evidence,' *The Accuracy of Fact Witness Memory in International Arbitration: Current Issues and Possible Solutions*, ICC (Nov. 2020), *available at* https://iccwbo.org/content/uploads/sites/3/2020/11/icc-arbitration-adr-commission-report-on-accuracy-fact-witness-memory-international-arbitration-english-version.pdf (hereinafter the "ICC Report").

[7] Toby Landau QC, Guest Speech at the ICC Commission on Arbitration and ADR, *Unreliable Recollections, False Memories and Witness Testimony* (Oct. 2015).

A. *ICC Report Findings*

The ICC Report is the first study to apply decades of research on witness memory in legal proceedings to a commercial, instead of a criminal, context. The study examined the extent to which two factors known to influence memory–having a biased perspective and misleading post-event information–affect memory recall in a commercial context. The study found that the presence of these two factors significantly decreased witness accuracy and provided recommendations to mitigate the distorting effects of exposure to such post-event information.

Although a substantive review of the ICC Report is beyond the scope of this article, Wade highlighted the following three findings that bear repeating:

1. The way a question is worded can have a significant impact on a witness's memory recall; using neutral language can avoid the creation of misinformation which may become coded into the witness's memory. Misinformation might merely cause occlusion of an original memory, but there is also a risk that it could completely overwrite the memory and make further accurate recall thereof impossible.

   As one example of neutral language in questioning, the ICC Report provides the following example: "[D]o not ask 'How aggressively did the Respondent's manager react?' or 'How stubbornly did they resist your request?' as the qualifying descriptors 'aggressively' or 'stubbornly' may impact the witness's response. Instead, use more neutral language: 'How did the discussion at the meeting progress?'"[8]
2. Co-witness discussion is a powerful mechanism for the transmission of misinformation. Thus, working to avoid co-witness discussion by conducting solo interviews is an effective method of avoiding exposure to memory-warping misinformation.[9]
3. People often attune their retelling of a memory to the audience they are speaking to. Similarly, where witnesses are employed by a party to the

[8] ICC Report, *supra* note 6, ¶ 5.10.f).

[9] *Id.* ¶ 5.8.

proceeding, they can often tailor their statements in an unconsciously biased manner. Attorneys can avoid unintentionally leaning into this potential bias by asking unbiased and open-ended questions.[10]

B. *Confidence as a Proxy for Accuracy*

Wade also discussed whether a witness's confidence is a good indicator of their accuracy. Wade explained that, in theory, accuracy and confidence should correlate, but that, in practice, correlation only occurs if interviews are conducted appropriately and without a time-delay; even then, the correlation is less than ideal.[11] Exposure to misinformation and a large time-delay made witnesses both more confident and less accurate, as did poor interview techniques. Essentially, even though fact-finders often use witness confidence as a proxy for their accuracy (and thus their reliability), such reliance should be met with extreme caution.

III. BEYOND ACCURACY: THE CREDIBILITY OF A WITNESS

Even if the memory of a witness is preserved as accurately as possible, the credibility determinations made by tribunal fact-finders can significantly affect the worth of that accuracy. Williams described nerves as "the flip-side of memory," acknowledging that whether a witness is perceived as credible, regardless of their accuracy, depends largely on the tribunal's perception of their physical response to examination. Thus, Williams posited, a calm witness is a credible witness.

Williams cited Professor Albert Mehrabian's three elements for effective communication which theorizes that 55% of messages are communicated by body language, 38% by vocal tone, and 7% through actual words.[12] Attorneys would want a witness to balance all three elements in favor of spoken words. Williams showed that nerves pull focus from witness testimony—voices strain and crack, hands fidget, bodies clam up—such that the actual words being said are drowned out by the clamor

[10] *Id.* ¶ 5.10.e).

[11] *See* ICC Report, *supra* note 6, at 25, n.24 (explaining the report's statement that "witness confidence is not by itself a good indicator of memory accuracy").

[12] Albert Mehrabian and Morton Wiener, *Decoding of Inconsistent Communications*, J. OF PERSONALITY AND SOC. PSYCH. 6, 109–114 (1967); Albert Mehrabian and Susan R.Ferris, *Inference of Attitudes from Nonverbal Communication in Two Channels*, J. OF CONSULTING PSYCH. 31, 248–252. (1967) (theorizing that three elements—words, tone of voice, and facial expressions—account for the liking of a person).

of body language and vocal tone, thereby impacting the credibility of a good faith witness.

To demonstrate the impact cross-examination has on witness nerves, Williams cross-examined Professor Patricia Shaughnessy—conference co-chair and professor of law at Stockholm University—on her interest in foraging, eventually landing on the tension between her love for it due to its sustainable nature and her attending the conference via a carbon-heavy flight from Sweden to Texas. When asked how she felt after the cross-examination was over, Professor Shaughnessy confessed that she was uncomfortable at being unable to predict the direction of the questions and that her body became tense with the more difficult questions. Williams suggested that attorneys expose their witnesses to cross-examination, even on irrelevant topics, as it helps them prepare for the rush of nerves that surface during the real thing, and ultimately allows the witness to increase their perceived credibility through a calm demeanor.

Williams then described the approaches taken by three jurisdictions in witness preparation to mitigate this effect. In the US, attorneys often put witnesses through a full rehearsal, exposing them to questions they will likely be asked on both direct- and cross-examination. In contrast, French practitioners rarely prepare witnesses because testimonial evidence is extremely limited. Finally, practioners from the UK are prohibited from practicing, rehearsing, or coaching witnesses. However, they are allowed to familiarize them; attorneys can put witnesses in the position of being cross-examined for the first time, by asking witnesses personal, unrelated questions in the style of cross-examination, with the aim of preparing witnesses for the impact of nerves that take over during cross-examination.

Interestingly, Wade noted that the research coming out of the shift from in-person proceedings to virtual ones demonstrates that virtual hearings might actually be better venues for determining the credibility of a witness. She explained that the pervasive myth that non-verbal cues serve as deception identifiers has been debunked by research showing that deception is easier to detect when the emphasis is put on verbal cues instead of physical ones, as happens in a virtual setting.

IV. REFORMATION: A WORTHWHILE ENDEAVOR?

"*We don't need to rip up the rulebook, but we may need to adapt it.*"

–Kate Davies QC

With all of the issues stemming from witness accuracy and credibility, how can arbitration practitioners make sure that their witnesses are providing accurate testimony that will be heard in arbitral proceedings? Is it even worth attempting to reform a practice that is littered with red flags and that rarely proves pivotal to a tribunal's decision?

A. *An Arbitrator's Perspective*

Scherer presented the arbitrator's perspective, noting that witness evidence is not presented as a codified memory and that a case rarely hinges on the basis of the singular testimony of a witness. Yet, Scherer acknowledged it is important to be aware of the shortcomings of witness memory as it does beneit the arbitral process. Witness evidence helps shed light on the context of the dispute as well as the atmosphere and relationship between the parties, adding an additional gloss to the documentary evidence. Where documentary evidence provides a black and white landscape, Scherer mused, witness testimony adds color and life without changing the landscape itself. Thus, awareness of our limitations can only help enhance arbitral proceedings.

B. *An Attorney's Task*

When asked what attorneys can do to mitigate the impacts of time on witness memory, as many arbitral disputes harken back to twenty-year-old facts, Wade cautioned that the effect of a time-delay cannot be overcome. However, attorneys can work hard to interview witnesses as effectively as possible. Wade suggested the employment of the cognitive interview technique, recently adopted by UK police officers, which encourages recall in alignment with memory structure, enabling self-prompting of further details without contamination.

The ICC Report recommends applying a similar technique.[13] One of those

[13] ICC Report, *supra* note 6, at 25.

recommendations emphasized the importance of uninterrupted narratives as a natural way to capitalize on memory structure and coding, making it more likely that witnesses will prompt themselves to remember more. Interruptions break this natural cycle, making it more likely that a memory will be less accurate.

C. *An Institution's Choice*

The UK recently implemented Practice Direction 57AC, as discussed by Davies and Williams, which sets out a new fundamental regime for the preparation of witness statements in UK courts.[14] In relevant part, the regime dictates that witness statements must be written by the witness and must include a list of all the documents shown to the witness as part of their preparation. Williams praised 57AC as a good start in the right direction, noting its underlying principle that witness testimony should be limited with most of the evidence coming from documents.

Scherer expressed interest in establishing similar practice guidelines for the treatment of witnesses in international arbitration. Speaking to the likely benefit of a new practice guideline, Scherer highlighted the notable difference between the UK's 57AC and a potential practice guideline for international arbitration; as international arbitration practitioners are trained in the methods of their respective jurisdictions, their styles of witness interaction will vary. Scherer suggested that an established baseline might help level the witness preparation playing field. Scherer submitted that a variety of suggestions – such as listing what documents have been provided to witnesses in preparation, explaining how witnesses have been prepared, or whether there were any external service providers used in witness preparation – are worthy of consideration in the creation of a practice guideline.

V. SUGGESTIONS

The ICC Report acknowledges that many of its recommendations may not always be appropriate for any given situation. However, the adoption of mitigating interview techniques should be largely appropriate for all counsel collecting witness reports. Counsel should focus their efforts on refining their interview techniques to avoid unintentionally distorting witness recall through suggestive interview tactics. In

[14] Practice Direction 57AC, Civil Procedure Rules (U.K.).

addition, an institutional practice guideline should recommend the implementation of the cognitive interview technique, coupled with an emphasis on counsel neutrality, in order to collect statements that are as true to the event as possible.

This author also adopts Scherer's stance that a practice guideline would be beneficial to mitigate many of the issues with witness memory in international arbitration. Individual arbitral institutions, being the arbiters of their own procedures, should take the initiative to consider the recommendations of the ICC Report and adapt them to their particular cultural styles and chambers. Further study of the ICC Report and Wade's follow-up report[15] are similarly recommended for arbitrators, counsel, clients, and arbitral institutions alike.

Additionally, this author believes that real steps should be taken to develop practice guidelines that address the panel's discussion of witness credibility determinations. Without accurate credibility determinations, witness accuracy is largely irrelevant.

Williams made it clear that credibility is often inaccurately determined through body language which can be deeply impacted by nerves. There is a clear link, then, between witness credibility and accuracy being determined by the confidence of a witness or lack thereof, as understood through their physical reaction. This is particularly important for a variety of witnesses, including those who cannot control their nerves in legal proceedings and neurodiverse witnesses, whose communication styles can lead neurotypical people to perceive them as deceptive.[16] Thus, by reducing fact-finder reliance on body language, the arbitral community can reduce miscalculations of witness credibility.[17]

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[15] Kimberley A. Wade & Ula Cartwright-Finch, *The Science of Witness Memory: Implications for Practice and Procedure in International Arbitration*, 39 J. OF INT'L ARB. 1 (2022), preprint *available at* https://psyarxiv.com/fxjm6/.

[16] Aldert Vrij & Jeannine Turgeon, *Evaluating Credibility of Witnesses – Are We Instructing Jurors on Invalid Factors?*, 11 J. OF TORT L. 231 (2018) (examining the effect of typical traits of people with autism—gaze aversion, repetitive body movements, poor reciprocity and literal interpretation of figurative language—on perception of credibility and finding that "[a]utistic individuals were indeed judged as more deceptive and lower on perceived competence and character compared to neurotypical individuals").

[17] *See* Vrij & Turgeon, *supra* note 16 (suggesting that the US legal community should consider crafting jury instructions that educate jurors on the lack of connection between nonverbal cues and credibility); *but see* Denault et al., *The Detection of Deception During Trials: Ignoring the Nonverbal Communication*

Accordingly, this author questions the importance of fact-finders being able to see a witness during their testimony. As noted by Wade, being unable to rely on body language results in a better determination of witness credibility because it forces listeners to focus on verbal cues instead of misleading physical ones. And while Williams' demonstration showed that cross-examination creates involuntary physical reactions in witnesses, this author is not so sure that merely exposing a witness to cross truly calms the nerves. Having worked in US courtrooms and seen many witnesses flail under the pressure of cross-examination, she believes that cross-examination will generally produce these involuntary physical reactions regardless as most laymen are going to be nervous about simply being in a legal proceeding and because cross-examination is an uncomfortable experience by design.

Accordingly, it may be wise to incorporate recommended practice guidelines to place witnesses out of view of the fact-finders should proceedings return to an in-person format. This would force listeners to focus on verbal cues instead of misleading body language, extending the benefit of virtual hearings while eliminating the arbitration community's concern of being unable to control a witness.[18] While vocal tone would still be noticeable, tribunals would be unable to use body language to improperly assess accuracy.

Finally, culture can also impact the perception of credibility, such that further research should be done to understand how various cultures perceive and broadcast credibility.[19] This is particularly important in an arena as international as arbitration

of Witnesses Is Not the Solution—A Response to Vrij and Turgeon, 21 INT'L J. OF ETHICS AND PROOF 3 (2020) (recommending that jurors consider demeanor to enrich their overall understanding of witness testimony).

[18] 2021 INTERNATIONAL ARBITRATION SURVEY: ADAPTING ARBITRATION TO A CHANGING WORLD 24 (White & Case, 2021), *available at* https://www.whitecase.com/publications/insight/2021-international-arbitration-survey (citing 38% of respondents as thinking virtual hearings would make controlling witnesses and assessing their credibility more difficult).

[19] ICC Report, *supra* note 6, at 28; *see* Lorraine Hope et al., *Urgent Issues and Prospects at the Intersection of Culture, Memory, and Witness Interviews: Exploring the Challenges for Research and Practice*, 27 LEGAL AND CRIM. PSYCH. 1 (2022); *see also* Nancy Amoury Combs, *Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials*, 14 UCLA J. OF INT'L L. AND FOREIGN AFF. 235, 252 (2009) (discussing the additional impediment to fact-finding in international criminal tribunals by the cultural differences between witnesses and Western court personnel).

and should receive all due consideration.[20]

VI. CONCLUSION

In law, as in life, credibility and accuracy are not equal partners. Accuracy goes to the very nature of memory, which the ICC Report and panel speakers demonstrate is subject to manipulation via the procedures employed by attorneys in international arbitration. Thus, the onus is on attorneys to make sure that accuracy is preserved before proceedings begin. Credibility, instead, goes largely to the demeanor of the witness as perceived by the fact-finder once proceedings have begun. While attorneys can employ Williams' technique to try to help mitigate nerve-based responses to direct- and cross-examination, witness credibility is largely in the hands of the witness and the tribunal.

If a witness is not perceived as credible, it does not matter how accurate their recall is. This is the experience of many a neurodivergent person, who may avoid eye contact and fidget to self-soothe, trying to explain themselves to a neurotypical person but being perceived as dishonest.[21] Thus, by cultivating more accurate perceptions of witness credibility in the courtroom, in addition to preserving witness accuracy in pre-proceeding stages, the international arbitration community can more effectively safeguard the efficacy of witness testimony.

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[20] *See* WON KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION (2017) (providing an in-depth study of the role of culture in modern day arbitral proceedings).

[21] *See* Alliyza Lim *et al.*, *Autistic Adults May Be Erroneously Perceived as Deceptive and Lacking Credibility*, J. AUTISM DEV. DISORD. 52, 490–507 (2022), *available at* https://doi.org/10.1007/s10803-021-04963-4.

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REFLECTIONS ON THE PSYCHOLOGY OF ARBITRATOR DECISION MAKING FROM "THE PRESERVING PERSPECTIVES" INTERVIEW WITH EDNA SUSSMAN

by Christina Ma

I. INTRODUCTION

"Preserving Perspectives" is an ongoing initiative by the ITA Academic Council to record the evolution of modern international arbitration in the words of those who led it. As part of the ongoing project, Professor Pamela Brookman of Fordham Law School interviewed Edna Sussman, an eminent leader and pioneer of international arbitration and energy law who has written over 80 book chapters and articles on these subjects. Ms. Sussman has sat as an arbitrator in over 300 domestic and international cases and currently is a Distinguished Practitioner in Residence at Fordham University and sits on the advisory council for the ICC Task Force on Arbitration and ADR. She has previously served as a Chair of the New York Arbitration Centre, Director of American Arbitration Association (AAA), President for the College of Commercial Arbitrators and Founding Chair of the AAA-ICDR Foundation. In 2021, the American Arbitration Association awarded Ms. Sussman the Vision Award for her work in founding and chairing the AAA-ICDR Foundation.

A prominent thought leader in the development of arbitration, Ms. Sussman was on the cutting edge of many topics which are now commonplace in ADR, including mediating investor-state disputes and third-party funding. In this article I first summarize Ms. Sussman's interview with Professor Brookman, which covered Ms. Sussman's career and contributions to ADR. I then reflect on Ms. Sussman's contributions to the ongoing discussion on the psychology of arbitrator decision making.

II. CAREER AS A LITIGATION LAWYER AND ARBITRATOR

Professor Brookman began the interview with a discussion of Ms. Sussman's beginnings. Both of Ms. Sussman's parents were lawyers in Poland, yet out of the options of becoming a "doctor or a lawyer", her inclination was to be a doctor because it "travels better" than a lawyer. However, after scoring well on the law board and considering the versatility of a law degree and type of analytical thinking required, Ms. Sussman decided that law was suitable for her. Her illustrious career as an international arbitrator has proven her earlier hesitation wrong.

After graduating from Columbia Law School, Ms. Sussman worked for White & Case in the early days when women were beginning to be hired. Initially, Ms. Sussman was interested in

litigation because of the way in which law and facts develop throughout the life of a case. As she describes, each case comes with "new facts, new law, new people and new psychology".

However, as she progressed in her career, it became apparent to her that litigation was slow and costly. With her growing family of four children, Ms. Sussman was attracted to the flexibility of arbitration as a method of dispute resolution. She also anticipated that arbitration would be more productive for parties overall. In 1994, Ms. Sussman was placed on the AAA panel of arbitrators and thereafter expanded her practice to include mediation in the Southern District of New York.

In the years since, Ms. Sussman has become a thought leader in international arbitration. Her paper on "Capturing the Benefits of Arbitration for Cross Border Insolvency Disputes" as part of the Fordham Papers 2012, and her many writings on practical topics such as the development of baseball arbitration and encouraging settlement as an arbitrator, have been very influential and instructive in the field.

At the same time as developing her profile in the international arbitration community, Ms. Sussman has also worked in a variety of policy and non-profit roles, including working on novel initiatives with respect to climate change, renewable energy, energy efficiency, distributed generation, and green buildings. As part of the New York City Planning and Climate Change committee, she has also considered ways in which the law can be adapted to accommodate for climate change. The AAA-ICDR Foundation, of which Ms. Sussman is Founding Chair, has also funded research for projects such as Professor Stacie Strong's research on arbitrator decision making and an initiative which taught inmates how to resolve conflicts without violence.

Ms. Sussman credits her motivation to take part in these initiatives to the concept *Tikkun Olam* in Judaism, which means to "repair the world". In this spirt, Ms. Sussman concluded the interview by encouraging young practitioners to develop their skillset and build their practice by getting involved in organizations, including through volunteer work.

III. CONTRIBUTIONS TO THE PSYCHOLOGY OF DECISION MAKING

In her 2013 paper, "Arbitrator Decision Making: Unconscious Influences", Ms. Sussman explores the psychology of arbitrator decision making and the existence of biases which are unconscious psychological influences.[1] She describes how one's motivation to make the right decision and an arbitrator's strong sense of accountability to the parties and the tribunal can

[1] Edna Sussman, *Arbitrator Decision Making: Unconscious Influences*, 3 AMERICAN REV. OF INT'L ARB. 487, 488 (2013).

counteract intuitive biases or "blinders".[2] While there are deliberative processes arbitrators can use when reviewing their cases,[3] these debiasing techniques require further research in academic literature. Ultimately, Ms. Sussman suggests that "additional effort to factor psychological influences into the selection of the arbitrator and into the case presentation may be desirable".[4]

In short, Ms. Sussman's article encourages arbitrators not to lose sight of the human element to the psychology of cases in the pursuit of perfect fairness. In essence, all disputes are founded on human interaction, and human nature is wildly imperfect. Judges and arbitrators also fall prey to biases. The formalist view that reason is objective, and law requires strict application, is contrasted with the realist view that all judgments are biased by a judge's individual experiences. Yet, regardless of one's preferred jurisprudential viewpoint, bias is something that must be painstakingly acknowledged by decision makers and addressed through internal checks and balances.

This idea is not new. Indeed, the concept of "prejudice" in evidence law implies the existence of bias, and law is created to address the impact through, for instance, the exclusion of evidence. Furthermore, law, and the application of law, is not merely an automatic intuitive process, since each case requires deliberate analysis on the specific set of facts. Kantian philosophy differentiates the faculty of "thinking" from "knowing", an exercise crucial to judgment.[5] Hannah Arendt similarly posits that thinking is the quest for meaning whereas knowledge is like "a scientist's thirst for knowledge for its own sake".[6] According to her, the faculty of thinking is, by nature, self-contradictory and unnatural such that "it undoes every morning what it had finished the night before."[7] Yet perhaps its vital function is that it checks the ego of the thinker.

In the field of international arbitration, safeguards in existing law, and particularly those in the law of evidence, may provide such "checks" for arbitrators when considering instances which are vulnerable to biases. It is through safeguards in the law of evidence that biases or prejudices are addressed procedurally. In some jurisdictions, for example, prior criminal acts are ordinarily inadmissible with some exceptions. Admitting evidence of a prior crime in most circumstances would bias decision making and would be too prejudicial to the accused. The law thus uses

[2] Sussman, supra note 1, at 507.

[3] Sussman, supra note 1, at 507.

[4] Sussman, supra note 1, at 514.

[5] Hannah Arendt, *Thinking and Moral Considerations: A Lecture*, 38 SOC. RES. 417, 422 (1971).

[6] Arendt, supra note 5, at 424.

[7] Arendt, supra note 5, at 425.

procedural rules to factor in bias.

Rules surrounding failed settlement offers could also be instructive to arbitrators and counsel. For example, under Ontario Rules for Civil Procedure,[8] where an offer to settle is rejected, and the offeror obtains a judgment as favorable or more favorable than the offer, cost consequences arise in favor of the offeror. The motivation behind such a law is to encourage reasonable settlement. In arbitration, whether a failed settlement offer should be considered or excluded from evidence is debatable. On one hand, including a failed offer letter may cause the arbitrator to be biased against the party who did not accept the offer. On the other hand, excluding the offer may require the arbitrator to take a look at the offer first, in order to determine whether it should be excluded. In order to exclude the instance of bias, an arbitrator could specify, as early as the first procedural conference with the parties, which offers to settle could be admissible and which could not.

IV. CONCLUSION

Edna Sussman has made an enormous contribution to the development of arbitration. In furtherance of Ms. Sussman's call to factor psychological influences into an arbitrator's decision making, I suggest that arbitrators review the substantive rules of evidence in the jurisdiction of the arbitration clause. Rules of evidence often already account for situations that are susceptible to bias, and thus may be instructive for identifying potential blind spots and helping an arbitrator maintain neutrality. By doing so early in the proceeding, arbitrators may avoid the appearance of bias later on.

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[8] Rules of Civil Procedure, R.R.O. 1990 Reg. 194 (Can.), R. 49.

INTERNATIONAL DISPUTE RESOLUTION: WHEN AND WHY SHOULD PARTIES RESORT TO PARALLEL PROCEEDINGS?

By Emma Refuveille

I. INTRODUCTION

On April 19, 2022, #YoungITATalks North America organized a discussion on the challenges of managing parallel proceedings across jurisdictions with a specific focus on Latin America. Sandra Friedrich[1] moderated a discussion between Katharine Menéndez de la Cuesta[2], Jorge A. Mestre[3] and Eve Perez Torres.[4] Guest speakers analyzed the pros and cons of parallel proceedings, and how to mitigate conflicting decisions.[5]

II. WHEN AND WHY DO PARALLEL PROCEEDINGS ARISE?

A. *The Rise of Parallel Proceedings in a Globalized World*

Parallel proceedings refer to "the simultaneous or successive investigation or litigation of separate criminal, civil, or administrative proceedings commenced by different agencies, different branches of government, or private litigants arising out of a common set of facts."[6] Parallel proceedings can arise in domestic courts or arbitration tribunals and are more common in today's globalized and connected world. Parties engage in international transactions, and with parties in multiple forums, issues can arise as to where proceedings should take place in the event of a dispute.

A common type of parallel proceedings occurs when arbitration and litigation proceedings are conducted simultaneously between the same parties and based on a

[1] Lecturer in Law & Director of the International Arbitration Institute and White & Case International Arbitration LL.M. at the University of Miami School of Law.

[2] Partner at Holland & Knight LLP in Miami.

[3] Partner and founding member of Rivero Mestre LLP in Miami.

[4] In-house Counsel at Chiquita Brands International, Inc.

[5] #YoungITATalks North America, Transnational Litigation & Arbitration: Managing Parallel Proceedings, April 19, 2022, Miami, Florida. https://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2022/youngita-miami.html.

[6] MIRIAM WEISMANN, PARALLEL PROCEEDINGS-NAVIGATING MULTIPLE CASE LITIGATION (2011).

different contract or based on the same contract between different parties. Notably, it is common for parties to sign a contract with an arbitration clause and to initiate an arbitration when a dispute arises. Sometimes, a party to the arbitration may commence a court proceeding in another country. This typically happens when there is uncertainty as to the applicability of an arbitration clause or when a party alleges that it never consented to resort to arbitration. It is a well-established principle in arbitration that there can be no arbitration without clear and unambiguous consent. In some cases, not all parties will have consented to arbitration: a third party can be brought into the dispute such as a subcontractor who was not part of the original arbitration agreement and does not agree to arbitrate. International arbitration is a popular means of dispute resolution to handle international disputes. However, the absence of an appeal for arbitral awards is an aspect of the mechanism that some parties are worried about. Bringing the claim to a national court allows for an appeal, and thus such parties find comfort in bringing a claim to a national court rather than before an arbitral tribunal. The non-consenting party will therefore initiate a proceeding in court while consenting parties will initiate an arbitration proceeding.

Parallel proceedings vary, depending on factors such as the laws of the states involved, the contract between the parties, or treaties between countries where applicable. Conflict of laws principles can also lead to the initiation of parallel proceedings because of the courts' exclusive jurisdiction. For instance, there are many parallel proceedings in family disputes involving businesses. Some courts have exclusive jurisdiction on specific personal matters like divorces. If the business is not within the jurisdiction of the divorce court, the divorce case will be adjudicated in one jurisdiction and the sale of the business or repartition of the shares will be adjudicated in another state.

A similar issue arises with real estate assets. It is not uncommon for people to own real estate assets in multiple places. Many states adopt a *lex loci* approach to real estate properties, granting exclusive jurisdiction to the state where the property is located: parallel proceedings may occur when various courts have exclusive jurisdiction and litigate at a concurring time.

Parallel proceedings can also arise out of a single case and decision such as in the context of setting aside and enforcement proceedings related to the arbitration award: often the losing party seeks to set aside an award whereas the winning party seeks to enforce it. Most of the time, courts where enforcement is sought, will stay proceedings until the setting aside proceedings are over to avoid enforcing an award that was set aside at its seat. This scenario is not as problematic as parallel litigation or arbitration proceedings, but contributes to slowing down the dispute resolution process, as it can be costly, both in attorneys' fees or time, particularly for the party seeking monetary damages.

B. *The Dangers of Parallel Proceedings*

The possibility of litigating and/or arbitrating various proceedings at the same time in multiple places can be problematic for several reasons. First, suing or being sued, is a daunting process which can cause stress and inquietude to parties. The stress only increases when parties are involved in more than one proceeding. Second, it is arguably a waste of resources. Parallel proceedings take more time, as parties have to deal with proceedings in multiple places. It is also a financial burden. A party with proceedings in different states might need to use different sets of attorneys for each case, depending on the language of the litigation or arbitration, and the applicable law. It might be necessary to hire teams in each state or country requiring dealing extensively with teams in multiple countries and languages, with different laws applied to each proceeding, and which is not only difficult to manage but can also be costly and time-consuming. Parties that voluntarily engage in parallel proceedings should have a good understanding of the relevant applicable laws (substantive and procedural) should be ready to invest significant resources.

The parties must also consider the potential conflicts of laws between the laws governing the various proceedings and the eventual conflicting outcomes in case the proceedings are maintained in multiple jurisdictions and decisions are rendered. Different laws, even conflicting laws, can lead to drastically different decisions. Parties should carefully contemplate the effect of one proceeding on the other and plan ahead if they decide to pursue parallel proceedings. Parties should specifically

look at the state or country's rules on the setting aside of awards. For example, the UNCITRAL model laws establish that "[t]he arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court."[7]

Recent developments in international arbitration in the United States might lead to different outcomes between proceedings before an arbitration tribunal and a U.S. court. The Supreme Court has recently ruled in *ZF Automotive Us, Inc. v. Luxshare, Ltd*[8] that 28 U.S.C. § 1782, which was drafted and enacted to provide federal court assistance in gathering evidence in foreign and international proceedings, does not apply to private commercial arbitrations. The impact of the decision on international arbitration remains to be determined. The discovery process differs between arbitration and litigation, and discovery can make or break your case. Therefore, parties should carefully consider the type of discovery they need to conduct to obtain their evidence and assess whether an arbitral award and a court decision could be conflicting.

Lastly, parallel proceedings can conflict with the doctrine of *lis pendens* and *res judicata*. Regarding *res judicata*, depending on the rules and countries, a party can raise the issue if it has been litigated and if the party has not had a chance to intervene. If so, another issue arises: is the entire claim precluded or just one issue? A party's position on the issue will depend on whether the result of the first litigation was beneficial. A party that is involved in the first proceeding and would be involved in the second will argue that the entire claim is precluded. Regarding *lis pendens*, there is no uniform approach to *lis pendens*. The European Union functions on a first come first serve basis. The first court seized is the first to decide. The remaining courts will have to wait for the first court's decision. Other countries like England[9] perform a more in-depth analysis and focus on issues like *forum non-conveniens* to

[7] UNCITRAL Arbitration Rules (as revised in 2010), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf.

[8] *ZF Automotive Us, Inc. v. Luxshare, Ltd.* 142 S. Ct. 2078 (2022).

[9] Spiliada Maritime Corp v. Cansulex Ltd, [1986] UKHL 10

resolve lis pendens issues. Additional considerations when dealing with parallel proceedings include: which court had the initial authority? Was that party entitled to file where it did? Is there an arbitration clause? Is there jurisdiction for the court? Because there is a first proceeding doesn't mean a second one cannot survive.

III. REMEDIES

To avoid parallel proceedings, parties should plan ahead of the dispute and draft a detailed arbitration clause in their contract. An arbitration clause strictly defining its scope and the use of arbitration will not always prevent parallel proceedings from happening, but it can set out explicit language that will ultimately go towards protecting your client.

Once parallel proceedings are started, it may be possible to obtain an arbitral injunction if the court finds that the parties did not consent to arbitration. The injunction will stop the arbitration proceedings. Some state laws allow courts to order the claimant not to proceed with the arbitration and issue an anti-arbitration injunction.[10] The situation is more complex when the arbitration is international, as the weight and power of the injunction are unclear.

Consolidation is also an option in case of parallel proceedings. For example, Article 10 of the ICC Rules of Arbitration, which entered into force on 1 January 2021, states that:

> the Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:
> a) the parties have agreed to consolidation; or
> b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or
> c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible." Consolidation therefore depends on strict criteria, but can save tremendous time and money to parties when it is appropriate to

[10] Jennifer L. Gorskie, *US Courts and the Anti-Arbitration Injunction*, 28 ARB. INT'L, No. 2, 295-323 (2012).

consolidate the proceedings.[11]

Consolidation may sound like an easy remedy; however, in practice, it can be difficult to put in place. Sometimes, arbitrations are in different places or use different rules, which makes it difficult to consolidate. Even when parties agree to consolidate to avoid costly parallel proceedings, a court might not agree to consolidate if the cases do not meet certain criteria. For example, two arbitrations under the ICC rules might not be consolidated if they do not meet the standard of Article 10 discussed above.

IV. CAN PARALLEL PROCEEDINGS BE A STRATEGY?

The complexity of the process is what often motivates powerful parties to initiate parallel proceedings. It is a known technique in the international dispute resolution world: a powerful party will initiate parallel proceedings against a smaller one with fewer resources. This may force the less powerful party to settle for terms that are not ideal because it cannot afford to respond to each proceeding, either because of the financial investment, or the time investment.

Parallel proceedings can be a profitable strategy, but it ultimately depends on what side of the dispute you are on. Parties that initiate parallel proceedings must be creative and clever and know the pros and cons of each law and each jurisdiction. Attorneys should use parallel proceedings ethically and in the best interest of their clients.

V. WHAT CAN BE DONE TO SET GUIDELINES ON PARALLEL PROCEEDING?

Having a set of rules for parallel proceedings is not necessarily the way to manage parallel proceedings. There are existing rules, however, there are disputes on how to apply them. Attorneys must be careful with the use of parallel proceedings: they have an ethical obligation to follow the rules but also to represent the client as best as possible. Ideally, parallel proceedings should not be used to pressure the other side: a party with fewer means to litigate or arbitrate might be forced to dismiss its claim if the other side initiates parallel proceedings as a response to a complaint.

While arbitral institutions like the ICC have rules on consolidation, it could be

[11] ICC RULES OF ARBITRATION, Art. 10 (2021).

useful to have more guidelines or train the arbitrators on how to handle parallel proceedings. The uncertainty of the power of anti-arbitration injunctions in international arbitrations should also be addressed by institutions. Rules are difficult to put in place, but guidelines can help parties understand how to navigate through their dispute.

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APONTAMENTOS SOBRE ARBITRAGEM E OPERAÇÕES DE M&A

by Gustavo Favero Vaughn

I. INTRODUÇÃO

O mercado de fusões e aquisições (*mergers and acquisitions*—M&A, em inglês) cresceu exponencialmente no Brasil, em especial em 2021. Há registros de que operações dessa natureza atingiram um desempenho recorde no país em tal ano. Segundo pesquisa realizada pela empresa de consultoria empresarial, KPMG[1], foram mais de 1.900 transações realizadas, o que representa um crescimento de 59% em comparação ao ano de 2019.[2] Bilhões de reais foram movimentados.

O fato de as operações de fusões e aquisições impulsionarem a economia não as torna insuscetíveis de problemas. Não são raras as disputas surgidas após o fechamento (*closing*) de operações de M&A.[3] Essas disputas são, em regra, complexas, ainda mais quando se trata de *cross-border* M&A. Discussões sobre ajuste de preço, declarações imprecisas ou falsas, omissão de informações e quebra de garantias são frequentes em litígios de M&A.[4]

Os contratos de M&A costumam prever cláusulas compromissórias. Isso evidencia, por fatores diversos (*e.g.*, confidencialidade do processo arbitral e possível expertise técnica dos árbitros),[5] a preferência pela arbitragem daqueles que participam dessas operações.[6] Para ilustrar essa afirmação, um levantamento feito,

[1] A KPMG é uma das maiores empresas de prestação de serviços profissionais, que incluem Audit (Auditoria), Tax (Impostos) e Advisory Services (Consultoria de Gestão e Estratégica, Consultoria Empresarial, Governança Corporativa, Assessoria Financeira, Riscos, Compliance, Fusões e Aquisições, Restruturações, Inovação e Tecnologia).

[2] *Operações de fusões e aquisições em 2021 alcançaram melhor desempenho dos últimos 25 anos*, KPMG (Jul. 21, 2022), https://home.kpmg/br/pt/home/insights/2022/03/volume-fusoes-aquisicoes-alcancou-recorde-2021.html.

[3] HEIKO D. ZIEHMS, M&A DISPUTES AND COMPLETION MECHANISMS 5 (2018).

[4] Anne V. Schlaepfer & Alexandre Mazuranic, *Drafting Arbitration Clauses in M&A Agreements*, *in* THE GUIDE TO M&A ARBITRATION 7, 7 (Amy C. Kläsener ed., 2020).

[5] Eliane Fischer & Michael Walbert, *The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 21, 21 (Christian Klausegger, Peter Klein, et al. eds., 2017).

[6] Harald Frey & Dominique Müller, *Arbitrating M&A Disputes*, *in* ARBITRATION IN SWITZERLAND:

em 2019, pelo Centro de Arbitragem da Câmara de Comércio Brasil-Canadá indicou que 51% das arbitragens administradas por tal instituição teriam relação com contratos societários, notadamente os contratos de compra e venda de participação societária.[7]

II. O EVENTO

Ciente da importância e da complexidade das operações de M&A, que por vezes se tornam litigiosas e são decididas por arbitragem, o capítulo jovem do *Institute for Transnational Arbitration* ("Young ITA") organizou um evento on-line, ocorrido em 12 de maio de 2022, para debater temas espinhosos acerca das arbitragens envolvendo operações de M&A.

Intitulado *Arbitration and M&A: Hot Topics Under Brazilian Law and Beyond*, o evento foi moderado por Guilherme Piccardi (Vice-Presidente do Young ITA Brazil e associado sênior do escritório de advocacia Pinheiro Neto Advogados). Participaram dos profícuos debates: Jair Gevaerd (sócio fundador do escritório de advocacia Gevaerd & Associados e professor de Direito da *Pepperdine Caruso School of Law*), Renato Grion (sócio do escritório de advocacia Pinheiro Neto Advogados), Giovana Benetti (professora de Direito na Faculdade Federal do Rio Grande do Sul e consultora do escritório de advocacia Judith Martins-Costa Advogados) e Mariana França Gouveia (sócia do escritório de advocacia PLMJ Sociedade de Advogados e professora da Faculdade de Direito da Universidade NOVA de Lisboa).

Entre os assuntos endereçados pelos palestrantes, destaco, pela análise que fiz, estes quatro como sendo os principais: (A) choque cultural entre as tradições de *common law* e *civil law* em relação a institutos jurídicos importados pelo Brasil dos Estados Unidos da América; (B) efeitos do dolo na fase pré-contratual do M&A; (C) função das cláusulas de *sandbagging*; e (D) cláusulas de resolução de disputas conflitantes em contratos coligados. Reflito sobre esses pontos na sequência.

THE PRACTITIONER'S GUIDE 1116 (Manuel Arroyo ed., 2 ed., 2018).

[7] *Relatório anual do CAM-CCBC – Centro de Arbitragem e Mediação*, Centro de Arbitragem e Mediação-CAMCC, CAM-CCBC (Jul. 21, 2022), https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/arbitragem-estatisticas/.

III. ALGUMAS REFLEXÕES A PROPÓSITO DO EVENTO

A. *Choque cultural, operações de M&A e arbitragem*

A primeira parte do evento realçou a importância de se situar culturalmente institutos jurídicos aplicados em operações de M&A. Nesse ponto, foram lembradas as tradições jurídicas anglo-saxã (*common law*) e romano-germânica (*civil law*), que frequentemente protagonizam exemplos de choque cultural a propósito dos mais variados temas.

É oportuna a ressalva quanto à contextualização de institutos jurídicos tendo como base o arcabouço legal do qual eles são extraídos, pois "[n]a prática contratual, nos seus diversos aspectos, é frequente o recurso a cláusulas decorrentes do Direito anglo-americano,"[8] tais como as cláusulas de *representations and warranties*, *covenants*, *earn-out* e *sandbagging*. Em se tratando de operações de M&A no Brasil, pode-se dizer que o sistema do *common law* "inspirou sobremaneira o padrão estrutural que é desenvolvido hoje nas minutas de contratos de compra e venda de empresas, cuja elaboração tem, como linguagem própria, a do Direito Norte-americano."[9]

As partes envolvidas em operações de M&A e os sujeitos processuais das disputas que possam decorrer dessas operações devem ter consciência de que institutos importados da prática norte-americana não podem ser automaticamente replicados no Brasil, como se houvesse—mas decerto não há—absoluta similitude e harmonia entre os sistemas de *common law* e *civil law* desses países. O alerta é importante especialmente na esfera contratual porque, em regra, o contrato faz lei entre as partes (*pacta sunt servanda*). Com efeito, uma disposição contratual advinda da prática estrangeira, por mais clara que possa ser, poderá ser invalidada no âmbito de uma arbitragem por ser incompatível com o Direito brasileiro.

Exemplos relevantes das diferenças entre ambas as tradições, no tocante a

[8] Fábio Siebeneichler de Andrade, *Notas Sobre o Enquadramento da Cláusula* Earn Out *na Teoria Geral do Contrato de Compra e Venda*, 25 REV. BR. DIR. CIV. 141, 141 (2020).

[9] Daniel Kalansky & Rafael Biondi Sanchez, *Sandbagging Clauses nas Operações de Fusões e Aquisições (M&A)*, *in* NOVOS TEMAS DE DIREITO E CORPORATE FINANCE 145, 149 (Henrique Barbosa & Sérgio Botrel eds., 2019) [doravante apenas: Kalansky & Sanchez].

operações de M&A, dizem respeito ao dever de informar.[10] Em artigo sobre o tema, cuja leitura se recomenda, dois advogados escreveram o seguinte:

> [W]hile under Brazilian Law the buyer is required to act with reasonable diligence, there is no equivalent doctrine to the *caveat emptor* rule as applied in the US. Brazilian Law does impose, however, a duty of disclosure on seller during negotiations, as a corollary of the general statutory principle of good faith."[11]

Ademais, destacaram que, ao contrário do que acontece no sistema do *common law*, "Brazilian law gives great importance to the parties' conduct during the negotiations and performance of agreements, to the point it may prevail over the contract's literal provisions."[12]

Em linhas gerais, os *practitioners* norte-americanos encaram o Direito de uma maneira mais pragmática do que os brasileiros. O *common law*—de origem anglo-americana ou não—enxerga o direito como uma construção jurisprudencial, amparando-se em um sistema de precedentes judiciais (doutrina do *stare decisis*). Ainda que no *common law* também se dê valor ao Direito positivado, a lei positivada não assume a mesma relevância que ela tem para países de *civil law*, como o Brasil.

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[10] A propósito do dever de informar, vale conferir as lições constantes de sentença arbitral proferida em disputa de M&A envolvendo a aquisição de um grupo econômico, em que o tribunal arbitral, aplicando o Direito Brasileiro, consignou o seguinte: "O dever informacional existe independentemente de previsão contratual, sendo um dever lateral corolário do princípio da boa-fé objetiva, nos termos chancelados no art. 422 do Código Civil. Quer-se com isso dizer que é dever das contratantes levar ao conhecimento da outra contratante todos os elementos relevantes de que se tenha conhecimento e que possam impactar nas bases do negócio e no *animus contrahendi*, independentemente da relevância que a parte omissa atribua a tais fatos. Não se pode jamais olvidar que os contratos surgem da intersecção das declarações jurídico-negociais das partes contratantes, pelo que uma das partes apenas pode adequadamente formar sua intenção negocial e avaliar seu interesse na formação do vínculo contratual com base nas informações que são disponibilizadas pelo outro contratante relativamente ao objeto e às condições do negócio. Autorizar e tutelar a omissão de informações sensíveis romperia a própria lógica da boa-fé que deve pautar as relações negociais." (Arbitragem CMA No. 437, p. 47; sentença arbitral tornada pública em sede de ação anulatória).

[11] Marcelo Roberto Ferro & Antonio Pedro Garcia de Souza, *International Post-M&A Arbitrations in Brazil*, *in* INTERNATIONAL ARBITRATION: LAW AND PRACTICE IN BRAZIL 4 (Peter Sester ed., 2020).

[12] *Id.*

No Brasil, a impressão geral que parece vir de fora do país é que a lei, por ser alegadamente engessada, limitaria a capacidade interpretativa dos juízes. Não é bem assim, porém. A figura do *juge bouche de la loi*, para citar uma conhecida expressão francesa, já foi superada, inclusive no Brasil.[13] Na prática brasileira, a atuação jurisdicional tem se mostrado bem menos rígida (flexível até demais, alguns dirão) quanto à interpretação de textos normativos.

Quando se comparam os regimes jurídicos norte-americano e brasileiro, o ponto nevrálgico, a meu ver, parece ser a segurança jurídica. O modelo do *common law* norte-americano é superior ao modelo de *civil law* brasileiro no tocante à segurança jurídica. E isso é devido, em grande medida, à doutrina do *stare decisis*.

A garantia da segurança jurídica é fundamental para um bom ambiente de negócios (atrai investimentos, por exemplo), aqui incluídas as transações de M&A. Porque o modelo do *common law* norte-americano assegura, em regra, estabilidade, uniformidade e previsibilidade decisória, não é recomendável importar institutos jurídicos de lá para o Direito Brasileiro sem que sejam eles situados em seus devidos contextos.

Antes de concluir este primeiro tópico sobre o evento, não posso deixar de tecer comentários sobre questões de ordem pública *vis-à-vis* o Direito Brasileiro, já que muito foi dito sobre isso no início dos debates. Alegações de violação à ordem pública são suscitadas em situações diversas no Direito Brasileiro, principalmente em processos judiciais. Busca-se, no mais das vezes, o reconhecimento de uma nulidade processual ou a redução de condenações pecuniárias.

O conceito de ordem pública é vago, e não há lei que o defina no Brasil. Por isso, dá margem a subjetivismos decisórios, o que, por conseguinte, gera insegurança jurídica. Como não há um conceito claro a respeito do que seria ordem pública, e questões dessa espécie podem ser arguidas e enfrentadas a qualquer tempo, em qualquer grau de jurisdição, a ordem pública é um fator legítimo de preocupação

[13] Georges Abboud & Gustavo Favero Vaughn, *Notas Críticas sobre a Reclamação e os Provimentos Judiciais Vinculantes do CPC*, 287 REV. PRO. 409, 409 (2019).

daqueles que litigam no Brasil—brasileiros ou estrangeiros.[14]

Questões de ordem pública no contexto de disputas de M&A submetidas à arbitragem podem ser problemáticas a depender da composição do tribunal arbitral. Pode ser que haja um árbitro mais sensível a essa sorte de argumento (um magistrado aposentado, por exemplo). A situação parece ser mais delicada em processos judiciais, em que, no contexto contratual, o Estado-juiz reconhece a natureza de ordem pública de temas como prescrição,[15] incidência de juros de mora[16] e valor de cláusulas penais.[17]

É em sede judicial—na fase pós-arbitral, em particular—que questões de ordem pública podem repercutir mais gravemente em disputas de M&A submetidas à arbitragem. A criatividade dos advogados pode levar o Poder Judiciário a anular (ou não homologar, a depender da hipótese) uma sentença arbitral por considerá-la afrontosa à ordem pública brasileira. Isso poderia ocorrer, por exemplo, com uma sentença arbitral que condenasse o vendedor a pagar indenização ao comprador por ter declarado informação falsa, mas fixasse o *quantum debeatur* sem observar o parâmetro do artigo 944 do Código Civil, segundo o qual a "indenização mede-se pela extensão do dano." Essa regra legal já chamou a atenção do Poder Judiciário brasileiro

[14] Superior Tribunal de Justiça – (doravante apenas STJ) (Superior Court of Justice), REsp 987.598/PR, relator Ministro Napoleão Nunes Maia Filho, Primeira Turma, julgado em Aug. 27, 2013. ("As matérias de ordem pública, que envolvem regras imperativas e inafastáveis pela vontade das partes, podem, a qualquer tempo, ser conhecidas pelo Tribunal, inclusive de ofício.").

[15] STJ, AgInt nos EDcl no REsp 1.965.396/RS, relator Ministro Raul Araújo, Quarta Turma, 2022. ("a prescrição é matéria de ordem pública e, portanto, pode ser suscitada a qualquer tempo nas instâncias ordinárias, ainda que alegada em embargos de declaração, não estando sujeita a preclusão.").

[16] STJ, AgInt no REsp 1.571.268/RS, relator Ministro Og Fernandes, Segunda Turma, 2022. ("os juros de mora, por se tratarem de matéria de ordem pública, podem ser modificados de ofício pelo magistrado.").

[17] STJ, REsp 1.898.738/SP, relatora Ministra Nancy Andrighi, Terceira Turma, 2021. ("o abrandamento do valor da cláusula penal em caso de adimplemento parcial é norma cogente e de ordem pública, consistindo em dever do juiz e direito do devedor a aplicação dos princípios da função social do contrato, da boa-fé objetiva e do equilíbrio econômico entre as prestações, os quais convivem harmonicamente com a autonomia da vontade e o princípio pacta sunt servanda.").

em, ao menos, duas circunstâncias envolvendo arbitragem e disputas de M&A.[18]

Em síntese, vejo com bons olhos a importação de institutos estrangeiros que funcionam, desde que eles sejam bem compreendidos por quem negocia e elabora contratos de M&A, por quem vai a juízo reclamar a tutela jurisdicional estatal ou privada, assim como por quem decide de forma autoritativa, com caráter vinculante às partes, as disputas relativas a operações de fusões e aquisições (juízes e árbitros). Sobre as questões de ordem pública, é preciso sempre estar atento e trabalhar para evitar abusos.

B. *Em torno do dolo em disputas de M&A*

O evento então passou a focar na figura do dolo e sua importância prática na fase pré-contratual das operações de M&A, que precedem a assinatura do contrato de alienação societária (*signing*).

Ao menos na concepção civilista brasileira, o "dolo provém de uma indução em erro: o agente provoca, reforça, ou deixa que o erro persista na mente da vítima."[19] Para se falar em dolo, deve haver, "por parte do agente do dolo, ou *deceptor*, um consciente e reprovável *enganar a outrem*."[20] O dolo negocial, assim, "constitui o ato, positivo ou negativo, com que, 'conscientemente, se induz, se mantém, ou se confirma outrem em representação errônea'."[21]

Foi bem observado, durante o evento, que o primeiro passo nessa análise é

[18] STJ, SEC 9.412/EX, relator Ministro Felix Fischer, relator para acórdão Ministro João Otávio de Noronha, Corte Especial, 2017. ("Estabelecida a observância do direito brasileiro quanto à indenização, extrapola os limites da convenção a sentença arbitral que a fixa com base na avaliação financeira do negócio, ao invés de considerar a extensão do dano."). Tribunal de Justiça do Estado de São Paulo - TJ-SP (São Paulo State Court of Appeals), Apelação Cível 1048961-82.2019.8.26.0100, relator Desembargador Azuma Nishi, 1ª Câmara Reservada de Direito Empresarial, 2021. ("era de rigor que fossem expostas as razões pelos quais os árbitros entenderam ser justa a indenização fixada no importe de 25% do preço, considerando-se, ainda, os desdobramentos fáticos no equilíbrio do contrato, com base em parâmetros objetivos, tais como a diminuição do faturamento ou do EBITD, a fim de que a indenização contemplasse o comando do art. 944 do CC.").

[19] Judith Martins-Costa, *Os Regimes do Dolo Civil no Direito Brasileiro: Dolo Antecedente, Vício Informativo por Omissão e por Comissão, Dolo Acidental e Dever de Indenizar*, 923 REV. TRIB. 115, 117 (2012).

[20] *Id.*

[21] *Id* at 118.

identificar o regime de dolo aplicável—dolo principal ou dolo acidental. Somente após a identificação do regime aplicável é que se saberá qual efeito a conduta dolosa terá em relação ao contrato de alienação societária. Se o dolo for principal, o contrato será anulável quando o vício for capaz de afetar a essência do contrato, levando o comprador a querer desfazer o negócio mediante a sua anulação.[22] Casos de dolo acidental, aqueles em que, a despeito do dolo, "o negócio seria realizado, embora por outro modo," são resolvidos por perdas e danos, sem necessidade de anular o contrato.[23]

Aventou-se também, no evento, a figura do dolo parcial ou total. O dolo parcial atacaria apenas parcela do negócio jurídico (uma ou mais cláusulas contratuais), ao passo que o dolo total, como o nome sugere, implicaria a anulação completa do contrato de M&A. O dolo parcial é especialmente relevante porque permite, a depender da hipótese (se for possível preservar a essência do negócio), extirpar do contrato apenas a parte viciada, permanecendo inalteradas as disposições contratuais não afetadas pela conduta dolosa.[24]

Citou-se o caso Abengoa para retratar um exemplo concreto de arbitragem envolvendo operação de M&A em que a figura do dolo foi aplicada.[25] A disputa envolveu um contrato de compra e venda de ações, por meio do qual a compradora adquiriu a integralidade das ações de uma sociedade *holding* e outras empresas pertencentes à indústria sucroalcooleira. Segundo a compradora, após o fechamento da operação ela descobriu que o vendedor teria deixado de informar tudo o que deveria ter informado (ou teria prestado informações falsas) durante a *due diligence*

[22] Código Civil (Lei 10.406/2002) ("Art. 145. São os negócios jurídicos anuláveis por dolo, quando este for a sua causa.").

[23] Código Civil (Lei 10.406/2002)("Art. 146. O dolo acidental só obriga à satisfação das perdas e danos, e é acidental quando, a seu despeito, o negócio seria realizado, embora por outro modo.").

[24] Código Civil (Lei 10.406/2002)("Art. 184. Respeitada a intenção das partes, a invalidade parcial de um negócio jurídico não o prejudicará na parte válida, se esta for separável; a invalidade da obrigação principal implica a das obrigações acessórias, mas a destas não induz a da obrigação principal.").

[25] *Supra* note 18.

e a fase de negociação do contrato de alienação societária. A compradora argumentou que o vendedor teria agido com dolo ao omitir informações ou prestá-las de forma enganosa.

Analisando a existência de dolo no caso concreto, o tribunal arbitral consignou em sentença que não estaria "satisfeito com o fato de a não divulgação pelos Requeridos do Contrato de *Swap* de Maio durante o curso de *due diligence* constituir dolo."[26] Na sequência da fundamentação, a sentença arbitral de uma das arbitragens,[27] atenta às características do dolo no Direito Brasileiro, ressaltou não ter sido apresentada "qualquer evidência direta do objetivo dos Requeridos de indução ao erro através de má-fé ou fraude," sendo certo, ademais, que a parte requerente não teria apresentado "também evidência suficiente ao Tribunal no sentido de inferir que o Vendedor tinha o propósito necessário de enganar ou fraudar para se considerar dolo."[28] Em arremate, ficou registrado pelos árbitros que a "omissão do Vendedor é insuficiente para estabelecer que os Requeridos buscaram intencionalmente induzir a Requerente ao erro."[29]

O dolo foi objeto de debate também na arbitragem envolvendo o controle da Varig, uma companhia aérea brasileira. O cerne da arbitragem, administrada pela CCI e regida pela lei brasileira, foi a manipulação do balanço da Varig pelos vendedores, que, em razão disso, teriam vendido a companhia à Gol, outra companhia aérea brasileira, por um valor maior do que o devido. Na concepção da compradora, em suma, essa manipulação se teria dado mediante a prática de ato doloso.

Interessante notar que, na sentença arbitral, os árbitros reconheceram a existência de duas categorias de dolo no Direito Brasileiro, conforme dito acima: o dolo causal (principal) e o dolo acidental. Para distinguir essas duas espécies, o tribunal explicou, tomando por base um contrato de compra e venda, que "se o dolo

[26] STJ, SEC 9.412/US, at 161 e-STJ. Esse caso tornou-se público, no Brasil, após a tentativa de homologação, perante o Superior Tribunal de Justiça, de duas sentenças arbitrais estrangeiras.

[27] Arbitragem CCI No. 16176/JRF.

[28] *Id.*

[29] *Id.*

afeta o preço, e o comprador tivesse comprado, mas a um preço inferior, o dolo será acidental; ao contrário, se afeta a essência da coisa, e comprador nunca tivesse celebrado o contrato, o dolo considerar-se-ia causal e permitiria—se assim lhe interessasse—a anulação do negócio."[30] A sentença reconheceu que "a distinção entre ambos os tipos de dolo tem um elemento subjetivo: em essência depende da atitude da vítima e da pretensão que exerça no processo judicial no qual solicita a pretensão."[31] Ao final, o tribunal entendeu que teria havido dolo de terceiro.

No que se refere ao dolo, desponta imprescindível examinar minuciosamente, caso a caso, a conduta das partes, para que se possa aferir se houve ou não dolo na prática de atos vinculados à operação de M&A e quais possíveis efeitos decorrentes disso. Conforme lembrado no evento, disputas de M&A tendem a envolver alegações de dolo acidental, que levam a um remédio indenizatório, porque o desfazimento do negócio jurídico (ao menos a anulação total) seria desinteressante, para dizer o mínimo, ao comprador, que já estaria atuando na administração da sociedade por ele adquirida.

C. O *que é isto* – sandbagging?

Falou-se, na sequência, sobre cláusulas de *sandbagging* e sua eventual compatibilidade com o regime de *civil law* que impera no Brasil e em Portugal. As conclusões dos palestrantes foram afirmativas, isto é, tais cláusulas seriam *a priori* admissíveis nesses países.

Cláusulas de *sandbagging* estão relacionadas com o já mencionado dever de informar. Pode o comprador que toma conhecimento de alguma declaração incorreta do vendedor se valer desse argumento para obter indenização após a transação de M&A ter sido concluída? As cláusulas de *sandbagging* tratam de hipóteses como essa.[32]

[30] Arbitragem CCI No. 15372/JRF. Caso tornado público em sede de ação anulatória de sentença arbitral – STJ, EREsp 1.656.613-SP, at 219 e-STJ.

[31] *Id.*

[32] "Transactional lawyers often refer to this practice-knowing of the breach, closing, and then asserting a post-closing claim-as 'sandbagging.' Buyer, in this case, chose to close its purchase of Target rather than renegotiate the deal's terms or walk away (and then, perhaps, sue Seller).

Há três cenários que podem ser observados em contratos de alienação de participação societária a esse respeito: (1) permissão expressa do *sandbagging* (cláusulas *pro-sandbagging*); (2) vedação expressa do *sandbagging* (cláusulas *anti-sandbagging*); ou (3) ausência de disposição sobre o assunto. De um lado, a cláusula *pro-sandbagging* "consiste em uma disposição em que o direito do comprador em ser indenizado permanece intacto, independentemente de qualquer conhecimento prévio (antes do fechamento) sobre quebra de uma declaração ou garantia prestada pelo vendedor no contrato."[33] De outro lado, a cláusula *anti-sandbagging* "estabelece que o comprador acorda afastar seu direito indenizatório em relação às declarações e garantias prestadas pelo vendedor sobre as quais, antes do fechamento da operação, tinha conhecimento de sua inexatidão."[34]

Quanto ao Brasil, a grande problemática em torno das cláusulas de *sandbagging* parece ser o princípio da boa-fé objetiva, que é praticamente onipresente em disputas contratuais, inclusive as societárias. O artigo 422 do Código Civil prevê que os "contratantes são obrigados a guardar, assim na conclusão do contrato, como em sua execução, os princípios de probidade e boa-fé."[35] Como conciliar essa previsão e os deveres anexos da boa-fé objetiva com o *sandbagging*?

No caso de cláusulas *pro-sandbagging*, um tribunal arbitral poderia limitar eventual indenização em favor do comprador por entender que ele não agiu de boa-fé ao guardar para si a informação sobre a declaração equivocada feita pelo vendedor (postura oportunista, por assim dizer). A lógica seria a seguinte: se o comprador sabia que a declaração era falsa, teve a oportunidade de informar o vendedor sobre esse equívoco durante a execução do contrato de M&A, mas deliberadamente não

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The question is whether Buyer has a post-closing claim under the Seller's indemnity. The answer is surprisingly unsettled." (Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*, 36 DEL. J. CORP. L. 1081, 1083 [2011]).

[33] Kalansky & Sanchez, *supra* note 8, at 146.

[34] Kalansky & Sanchez, *supra* noite 8, at 147.

[35] Some-se a essa previsão o que dispõe o artigo 113 do Código Civil (Lei Federal 10.406/2002): "Os negócios jurídicos devem ser interpretados conforme a boa-fé e os usos do lugar de sua celebração."

informou o vendedor e, tempos depois, requereu o pagamento de indenização com base nessa informação prestada de modo equivocado, "poder-se-ia entender, nesse caso, que houve desequilíbrio entre as partes, uma que entregou os documentos necessários para serem analisados e outra que usou de tais documentos para obter propositalmente a indenização, mesmo tendo a oportunidade de informar o vendedor sobre a incorreção."[36] Em tal cenário, o tribunal arbitral poderia simplesmente deixar de aplicar a cláusula *pro-sandbagging* sob o fundamento de que o comprador teria violado a boa-fé objetiva. Uma outra possibilidade, mais extrema e que requer maiores reflexões, seria cogitar de abuso de direito, à luz dos artigos 186 e 187 do Código Civil Brasileiro.[37]

É importante, contudo, analisar atentamente os fatos de cada caso concreto para verificar se o comprador teve ou não intenção de se aproveitar do vendedor, deixando ele prestar uma informação falsa para, em seguida, postular indenização. Nesse sentido, deve-se "examinar a prova do conhecimento que o comprador tinha a respeito da declaração falsa, buscando entender quem realmente teve acesso a referida informação e como ela foi transmitida por quem teve acesso a tal informação ao comprador."[38] Se o comprador não teve intenção de induzir o vendedor a erro para obter vantagem financeira com isso ou, então, se o conhecimento do comprador sobre a declaração falsa não era totalmente claro, inequívoco, "não há porque cercear o direito do comprador de ser indenizado pelos danos sofridos, de forma que a cláusula *pro sandbagging*, ou até mesmo o silêncio do contrato sobre o assunto, terão como consequência a reparação civil."[39]

Um caso interessante sobre *sandbagging*, porém fictício, foi apresentado aos

[36] Kalansky & Sanchez, *supra* note 8, 151.

[37] Código Civil (Lei Federal 10.406/2002)("Art. 186. Aquele que, por ação ou omissão voluntária, negligência ou imprudência, violar direito e causar dano a outrem, ainda que exclusivamente moral, comete ato ilícito.")"Art. 187. Também comete ato ilícito o titular de um direito que, ao exercê-lo, excede manifestamente os limites impostos pelo seu fim econômico ou social, pela boa-fé ou pelos bons costumes.").

[38] Kalansky & Sanchez, *supra* note 8, at 152.

[39] *Id.*

estudantes de arbitragem que participaram da XI Edição da Competição Brasileira de Arbitragem e Mediação Empresarial, realizada pela CAMARB no Brasil, em São Paulo. O referido caso teve o seguinte pano de fundo: contrato de compra e venda da integralidade das ações da empresa Camus, a ser adquirida pela empresa Saga e vendida pela empresa BACAMASO; durante as etapas finais das negociações, a vendedora informou à compradora que, até aquele momento, sua investigação interna não teria identificado práticas anticoncorrenciais; a compradora, porém, sabia que havia um inquérito contra a vendedora tramitando no CADE—Conselho Administrativo de Defesa Econômica, uma autarquia federal brasileira, vinculada ao Ministério da Justiça, que zela pela livre concorrência no mercado; sem informar a vendedora sobre isso, a compradora negociou a inserção de uma cláusula *pro-sandbagging* no contrato de alienação societária.[40] Os participantes dessa competição, inclusive os avaliadores, travaram bons debates a respeito da possibilidade de a compradora ser indenizada pela vendedora.

Tratar de *sandbagging* não é simples. No Brasil, parece-me que esse tema ainda é pouco explorado pela doutrina e pouco ou quase nada enfrentado pelo Poder Judiciário. Viu-se que a arbitragem é um campo fértil para resolver disputas envolvendo cláusulas como essa. Caberá às partes indicar árbitros tecnicamente qualificados para julgar disputas complexas envolvendo transações de M&A.

D. *Contratos coligados e cláusulas de resolução de disputas conflitantes*

O quarto e último tópico diz respeito a possíveis inconsistências entre cláusulas de resolução de disputas inseridas em contratos relacionados a uma mesma operação de M&A. Esse tema é igualmente delicado. Cláusulas desse tipo, inclusive cláusulas arbitrais, por vezes não são objeto do mesmo grau de cuidado que outras cláusulas constantes de um contrato de alienação societária.[41]

[40] Caso com esclarecimentos – Competição brasileira de arbitragem e mediação empresarial CAMARB, CAMARB – Câmara de Mediação e Arbitragem Empresarial (Jul. 22, 2022), https://camarb.com.br/en/wp-content/uploads/2020/06/xi-cbam-caso-final-com-esclarecimentos-e-correcoes.pdf.

[41] "Despite the crucial importance of the arbitration agreement, since it is, as stated, the source of the jurisdiction of the arbitral tribunals, … the parties do not put due care upon drafting their arbitrating agreements, especially as regards to contractual clauses. … the arbitration

De saída, avulta registrar que não há, em regra, óbice à existência concomitante de uma cláusula arbitral e uma cláusula de eleição de foro em um mesmo contrato de M&A. Cada uma dessas cláusulas exerce função específica, sendo a cláusula compromissória indispensável para legitimar a jurisdição arbitral. O Superior Tribunal de Justiça já decidiu que a "cláusula de eleição de foro não é incompatível com o juízo arbitral, pois o âmbito de abrangência pode ser distinto, havendo necessidade de atuação do Poder Judiciário, por exemplo, para a concessão de medidas de urgência; execução da sentença arbitral; instituição da arbitragem quando uma das partes não a aceita de forma amigável."[42] Haveria inconsistência—e aqui reside a exceção à regra mencionada no início deste parágrafo—se tanto a cláusula arbitral quanto a cláusula de eleição de foro tivessem idêntica finalidade.

Suponha-se agora que uma operação de M&A demande, em razão de suas particularidades, a celebração de um contrato de compra e venda de ações e outro de cessão de crédito, este segundo para regulamentar o cumprimento de parte das obrigações ajustadas entre comprador e vendedor. Se o contrato principal contiver cláusula arbitral e o contrato de cessão de crédito silenciar sobre arbitragem, em qual foro seria resolvido eventual disputa envolvendo ambos os contratos: arbitragem, Poder Judiciário ou ambos? Entra em cena, aqui, o princípio da autonomia da vontade, do qual se extrai um elemento basilar da arbitragem: o consentimento das partes quanto à jurisdição arbitral.

O Superior Tribunal de Justiça já enfrentou questão como essa, tendo considerado possível estender os efeitos da cláusula compromissória prevista no contrato principal ao contrato de cessão de crédito, ainda que este não dispusesse sobre arbitragem. A síntese do julgamento, ainda que extensa, bem ilustra o cenário fático da disputa e as conclusões da referida corte:

> 1. Controverte-se … se a cláusula compromissória arbitral,

clause is usually seconded and left to last, after all the substantive points of the contract that the parties wish to conclude have already been negotiated and agreed. This is precisely why the arbitration clause is commonly referred to as the 'champagne' clause or the 'midnight' clause." (Paulo de Tarso Domingues, *The Arbitration Agreement*, *in* INTERNATIONAL ARBITRATION IN PORTUGAL 47, 49-50 [André Pereira da Fonseca, Dário Manuel Vicente, et al. eds., 2020]).

[42] STJ, REsp 904.813/PR, relatora Ministra Nancy Andrighi, Terceira Turma, 2011.

inserta no contrato de Compra e Venda de Quotas de Universidade e Outras Avenças - dito contrato principal -, deve ser estendida, a fim de atrair a competência do Tribunal arbitral para dirimir litígio advindo do contrato de cessão de direitos creditórios, àquele coligado. 2. A coligação contratual pode, eventualmente - e não necessariamente - ensejar a extensão da cláusula compromissória arbitral inserida no contrato principal ao contrato acessório a ele conexo se a indissociabilidade dos ajustes em coligação, evidenciada pela ausência de autonomia das obrigações ajustadas em cada contrato, considerado o elevado grau de interdependência, tornar impositiva a submissão de ambos os contratos à arbitragem, sem descurar, na medida do possível, da preservação da autonomia da vontade das partes contratantes de se submeterem à arbitragem. 2.1 Na hipótese, sobressai evidenciado que o contrato de cessão de crédito teve por objeto definir o modo pelo qual se daria o cumprimento de parte do pagamento estipulado no contrato principal de compra e venda. Trata-se, pois, de pactuação destinada justamente a dar consecução ao cumprimento de parte da obrigação estabelecida no contrato de compra e venda da Universidade em questão. Não há, assim, nenhuma autonomia das obrigações ajustadas no contrato acessório em relação ao principal, a viabilizar, de modo fragmentado e por jurisdições que não se comunicam, a análise de controvérsia advinda daquele (contrato de cessão de crédito), sem imiscuir-se nos contornos gizados nesse último (contrato de compra e venda). ... 3. A extensão objetiva do compromisso arbitral, nessa específica circunstância, não tem o condão de comprometer a autonomia da vontade das partes contratantes de submeterem à arbitragem, vetor basilar dessa jurisdição. Isso porque, quanto maior for o grau de interseção entre os ajustes integrantes do sistema contratual, sobretudo na hipótese de inexistir autonomia da obrigação estipulada no contrato acessório em relação àquela estabelecida no contrato principal, maior será a intensidade da participação dos atores contratuais nesse último ajuste, em que estipulada a cláusula compromissória arbitral. 4. Ademais, a abrangência da cláusula compromissória arbitral inserta no contrato principal, que não estabeleceu nenhuma ressalva em relação a ajuste coligado ali já previsto, revelaria, por si, a nítida intenção das partes signatárias de submeter à arbitragem todos os conflitos oriundos ou relacionados ao contrato de compra e venda da universidade, a autorizar a extensão objetiva da cláusula arbitral ao contrato de cessão de crédito a ele conexo. Nesse contexto, não impressiona o fato, em si, de o contrato acessório de cessão de crédito ter previsto cláusula de eleição de foro, devendo-se, pois, adequá-la às exceções estabelecidas no contrato principal, que foi expresso, e sem reservas, em instituir a arbitragem para todas as controvérsias oriundas do

> contrato de compra e venda da universidade ou a ele relacionados.[43]

Em outro caso—não relacionado a operações de M&A—, o Superior Tribunal de Justiça entendeu que, reconhecida a coligação contratual, seria "possível a extensão da cláusula compromissória prevista no contrato principal [de abertura de crédito] aos contratos de 'swap', pois integrantes de uma operação econômica única."[44] Tal decisão ressaltou, ademais, que no sistema de coligação contratual "o contrato reputado como sendo o principal determina as regras que deverão ser seguidas pelos demais instrumentos negociais que a este se ajustam, não sendo razoável que uma cláusula compromissória inserta naquele não tivesse seus efeitos estendidos aos demais."[45]

Pela leitura das decisões acima referenciadas, parece que o Superior Tribunal de Justiça considerou factível, sem afrontar a autonomia da vontade, submeter à jurisdição arbitral a resolução de disputas referentes inclusive a contratos (acessórios) que não continham cláusulas compromissórias. Para tanto, baseou-se na *teoria da operação econômica única*, aparentemente aplicável a operações de M&A.[46]

Há, porém, outras variáveis que tornam mais complicado o exame desse tema. Qual seria a solução para a hipótese de as partes signatárias do contrato principal de compra e venda de ações que contém cláusula arbitral não serem as mesmas que assinaram contrato acessório sem cláusula arbitral? A doutrina especializada já se pronunciou no seguinte sentido: "When the parties to the various contracts are not the same and the contracts do not contain compatible arbitration clauses, bringing

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[43] STJ, REsp 1.834.338/SP, relatora Ministra Nancy Andrighi, relator para acórdão Ministro Marco Aurélio Bellizze, Terceira Turma, 2020.

[44] STJ, REsp 1.639.035/SP, relator Ministro Paulo de Tarso Sanseverino, Terceira Turma, 2018.

[45] *Id.*

[46] "Whenever parties actually had the intention of being bound by a single agreement, which—in their mind—constituted a single unit, whose elements could not be dissociated, and whenever an economic link between the agreements demonstrates that there is a necessary interdependence between them, such agreements should not be appreciated separately. A refusal to consider obligations arising from related contracts as obligations resulting from one indivisible agreement would not be a compliance with modern law and practice involving contracts in international commercial arbitration." (Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L ARB. 43, 98 [1996]).

the disputes together in one single arbitration proceeding will generally not be possible."[47] Alguns regulamentos de arbitragem, como o da CCI, dispõem sobre o tema, na tentativa de evitar maiores problemas com relação a disputas envolvendo múltiplos contratos.[48]

Esse assunto requer reflexões aprofundadas e depende de uma série de fatores para que certas respostas sejam dadas. Entre dúvidas e incertezas, é certo que, se houver cláusula compromissória, eventuais divergências sobre a jurisdição arbitral deverão ser resolvidas pelos árbitros, em primeira mão e com prioridade temporal ao Poder Judiciário, por força do princípio da competência-competência.

IV. CONCLUSÃO

Eventos como o organizado pelo Young ITA a propósito da resolução de disputas de M&A pela via da arbitragem são necessários para que as complexidades sobre tal tema sejam ampla e francamente debatidas. Isso contribui não só para incentivar a produção acadêmica, como também para orientar advogados, empresas, empresários, juízes e profissionais que atuam como árbitros a melhor compreenderem os institutos jurídicos relacionados à prática de fusões e aquisições e a melhor se posicionarem em decisões estratégicas antes, durante e depois de concluída a transação. Espera-se que o Young ITA realize eventos similares no futuro.

As ideias e comentários que apresentei no decorrer deste artigo, como adiantado, basearam-se nos debates ocorridos durante o evento. Não pretendi esgotar a análise das matérias que abordei, mas, na medida do possível, procurei elucidar (ou questionar) determinadas discussões que, sem dúvida, não têm uma única resposta correta, mas são absolutamente relevantes na prática.

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[47] BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTI-PARTY, MULTI-CONTRACT, MULTI-ISSUE – A COMPARATIVE STUDY 228-9 (2 ed., 2020).

[48] "Article 9: Multiple Contracts. Subject to the provisions of Articles 6(3)-6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules." (ICC Rules of Arbitration (2012), art. 9, (Jul. 24, 2022), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

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