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DETERMINING QUESTIONS OF ARBITRABILITY: WHERE DO WE STAND AFTER SCHEIN?

by William W Russell

I. INTRODUCTION

The history of the *Henry Schein, Inc. v. Archer & White Sales, Inc.* case shows that some thresholds can be more difficult to cross than others. The parties in *Schein* spent almost a decade battling over where the battle should take place: court or arbitration. Even though the case settled prior to resolving all the issues surrounding this battle, the case law left in its wake provides a good summary of the current state of the law regarding the steps in determining arbitrability. The case also highlighted recent questions regarding the long-standing and ubiquitous understanding that incorporating most arbitration rules by reference into an arbitration agreement effectively delegates the arbitrability question to the arbitrators.

This article will discuss the necessary steps in determining the arbitrability question, including certain implicated issues such as the applicable law and the recent questions regarding the delegation of the arbitrability issue to the arbitrators.

II. BACKGROUND OF THE SCHEIN CASE

The *Schein* case involved an antitrust claim brought by Archer & White Sales, Inc. against Henry Schein, Inc. in 2012 in the Eastern District of Texas. The case went to the Fifth Circuit and the Supreme Court twice on arbitrability issues and finally settled in 2021.[1] In addition to economic damages, Archer sought injunctive relief, a fact that ultimately converted the arbitrability issue from a mere motion into an almost decade-long odyssey. The arbitration agreement in the Schein case had a split arbitration clause specifically excluding injunctive relief from its scope.[2]

The federal magistrate judge ruled that incorporating the AAA Commercial

[1] Bryan Koenig, *Dental Suppliers Settle Antitrust Dispute Ahead of Trial*, LAW360 (Apr. 26, 2021), https://www.law360.com/articles/1378719/dental-suppliers-settle-antitrust-dispute-ahead-of-trial.

[2] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5th Cir. 2017), vacated and remanded, 139 S. Ct. 524 (2019). The arbitration agreement covered in part "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief…)." *Id.*

Arbitration Rules and Mediation Procedures ("AAA Commercial Rules") in the arbitration clause meant that questions of arbitrability were to be decided by the arbitrator.[3] The district court judge disagreed, concluding that a motion to compel arbitration of an action seeking injunctive relief—the relief that was expressly excluded from the scope of the arbitration clause—was "wholly groundless" and did not need to be sent to the arbitrators.[4] The case ultimately worked its way to the Supreme Court on this issue, and the Court determined that the FAA does not contain a "wholly groundless" exception to submitting disputes to arbitration.[5] Foreshadowing the next stage of litigation, the Court made a point of expressing "no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator."[6]

On remand, the Fifth Circuit re-engaged the question of whether there was clear and unmistakable evidence of a delegation of the arbitrability issue based on the incorporation by reference of the AAA Commercial Rules. The court concluded that the standard was not met, reasoning that the AAA Commercial Rules (including the delegation found in those Rules) applied only to those claims that had not been carved out of the scope of the arbitration clause. The delegation language in the AAA Commercial Rules, therefore, did not apply to injunctive claims.[7] The Supreme Court granted certiorari on some issues, but refused to grant certiorari on the delegation question. After briefing and oral argument, the Court dismissed the second grant of certiorari as improvidently granted.[8] The case was settled shortly thereafter.[9]

[3] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-CV-572-JRG-RSP, 2013 WL 12155243, at *1 (E.D. Tex. May 28, 2013).

[4] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG, 2016 WL 7157421, at *8–9 (E.D. Tex. Dec. 7, 2016).

[5] *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

[6] *Id.* at 531.

[7] *Archer & White Sales, Inc.*, 935 F.3d 274, 282 (5th Cir. 2019).

[8] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 656 (2021).

[9] Koenig, *supra* note 1.

III. WHERE DO WE STAND IN THE WAKE OF SCHEIN? ANALYTICAL STEPS FOR DETERMINING ARBITRABILITY.

The *Schein* case is the latest pronouncement in the Court's guidance over the years regarding the analytical steps for determining whether or not a dispute is subject to arbitration. The analysis draws from federal common law on arbitrability and state law on contract interpretation. Therefore, a threshold question is what law governs these questions of arbitrability, and how do they relate to each other? Next, what analytical steps should a court or arbitrator follow to make this determination?

A. *What Law Governs Arbitrability Questions?*

Navigating the arbitrability rubric requires input from both federal and state law. It is not always clear how to delineate what territory is governed by the Federal Arbitration Act and its associated common law, and what territory is governed by the state arbitration acts and common law.

1. Role of the Federal Arbitration Act and Federal Common Law

The Federal Arbitration Act ("FAA") provides the framework for determining arbitrability issues governed by the FAA. The FAA extends to any contract "affecting commerce," *i.e.*, as far as the Commerce Clause will reach.[10] Section 2 of the FAA– "the primary substantive provision of the Act"–sets forth the federal mandate that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[11] Such grounds include state-law issues regarding contract validity and formation.[12] The *Moses H. Cone* Court observed that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary . . . [the] effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[13]

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[10] *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

[11] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); 9 U.S.C. § 2.

[12] *Rent–A–Center, W., Inc. v. Jackson*, 561 U.S. 63, 79 (2010); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

[13] *Moses H. Cone*, 460 U.S. at 24.

For arbitration agreements covered by the FAA, "the court is to make the arbitrability determination by applying the federal substantive law of arbitrability."[14] The FAA establishes that "as a matter of federal law, any doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[15]

2. Role of State Arbitration Acts and State Common Law

Notwithstanding the broad scope addressed by federal arbitration law, the resolution of many arbitrability questions turn on state law.

(i) Role of State Common Law

Despite the federal presence in this field, state contract law and arbitration law play a role in making arbitrability determinations: "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below [regarding clear and unmistakable evidence of delegation]) should apply ordinary state-law principles that govern the formation of contracts."[16] The FAA does not "reflect a congressional intent to occupy the entire field of arbitration."[17] The *Volt* Court confirmed that the FAA does not prohibit the application of state arbitration acts simultaneously with the FAA, as long as the provisions of the state act do not conflict with the objectives of the FAA.[18]

The Supreme Court of Texas endeavored to delineate the metes and bounds of these bodies of law: "under the FAA, state law governs whether a litigant agreed to arbitrate, and federal law governs the scope of an arbitration clause."[19] These bodies of law exist in harmony. Texas appellate courts have observed that "because many of

[14] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *see also Moses H. Cone*, 460 U.S. at 24–25, n.31 ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

[15] *Moses H. Cone*, 460 U.S. at 24–25 (emphasis added).

[16] *First Options of Chic., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

[17] *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

[18] *Id.* at 475–76.

[19] *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005).

the underlying substantive principles are the same, when appropriate, we rely on both federal and state case law."[20] The US Supreme Court delineated the outer limits of the applicability of state law by explaining that while FAA Section 2's "saving clause[21] preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[22]

Federal law certainly has occupied some of this state-law territory. For example, the "clear and unmistakable" evidence standard for delegating the issue of arbitrability to the arbitrator is a federal edict on contract interpretation rules. The Supreme Court explained that "it is an 'interpretive rule,' based on an assumption about the parties' expectations."[23] The *Volt* Court also illustrated how the federal presumption favoring arbitration meshes with state contract law:

> [I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.[24]

The delineation between state and federal law is not always clear.[25] For example, the Supreme Court of Texas struggled with this issue in the context of non-signatories observing that "it is not entirely clear what substantive law governs whether a nonparty must arbitrate."[26] Regarding procedural issues, the court explained: "[w]hen Texas courts are called on to decide if disputed claims fall within

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[20] *Hous. NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 906 (Tex. App. 2019, pet. denied); *see also Weekley Homes*, 180 S.W.3d at 131 (applying "state law while endeavoring to keep it as consistent as possible with federal law").

[21] Section 2's savings clause provides in relevant part: "… save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

[22] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (finding a California law making class arbitration waivers unconscionable to be in conflict with the FAA, and therefore, preempted); *see also Rent–A–Center*, 561 U.S. at 72 (upholding delegation clause against unconscionability challenge under Nevada law).

[23] *Rent–A–Center*, 561 U.S. at 79, n.1 (discussing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

[24] *Volt Info. Scis.*, 489 U.S. at 476.

[25] *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (noting that whether state or federal law of arbitrability applies "is often an uncertain question").

[26] *In re Weekley Homes*, 180 S.W.3d at 130–31.

the scope of an arbitration clause under the [FAA], Texas procedure controls that determination."[27]

The FAA and the associated federal case law create a body of federal substantive law on these arbitrability issues.[28] Nonetheless, analysis of issues of contract formation, validity, and grounds for revocation as referenced in Section 2's savings clause draw from state-law principles that govern the formation of contracts.[29] As summarized in generalities by the Supreme Court of Texas, state law governs whether the parties agreed to arbitrate, and federal law governs the scope of an arbitration agreement.[30] These state-law contract interpretation principles, however, are subject to being overwritten by federal arbitration substantive law.[31]

(ii) Role of State Arbitration Acts

In *Volt*, the Supreme Court confirmed that application of state arbitration acts simultaneously with the FAA is permitted, as long as the provisions of the state acts do not conflict with the objectives of the FAA.[32] Under *Volt* and *Mastrobuono*, if the parties elect to proceed under a state arbitration act instead of the FAA, that decision will be respected to the extent those acts are not in conflict with the FAA. If the parties do not make such an express selection, the application of state arbitration acts is less clear.

In the international arbitration field, it is relatively well accepted that selection of the seat of arbitration activates that country's arbitration act as the procedural law of the arbitration, referred to as the *Lex Arbitri* or curial law. As recognized by multiple federal courts, "[u]nder the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies

[27] *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992).

[28] *Moses H. Cone*, 460 U.S. at 24.

[29] *First Options*, 514 U.S. at 944.

[30] *Weekley Homes*, 180 S.W.3d at 130.

[31] *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

[32] *Volt Info. Scis.*, 489 U.S. at 475–76; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

to the arbitration."[33]

In fact, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (commonly referred to as the "New York Convention") establishes the seat of arbitration as the "primary jurisdiction:" "[u]nder the Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have primary jurisdiction over the arbitration award."[34]

For US arbitrations covered by Chapter 2 or 3 of the FAA (implementing the New York Convention and the related Panama Convention respectively), the FAA is likely to be the applicable arbitration law. The drafting committee of the Revised Uniform Arbitration Act set forth its view on the limited application of state arbitration acts in the international context:

> There are two instances where state arbitration law might apply in the international context: (1) where the parties designate a specific state arbitration law to govern the international arbitration and (2) where all parties to an arbitration proceeding involving an international transaction decide to proceed on a matter in state court and do not exercise their rights of removal under Chapter 2 of Title 9 and the relevant provision of state arbitration law is not preempted by federal arbitration law or the New York Convention.[35]

There is very little authority discussing whether the seat determines the procedural law of arbitration in the domestic arbitration context. Nonetheless, for proceedings in Texas state courts, courts will look to the Texas General Arbitration Act.[36] If the arbitration is also covered by the FAA, Texas courts have provided practical guidance:

> We note that the FAA and the TAA are not mutually exclusive. Even where the FAA applies to substantive issues, we apply Texas law to procedural issues in

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[33] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan*, 364 F.3d 274, 291 (5th Cir. 2004); *see also Balkan Energy Ltd. v. Republic of Ghana*, 302 F.Supp.3d 144, 152–53 (D.D.C. 2018) ("In this case, because the parties designated in the arbitral clause that The Hague, Netherlands was to serve as the seat of arbitration, Dutch law supplied the law applicable to the arbitration agreement."), appeal dismissed, 2018 WL 5115571 (D.C. Cir. Oct. 12, 2018).

[34] *Karaha Bodas Co.*, 364 F.3d at 287 (citing Art. V of the New York Convention, insertions in original).

[35] UNIF. ARB. ACT, Prefatory Note, at 6 (NAT'L CONF. COMM'RS 2000), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cf35cea8-4434-0d6b-408d-756f961489af.

[36] Texas Alternate Methods of Dispute Resolution, General Arbitration Act, CIV. PRAC. & REM. CODE § 171; *see also* Texas Arbitration and Conciliation of International Commercial Disputes Act, CIV. PRAC. CODE & REM. § 172.

> arbitration proceedings. Here, we need not determine whether confirmation of an award is procedural or substantive or which act applies because our conclusion would be the same under either act.[37]

Accordingly, the application of the Texas Arbitration Act ("TAA") in disputes which are also governed by the FAA is not clearly defined. Some guiding principles include that courts should endeavor to read the acts in harmony, and at least in Texas courts, procedural issues can be controlled by the TAA while substantive issues can be controlled by the FAA.

B. *Steps to Determine Arbitrability*

The *Schein* case and its Supreme Court predecessors laid out several steps and presumptions for the determination of whether a dispute is arbitrable. The threshold questions are (i) whether there is an agreement to arbitrate between the parties; and (ii) whether the agreement covers the dispute [38] The Supreme Court has also recognized that the arbitrability question can be delegated to an arbitrator if "the parties clearly and unmistakably provide" for such delegation to the arbitrator.[39]

1. Question 1: Is there an Agreement to Arbitrate?

The first step is to determine "whether the parties entered into any arbitration agreement at all."[40] The *Rent–A–Center* Court confirmed that the "FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms."[41] The Supreme Court has repeatedly pointed out that this is a question for the court: "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."[42]

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[37] *Cambridge Legacy Grp., Inc. v. Jain*, 407 S.W.3d 443, 448 (Tex. App. 2013, pet. denied) (citations omitted); *see also Hou. NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 906 n.6 (Tex. App. 2019, pet. denied) ("[B]ecause many of the underlying substantive principles are the same, when appropriate, we rely on both federal and state case law."); *In re Weekley Homes*, 180 S.W.3d at 131 (applying "state law while endeavoring to keep it as consistent as possible with federal law").

[38] *Howsam*, 537 U.S. at 84.

[39] *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *see also First Options*, 514 U.S. at 944.

[40] *Archer & White Sales*, 935 F.3d at 278 (citation and emphasis omitted).

[41] *Rent–A–Center*, 561 U.S. at 67–68.

[42] *Schein*, 139 S. Ct. at 530.

2. Question 2(A): Who Determines Arbitrability?

(i) Default: Court Decision

If a valid arbitration agreement exists, the next question is whether the dispute falls within the scope of that agreement. A threshold question is who decides this question of arbitrability?[43] The general rule is that "the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[44]

The Supreme Court has made clear that the presumption in favor of arbitration does *not* apply to the question of "whether the parties have submitted a particular dispute to arbitration."[45] To the contrary, the Supreme Court has created a presumption in favor of judicial determination of whether the dispute is arbitrable, which can only be overcome with clear and unmistakable evidence to the contrary.[46]

(ii) Delegation to Arbitrator: Clear and Unmistakable Evidence

AT&T and its progeny make clear that "parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence."[47] The "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."[48]

The Supreme Court in Schein summarized the reasoning in *First Options* and *Rent-A-Center* as follows:

> Under the [Federal Arbitration] Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. Applying

[43] The scope of "arbitrability" includes several components. For example, it includes questions of "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Schein*, 139 S. Ct. at 529; *see also Rent--A-Center*, 561 U.S. at 69.

[44] *AT&T Techs.*, 475 U.S. at 649 (emphasis added).

[45] *Howsam*, 537 U.S. at 83.

[46] *Id.*; *see also AT&T Techs.*, 475 U.S. at 649.

[47] *See Schein*, 139 S. Ct. at 530; *AT&T Techs.*, 475 U.S. at 649; *First Options*, 514 U.S. at 944; *Rent-A-Center*, 561 U.S. at 69 n.1.

[48] *Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 70).

> the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. We have explained that an agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.[49]

Overcoming the presumption that arbitrability questions are for the court is subject to a heightened standard: "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[50] As *First Options* explained, this reverses the presumption in favor of arbitration:

> In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"–for in respect to this latter question the law reverses the presumption.[51]

Therefore, the court must determine whether the parties displayed clear and unmistakable evidence of their intent to delegate the arbitrability issue to the arbitrators.

(iii) Clear and Unmistakable Evidence: Express Statement in the Arbitration Clause

Courts have analyzed various purported delegation scenarios under this heightened standard. Courts have held that the parties can meet this standard, of course, by including an express delegation clause in their agreement to arbitrate. For example, the arbitration clause in *Rent-A-Center* stated as follows: "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this [agreement to arbitrate]."[52] Such express language in the clause constitutes

[49] *Id.* (citations and quotation marks omitted)

[50] *First Options*, 514 U.S. at 944; *see also Rent–A–Center*, 561 U.S. at 70, n.1; *Schein*, 139 S. Ct. at 530, 531.

[51] *First Options*, 514 U.S. at 944–45 (citing *Mitsubishi Motors*, 473 U.S. at 626 for the statement regarding "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

[52] *Rent–A–Center*, 561 U.S. at 66; *see also Carson v. Giant Food, Inc.*, 175 F.3d 325, 330–31 (4th Cir. 1999) (explaining that parties "who wish to let an arbitrator decide which issues are arbitrable need only state that 'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect").

clear and unmistakable evidence of the intent to delegate the arbitrability issues to the arbitrator.

(iv) Clear and Unmistakable Evidence: Incorporation of Arbitration Rules in the Arbitration Clause

Virtually all federal circuit courts have found that the parties can meet the clear and unmistakable evidence standard merely by incorporating by reference arbitration rules that give the arbitrator jurisdiction to determine its own jurisdiction.[53] In international arbitration circles, this is often referred to as "competence-competence" language. For example, Rule 7(a) of the AAA Commercial Rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."[54]

The Fifth Circuit has held that "stipulating that the AAA Rules will govern the arbitration of disputes constitutes such 'clear and unmistakable' evidence."[55] Virtually every federal circuit is in accord.[56] Such delegation clauses are common throughout the major administrative bodies' domestic[57] and international[58]

[53] *See infra* note 56.

[54] AAA Commercial Arbitration Rules and Mediation Procedures (2013), Rule 7(a) [hereinafter "AAA Rules"].

[55] *Arnold v. HomeAway, Inc.*, 890 F.3d 546, 552 (5th Cir. 2018); *see also Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012).

[56] *See, e.g.*, *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (ICC Rules); *Emilio v. Sprint Spectrum L.P.*, 508 Fed.Appx. 3 (2d Cir. 2013) (JAMS Rules); *Richardson v. Coverall N. Am.*, Inc., 2020 U.S. App. LEXIS 13568 (3d Cir. 2020) (AAA Rules); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 530 (4th Cir. 2017) (JAMS Rules); *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 851 (6th Cir. 2020) (AAA Rules); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009) (AAA Rules); *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015) (AAA Rules); *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017) (JAMS Rules); *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018) (AAA Rules); *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 207–08 (D.C. Cir. 2015) (UNCITRAL Rules); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (AAA Rules).

[57] *See, e.g.*, AAA Rules, *supra* note 54, Rule 7(a); CPR Administered Arbitration Rules (Mar. 1, 2019), Rule 8.1; CPR Non-Administered Arbitration Rules (Mar. 1, 2018), Rule 8.1; JAMS Comprehensive Arbitration Rules & Procedures (June 1, 2021), Rule 11(b); JAMS Engineering & Construction Arbitration Rules & Procedures (June 1, 2021), Rule 11(b).

[58] *See, e.g.*, China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (Jan. 1, 2015), Rule 6.1; CPR Administered Arbitration Rules (Mar. 1, 2019), Rule 8.1; CPR Non-Administered Arbitration Rules (Mar. 1, 2018), Rule 8.1; Dubai International Arbitration Centre Arbitration Rules (May 7, 2007), Rule 6.2; 2018 HKIAC Administered Arbitration Rules (Nov. 1, 2018), Rule 19.1; ICC Rules Arbitration

arbitration rules.

However, this ubiquitous agreement regarding the effectiveness of incorporation of arbitration rules has been questioned recently and was squarely before the Court in *Schein*. In its second trip to the Supreme Court, however, the Court refused to grant certiorari on this question. Presumably, this is due to the unanimity in the lower courts on this issue.[59]

On the other hand, some notable arbitration practitioners, thought leaders, publications, and lower courts deviate from the consensus. Most notably, the ALI's Restatement of the US Law of International Commercial and Investor-State Arbitration (the "Restatement") takes the opposite view regarding whether the incorporation of arbitration rules meets the "clear and unmistakable" evidence standard.[60] Professor George Bermann, the chief reporter for the Restatement filed an amicus brief in both *Schein* Supreme Court proceedings.[61] His argument tracked the reasoning in the Restatement. First, the incorporation by reference of arbitration rules does not constitute clear and unmistakable evidence. Second, competence-competence clauses allow tribunals to determine their authority, but they do not deprive courts of their authority. Third, competence-competence clauses are ubiquitous in arbitration rules, treating them as "clear and unmistakable evidence" would effectively undermine the elevated standard set by *First Options*. Fourth, to be truly "clear and unmistakable," the delegation belongs in an arbitration agreement

(2021), Art. 6.3; ICDR International Arbitration Rules (Mar. 1, 2021), Art. 21(1); JAMS International Arbitration Rules & Procedures (June 1, 2021), Rule 5.4; LCIA Arbitration Rules (Oct. 1, 2020), Rule 23.1; Singapore International Arbitration Centre Arbitration Rules (Aug. 1, 2016), Rule 28.2; UNCITRAL Arbitration Rules (2013), Rule 23(1); WIPO Arbitration Rules (July 1, 2021), Rule 36(a).

[59] *In re Intuniv Antitrust Litig.*, Civil Action No. 1:16-cv-12653-ADB, 2021 WL 517386, at * 4, n.3 (D. Mass. Feb. 11, 2021) (observing that the procedural history of Schein II "suggest[s] that [the Court] was not troubled by the state of the law regarding the significance of incorporating the AAA's rules").

[60] RESTATEMENT OF INT'L COM. & INV.-STATE ARB., § 2.8 cmt. B, n.b(iii) (2019) (Competence of the Tribunal to Determine its Own Jurisdiction).

[61] *See* Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent, *Schein*, 139 S. Ct. 524 (No. 19-963), http://www.supremecourt.gov/DocketPDF/19/19-963/158091/20201019132229861_Brief%20of%20Amicus%20Curiae%20Professor%20George%20A.%20Bermann.pdf (hereinafter "Bermann Brief").

itself, not buried in referenced rules of arbitral procedure.[62]

In his brief, Professor Bermann underscored the importance of judicial determination of arbitrability questions set forth in *First Options*.[63] Starting with the FAA, Section 4 authorizes a court to compel arbitration "upon being satisfied that the making of the agreement for arbitration . . . is not in issue."[64] He reasoned that these "gateway" arbitrability issues are an important component of the consent foundation upon which arbitration is built, and therefore, they directly impact the legitimacy of arbitration as a whole.[65] At the very core of arbitration is the understanding that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."[66]

He reasoned further that although incorporating arbitration rules with a competence-competence clause may provide the tribunal the power to determine its own jurisdiction, it does not deprive the courts of their important role in determining arbitrability questions.[67] This is also known as the "positive" and "negative" dimensions of competence-competence. The positive dimension confirms the tribunal's authority to determine its own jurisdiction, and the negative dimension deprives the courts of their authority to determine the arbitrability questions (prior to the arbitration).[68] Professor Bermann noted that the language of common arbitration rules grant the tribunal authority, but they do not contain language divesting the court of its jurisdiction.[69] Justice Ginsburg drew on this rationale in a

[62] *Id.* at 14.

[63] *Id.* at 24.

[64] 9 U.S.C. § 4.

[65] Bermann Brief at 3–4.

[66] *AT&T Techs.*, 475 U.S. at 648–49; *see also First Options*, 514 U.S. at 945 ("[O]ne can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.").

[67] Some have argued that the phrase "shall have the power" does not even constitute a mandatory directive, much less an unwritten exclusion of the court's power. *See Doe v. Natt*, 299 So. 3d 599 (Fla. 2d DCA 2020).

[68] Bermann Brief at 21–22.

[69] *Id.* at 15.

question in Schein I's oral argument: "why can't it be both; that is, that the arbitrator has this authority to decide questions of arbitrability, but it is not exclusive of the court?"[70] Professor Bermann and the Restatement contend that a reference only to the positive dimension is too oblique to inform parties of the negative dimension and therefore cannot meet the clear-and-unmistakable evidence standard.[71]

In response to the unanimity of the federal circuits on this issue, Professor Bermann contended that those courts "have offered no serious support for the proposition" that incorporation of the rules by reference meets the clear-and-unmistakable-evidence test.[72] He characterized these opinions as either making mere perfunctory and conclusory decisions or relying on those perfunctory conclusions.[73]

Professor Bermann and the Restatement are not alone in taking this position. In his brief, Professor Bermann cited various federal district courts and state courts following this reasoning and holding that the purported delegation does not deprive the court of its jurisdiction over such arbitrability questions.[74]

The Florida Supreme Court recently addressed this issue. The intermediate Florida court of appeals considered whether incorporation by reference of the AAA Commercial Rules in an Airbnb "clickwrap" agreement constituted clear-and-unmistakable evidence of delegation.[75] The court of appeals articulated many of the

[70] Transcript of Oral Argument at 7, *Schein*, 139 S. Ct. 524 (No. 17-1272). *See also id.* at 18 ("When the model case is this Court's Rent-a-Car decision, and there the clause said the arbitrator, not the court, has exclusive authority. And, here, we --we're missing both the arbitrator, to the exclusion of the court, and the arbitrator has exclusive authority. It's nothing like that."); Bermann Brief at 5.

[71] Bermann Brief at 24.

[72] *Id.* at 16.

[73] *Id.*

[74] *See, e.g.*, *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 789 (Cal. Ct. App. 2012) ("[T]he rule merely states that the arbitrator shall have 'the power' to determine issues of its own jurisdiction . . . . This tells the reader almost nothing, since a court also has the power to decide such issues, and nothing in the AAA rules states that the AAA arbitrator, as opposed to the court, shall determine those threshold issues, or has exclusive authority to do so . . . .") (emphasis omitted); *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016); *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181-82 (N.J. 2016); *Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 437 n.6 (S.D. 2005); *Fallang Fam. Ltd. P'ship v. Privcap Cos., LLC*, 316 So. 3d 344 (Fla. 4th DCA 2021).

[75] *Doe v. Natt*, 299 So. 3d 599, 605 (Fla. 2d DCA 2020).

grounds set forth by Professor Bermann and held:

> In the case at bar we have an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration is convened. That is not "clear and unmistakable evidence" that these parties agreed to delegate the "who decides" question of arbitrability from the court to an arbitrator. To the contrary, the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction.[76]

The Florida Supreme Court, however, addressed and rejected this "outlier" reasoning.[77] Regarding the argument that the delegation in the AAA Commercial Rules was not attached and only applied if an arbitration was convened, the court reasoned that the AAA Commercial Rules were incorporated into the agreement in the same fashion as various other extra-contractual policies, programs, rules, guides, and other materials were incorporated.[78] The incorporation of the AAA Commercial Rules is no less legally effective than the incorporation of these other documents and constitutes clear and unmistakable evidence of the parties' intent. The court cited the *Schein* case to dispatch the argument that the delegation provision of the AAA Commercial Rules only contained the positive dimension of competence-competence and did not contain the negative dimension, stating "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."[79]

3. Question 2(B): Determining Arbitrability

Once the existence of an agreement to arbitrate has been established, there is a recognized presumption in favor of arbitrability when determining the scope of the arbitration clause:

> [I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due

[76] *Id.* at 609.

[77] *Airbnb, Inc. v. Doe*, No. SC20-1167, 2022 Fla. Lexis 552, *12 (Fla. Mar. 31, 2022).

[78] *Id.* at *16–17.

[79] *Id.* at *17–18 (quoting *Schein*, 139 S. Ct. at 529–30.

> regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.[80]

When the presumption applies, a court should not deny arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[81]

IV. CONCLUSION

Although the threshold steps required to determine arbitrability are easy to identify, the Schein case demonstrates that sometimes they are difficult to cross. As with many arbitrability disputes, many of these problems can be avoided with careful drafting of the arbitration agreement. Nonetheless, if a party finds itself in an arbitrability dispute, it is worth the effort to carefully analyze the sequence of questions described above, applicable presumptions, and current issues in the courts relating to the determination of the arbitrability question.

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[80] *Volt Info. Scis.*, 489 U.S. at 475–76; *see also Moses H. Cone*, 460 U.S. at 24–25 ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

[81] *AT&T Techs.*, 475 U.S. at 650.

PARTY AUTONOMY AND ARBITRATOR'S LACK OF REASONING BRING DOWN SUBWAY AWARD

by Sean C. Sheely & Arantxa Cuadrado

I. INTRODUCTION

Senior District Judge Rakoff in the US District Court for the Southern District of New York recently vacated an international arbitration award on the grounds that the arbitrator exceeded her powers by deciding a claim that "was not presented by the parties and was not addressed in the underlying opinion."[1] This decision reinforces the principle of party autonomy by confirming that New York courts will enforce the agreement to arbitrate as written and offers important considerations for arbitration parties and practitioners in New York-seated international arbitrations. The relevant background, the court's reasoning, and a few key takeaways are addressed below.

II. BACKGROUND

The arbitration arose out of a dispute under a Master Franchise Agreement ("MFA") between Subway International B.V. ("SIBV" or "Respondent"), the international franchisor for the Subway quick service restaurant chain, and Subway Russia Franchising Company, LLC ("Subway Russia" or "Claimant"), its Russian franchisee. Subway Russia commenced an arbitration before the International Centre for Dispute Resolution ("ICDR") seeking a declaration that it had the right to renew the MFA for a two-year renewal term and that SIBV's notice of termination of the MFA was invalid (the "Renewal Claim"). In the alternative, Subway Russia argued that in July 2020 it had formed a new MFA, separate and apart from any renewal rights allegedly vested in the MFA, by accepting SIBV's December 2019 counter-offer to renew the MFA on new terms (the "Offer-Acceptance Claim").

The arbitrator found in Respondent SIBV's favor. In a partial final award, the arbitrator decided that "Claimant ha[d] no right to renew the MFA, in light of its existing defaults under the MFA at the time that Claimant provided notice of its intent

[1] *Subway Int'l, B.V. v. Subway Russ. Franchising Co., LLC*, 21-cv-7362 (JSR), 2021 WL 5830651, at *4 (S.D.N.Y. Dec. 8, 2021).

to renew and thereafter."[2] The arbitrator made no findings of fact and did not expressly rule on Subway Russia's alternative Offer-Acceptance Claim. In her Final Award issued without any further substantive proceedings, the arbitrator stated that the award was "in full settlement of all claims and counterclaims submitted to this Arbitration."[3]

Subway Russia opposed SIBV's petition in the District Court to confirm the award which, "if enforced, would result in a loss to Subway Russia of its $60 million business."[4] The District Court vacated the award under 9 U.S.C. § 10(a)(4) pursuant to which an award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[5]

III. SUBWAY RUSSIA DID NOT SEEK THE ARBITRATOR'S DETERMINATION ON THE OFFER-ACCEPTANCE CLAIM

First, the District Court found that the arbitrator erred by purporting to determine Subway Russia's Offer-Acceptance Claim when the Parties had not presented that issue to the arbitrator for determination as part of their cross-motions for partial summary judgment.[6] Subway Russia submitted a motion for summary judgment[7] seeking declaratory relief from the arbitrator that SIBV invalidly terminated the MFA and Subway Russia was entitled to renew the MFA on the same terms and conditions.[8] Subway Russia, however, reserved its alternative Offer-Acceptance Claim "for determination in further proceedings in this arbitration."[9] The arbitrator, however, issued the Final Award, following the Parties' motions for

[2] Subway Int'l, B.V. v. Subway Russ. Franchising Co., LLC, ICDR, Partial Final Award, 22 (July 14, 2021).

[3] Subway Int'l, B.V. v. Subway Russ. Franchising Co., LLC, ICDR, Final Award, 3 (July 26, 2021).

[4] Respondent's Answer to Petition and Cross-Petition to Vacate Arbitration Award at ¶ 3, *Subway Int'l, B.V. v. Subway Russ. Franchising Co., LLC*, 21-cv-7362 (JSR), 2021 WL 5830651 (S.D.N.Y. Dec. 8, 2021).

[5] 9 U.S.C. § 10(a)(4).

[6] *Subway Int'l, B.V.*, 2021 WL 5830651 at *4.

[7] The Case Management Order allowed the Parties to file dispositive motions. *Subway Int'l, B.V.*, ICDR, Partial Final Award, 1–2.

[8] *Subway Int'l, B.V.*, ICDR, Partial Final Award, 2–3.

[9] *Id.*, at n.14.

summary judgment and without any evidentiary hearing "in full settlement of *all claims* and counterclaims submitted to this Arbitration,"[10] therefore including the Offer-Acceptance Claim. According to the District Court, the Final Award "decided a claim that the [Partial Final Award] had expressly acknowledged was not presented by the parties."[11]

The District Court's decision to set aside the award for deciding the Offer-Acceptance Claim is consistent with *Matter of Colorado Energy Mgmt., LLC v. Lea Power Partners, LLC*. In that case, the court held that the arbitrator exceeded his authority by finding that respondent breached an Engineering Procurement and Construction contract and awarding damages for cost overruns where claimant only presented a claim alleging a gross negligence theory for recovery.[12]

IV. THE ARBITRATOR MADE NO FACTUAL FINDINGS OR LEGAL CONCLUSIONS ON THE OFFER-ACCEPTANCE CLAIM

Second, the District Court held that the Arbitrator "provide[d] no findings of fact or conclusions of law that support the decree in SIBV's favor on the question of whether Subway Russia consummated a new MFA via acceptance of the allegedly open offer extended on December 19, 2019."[13] In other words, the arbitrator decided the Offer-Acceptance Claim without setting forth in the award any legal or factual basis for the determination. Because the Arbitrator did not "provide . . . even a barely colorable justification for the arbitrator's interpretation of the contract," the District Court vacated the award under 9 U.S.C. § 10(a)(4).[14]

Judge Rakoff's decision is noteworthy because it navigates a path that courts have

[10] *Subway Int'l, B.V.*, ICDR, Final Award, 3 (emphasis added).

[11] *Subway Int'l, B.V.*, 2021 WL 5830651, at *4.

[12] *Matter of Colorado Energy Mgmt., LLC v. Lea Power Partners*, LLC, 114 A.D.3d 561, 564 (1st Dep't 2014); *see also Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991) ("if arbitrators 'rule . . . on issues not presented to [them] by the parties, [they have] exceeded [their] authority and the award must be vacated'"). *See also Emilio v. Sprint Spectrum L.P.*, 508 F. App'x 3, 4 (2d Cir. 2013) ("A district court may vacate an arbitral award under §10(a)(4) if 'the arbitrator[] exceeded [her] powers,' which may be evidenced by (1) consideration of issues beyond those submitted by the parties, or (2) resolution of issues 'clearly prohibited by law or by the terms of the parties' agreement'").

[13] *Subway Int'l, B.V.*, 2021 WL 5830651 at *5.

[14] *Id.*

"consistently accorded the narrowest of readings" to vacate an award under 9 U.S.C. § 10(a)(4).[15] "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable."[16] For Judge Rakoff, not including any factual or legal basis to decide a claim met the standard to vacate an award under 9 U.S.C. § 10(a)(4).

V. SUBWAY RUSSIA REQUESTED AN EVIDENTIARY HEARING

Third, the District Court found that Subway Russia was entitled to an evidentiary hearing on its alternative Offer-Acceptance Claim, "rather than a decision on the papers,"[17] which it did not get. Arbitration is a creature of contract and, here, the Parties' arbitration agreement expressly provided that "an award should be made on the basis of the files and records unless one of the parties expressly desires an oral hearing."[18] Subway Russia requested an evidentiary hearing in its Statement of Claim[19] and, then again, asked for an evidentiary hearing on the Offer-Acceptance Claim during the hearing on the cross-motions to dismiss.[20] But the arbitrator ruled on Subway Russia's Offer-Acceptance Claim without an evidentiary hearing, noting in a footnote that "the parties agreed that if it [was] determined that Subway Russia was properly terminated or had no right to renew, then there would be no need to proceed to the evidentiary hearing on any other claims."[21]

Judge Rakoff's decision to set aside the award based on the language of the arbitration agreement and Subway Russia's repeated requests that an evidentiary hearing be held, is consistent with the recognition by US courts of party autonomy

[15] *ReliaStar Life Ins. Co. of NewYork v. EMC Nat'l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009).

[16] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (internal quotation marks and citations omitted; alterations in original).

[17] *Subway Int'l, B.V.*, 2021 WL 5830651 at *5.

[18] Master Franchise Agreement between Subway International B.V. and Subway Russia Franchising Company, LLC ¶ 23(A)(2) (July 25, 2013).

[19] Respondent's Answer to Petition and Cross-Petition to Vacate Arbitration Award, ¶ 114 at *Subway Int'l, B.V., 21-cv-7362 (JSR)* (Oct. 4, 2021).

[20] Hearing on the Dispositive Motions, 8–9 at *Subway Int'l, B.V., LLC*, 21-cv-7362 (JSR) (July 1, 2021).

[21] *Subway Int'l, B.V.*, ICDR, Partial Final Award, n.4.

and a party's right to a hearing as fundamental principles in arbitration.[22]

VI. IMPACT OF THE DECISION

The District Court's decision is an instructive reminder of the importance of the concept of party autonomy in international arbitration. In *Subway International, B.V. v. Subway Russia Franchising Co., LLC*, the applicable arbitration agreement provided a streamlined procedure for a determination without a hearing unless one of the parties requested a hearing. By setting aside the arbitration award where the arbitrator did not hold a hearing as requested by one of the parties during the proceedings, the District Court recognized the parties' freedom to define and control the procedural aspects of the arbitration.

The District Court's decision also sets parameters for arbitrators, counsel, and courts in relation to future applications to confirm and vacate arbitration awards. In particular, under 9 U.S.C. § 10(a)(4), arbitrators should be mindful to draft an award determining only the issues presented by the parties and including findings of fact or conclusions of law to support each decree. In *Subway International, B.V. v. Subway Russia Franchising Co., LLC*, the District Court decided that the Offer-Acceptance Claim was not presented by the parties and concluded that the arbitrator's award which was "in full settlement of all claims and counterclaims submitted to this Arbitration" contained no reasoning sufficient to support any factual or legal basis to decide Russia Subway's alternative Offer-Acceptance Claim.

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[22] *Smaligo v. Fireman's Fund Ins. Co.*, 247 A.2d 577, 580 (PA. 1968) ("an award is not binding where there has been a denial of a hearing."); *see also* RESTATEMENT (THIRD) OF INT'L COM. ARB. § 4-19, Rep. n.c (2019) ("Generally, denial of a party's request to have even a single oral hearing may be grounds for denying recognition or enforcement.").

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THE SULTAN OF SULU AWARD: IS IT ENFORCEABLE IN THE US UNDER THE NEW YORK CONVENTION?

by Gary J. Shaw & Rafael T. Boza

I. INTRODUCTION

The Sulu Sultanate is a small portion of the north-eastern corner of the island of Borneo, along with other small islands surrounding the Sea of Sulu. The Sultanate is the 13th State of the Malay Federation ("Malaysia").

The Sultanate's story recently took a turn with the issuance of the Final Award in the *ad hoc* arbitration against Malaysia for US$14.92 billion.[1] In recent years, the heirs of the former Sultan of Sulu have been pursuing an *ad hoc* arbitration against Malaysia for non-payment of rents allegedly due under a 150-year-old agreement. Malaysia did not participate in the arbitration, and while the proceedings were ongoing, a number of different courts from multiple countries issued conflicting decisions on whether the arbitration should proceed. This article will describe the history of the dispute, both factually and procedurally and assess whether the massive Award is enforceable in the US pursuant to the New York Convention.

II. BACKGROUND

The story begins in the mid-nineteenth century. The Spanish Kingdom, the British Empire, the Dutch Kingdom, and other colonial powers were vying for power in southeast Asia. The Spanish Kingdom had colonized the Philippines in the early 1500s, which is near Borneo and the Sultanate's islands. The Spanish Kingdom was expanding throughout the region. The British empire had control of India, the modern Myanmar, and many of its adjacent lands, including the Malay Peninsula, Singapore, and the western part of Borneo.

In April 1851, the Sultanate of Sulu and the Kingdom of Spain signed an agreement by which the Sultanate submitted to Spanish rule and secured Sulu's trade to the Philippine Islands. British influence continued to expand in neighboring areas however, including Brunei, which is also located on Borneo.

[1] Nurhima Kiram Fornan v. Malaysia, Final Award (Ad Hoc) (Feb. 28, 2022) (G. Stampa Arb.).

In January 1878, the then Sultan of Sulu Jamal A'lam either ceded or leased the Sultanate's property on Borneo to the British North Borneo Company for an annual payment of $5,000 in Mexican currency of the time.[2] These concessions were in many ways concessions to the British Crown since the Company had ties to the British Government.[3] Spain protested the deal as it was not consulted per the 1851 Treaty.[4] Ultimately, however, Spain ceded all sovereignty over the Sultanate's property as part of a larger agreement with the UK and Germany.[5]

For the next sixty years, the British North Borneo Company exercised control over the area with no serious issues. In 1942, Japan occupied the area, only to surrender it in 1945. In 1946 the territory became an actual British Colony.[6] North Borneo then gained independence from Great Britain in the 1960s, and formally joined the Federation of Malaysia around 1963.[7]

According to the heirs, Malaysia honored the 1878 Agreement up until 2013, when it stopped making payments. In late 2017, the heirs served the Malaysian Embassy in Spain with a notice of intention to commence arbitration, pursuant to an arbitration clause in the Agreement.[8] Malaysia did not respond to the notice.

Malaysia's inaction in the proceedings prompted the claimant-heirs to seek, in February 2018, an arbitrator appointment from the Superior Court of Justice of

[2] Some sources report that payment should be "$5,300 Mexican gold pieces." *See What Went Before: Sultan of Sulu's 9 principal heirs*, PHIL. DAILY. INQ., Feb. 23, 2013, https://globalnation.inquirer.net/65303/what-went-before-sultan-of-sulus-9-principal-heirs#ixzz7Rbp50b3v; *see also* NAJEEB M. SALEEBY, THE HISTORY OF SULU 225 (1908), *available at* https://www.gutenberg.org/files/41771/41771-h/41771-h.htm.

[3] ADA PRYER, A DECADE IN BORNEO 11 (2002) ("[T]he Sultan of Sulu was persuaded to sign the concessions once he saw them as carrying the weight of the British Government.").

[4] As a subject of the Spanish crown, the Sultan was obligated to request authorization to grant any rights over the land. *See generally* SALEEBY, *supra* note 2, 225.

[5] Final Award, ¶ 165.

[6] *See* George McT. Kahin, *The State of North Borneo 1881-1946*, 7 FAR E.Q. 43 (1947); *see also* John S. Galbraith, *The Chartering of the British North Borneo Company*, 4 J. BRIT. STUD. 102 (1965).

[7] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425, ¶ 8.

[8] Final Award, ¶ 21. The connection to Spain arises from the Sultanate's 1851 submission to the Spanish Crown. The Award describes Spain's sovereignty over the North Borneo region at the time the Sultan signed the Agreement with the British North Borneo Company. *Id.* ¶ 165. However, the alleged arbitration clause never mentions Spain as a seat or in any other way.

Madrid pursuant to the Spanish Arbitration Act.[9] Malaysia did not take part in these proceedings either. The Superior Court granted the request, and in March 2019 appointed Dr. Gonzalo Stampa as the Sole Arbitrator ("Arbitrator").

With the Arbitrator in place, the claimants filed their Notice of Arbitration in July 2019. In the Notice, they sought to terminate the Agreement as of 2013 and receive US$5 billion in unpaid rent, as well as US$26 billion in lost revenue they would have received off the region post-termination.[10] Over the next two years, the arbitration proceeded with little participation from Malaysia.[11] The Arbitrator issued a Preliminary Award in May 2020 confirming his jurisdiction and the validity of the arbitration agreement.[12] Later, he issued a Final Award on February 28, 2022, awarding the claimant-heirs US$14 billion, plus interest and costs.

Although absent from the arbitration, Malaysia actively opposed the proceedings in the courts of several countries, including Malaysia, Spain, and France. First, Malaysia tried to stop the arbitration in its own courts by seeking an injunction against the heirs and the Arbitrator. Neither the heirs nor Dr. Stampa took part in those proceedings.[13] The High Court of Sabah granted the injunction in March 2020, before the Preliminary Award was issued. The High Court found that an arbitration agreement did not exist in the Agreement,[14] and that the Malaysian courts had

[9] *Id.* ¶ 23; see also Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 182/2018, May 8, 2018 (ID CENDOJ No. 28079310012018200021) (Spain).

[10] Final Award, ¶ 8; Cosmo Sanderson, *Huge claim against Malaysia nears award*, GLOBAL ARB. REV., Feb. 17, 2022, https://globalarbitrationreview.com/huge-claim-against-malaysia-nears-award.

[11] In October 2019, Respondent informed the Arbitrator and heirs of the appointment of Dr. Arias and Mr. Capiel as its counsel for purposes of the arbitration. Final Award, ¶ 14. However, those appointments appear to have been withdrawn without explanation a month later. *Id.* ¶ 15. In December 2021, Respondent's representative, Mr. Portwood, confirmed to the Arbitrator that Malaysia had chosen not to participate and was challenging the arbitration proceedings entirely. *Id.* ¶ 157.

[12] Final Award, ¶ 26.

[13] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425, ¶ 4.

[14] *Id.* ¶ 12(1)("(r) Absence of any valid and enforceable arbitration agreement between the parties estopped the [heirs] from referring any alleged dispute to arbitration. (s) The act of the Defendants in persisting with the Spanish Arbitration despite no binding arbitration agreement established between the parties [*sic*] amount to a grave violation of the Plaintiff's legal rights and the Court must not stand idle to allow such abuse of process to persist.").

jurisdiction over any dispute arising out of the Agreement.[15]

The heirs pushed forward however, and the Arbitrator continued the arbitration. In June 2021—several months after the proceedings were closed—Malaysia moved to vacate all rulings from the Superior Court of Justice of Madrid, including its choice of arbitrator. The Superior Court granted the request, finding that the heirs did not serve Malaysia properly with the notice of the arbitrator appointment proceedings.[16] All of the Superior Court's prior decisions against Malaysia were vacated.[17] The Superior Court then instructed the Arbitrator to close the proceedings immediately further to its prior decision. The Arbitrator refused, finding that the Court's intervention was not allowed under the Spanish Arbitration Act.[18]

The heirs then took matters into their own hands and sought to confirm the Preliminary Award *ex parte* before the Tribunal de Grande Instance de Paris ("Paris Court"). At the time, the Final Award had not yet been issued. The Paris Court granted the request, after which, claimants asked the Arbitrator to relocate the place of arbitration from Spain to France.[19] The Arbitrator agreed, finding that the recent decisions from the Superior Court were "intrusions" in the proceedings that created "a certain risk for the Parties of incurring in a denial of justice in Madrid."[20] The proceedings were relocated to France in late October 2021.

In December, Malaysia appealed the Paris Court's confirmation order to the Paris

[15] *Id.* ¶ 12(3) ("(a) The Deed of Cession concerns the grant and cession in perpetuity of territories and lands on the former State of North Borneo which now constitute territories within the modern-day State of Sabah, Malaysia. (b) Thus, as rightly submitted by the Plaintiff, the High Court of Sabah is the natural and proper forum to adjudicate on any dispute arising out of the Deed of Cession.").

[16] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 594/2021, June 29, 2021 (ID CENDOJ No. 28079310012021200080) (Spain), p. 4; see Final Award, ¶ 109; see also Joint Statement by the Ministry of Foreign Affairs and Attorney General's Chambers on the Decision in the Arbitration Proceedings in Paris, https://www.kln.gov.my/web/guest/-/joint-statement-by-the-ministry-of-foreign-affairs-and-attorney-general-s-chambers-on-the-decision-in-the-arbitration-proceedings-in-par-1.

[17] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 594/2021, June 29, 2021 (ID CENDOJ No. 28079310012021200080) (Spain), p. 4.

[18] Final Award, ¶ 126.

[19] *Id.* ¶ 129, 132.

[20] *Id.* ¶¶ 141-42.

Court of Appeal.[21] The Court of Appeal stayed the confirmation and barred the claimants from availing themselves to the confirmation order.[22] Malaysia sent these decisions to the Arbitrator and requested that the arbitration be discontinued immediately, but the Arbitrator rejected Malaysia's request, finding that the Preliminary Award was already incorporated into the "French legal order" and that the stay decision had no effect on the arbitration.[23]

Several months later, in February 2022, Malaysia initiated criminal proceedings against the Arbitrator before the Madrid court, and subsequently reiterated its request that the proceedings be discontinued.[24] The Arbitrator refused and issued his Final Award on February 28, 2022.

Since the Award was issued, both parties have sought relief from the courts in Spain and France. The heirs brought a constitutional action in the courts of Spain challenging the Superior Court's decision to vacate Dr. Stampa's appointment. Meanwhile, Malaysia asked the French court to overturn the Award.[25] It is not entirely clear how the French court will rule. According to one observer, there is precedent for the Arbitrator's decision to move the arbitration.[26] "Considering the French legal system's view of international arbitration as a transnational and autonomous system," the Paris court will likely scrutinize the Madrid court decision and come to its own conclusion.[27]

III. IS THE AWARD ENFORCEABLE IN THE US?

A. *Sovereign Immunity Defense Act (FSIA).*

The Award might not be enforceable in the US for several reasons, first of which, because Malaysia may have sovereign immunity. The Foreign Sovereign Immunities

[21] *Id.* ¶ 146.

[22] *Id.* ¶ 148.

[23] *Id.* ¶ 150.

[24] *Id.* ¶ 151.

[25] Cosmo Sanderson, *Malaysia Challenges Mega-Award in French Court*, GLOBAL ARB. REV., Mar. 18, 2022, https://globalarbitrationreview.com/malaysia-challenges-mega-award-in-french-court.

[26] *Id.*

[27] *Id.*

Act (FSIA) generally provides States with immunity from suit in US courts,[28] but the FSIA also provides exceptions to that general immunity, including an exception to enforce arbitration awards (the "arbitration exception").[29]

To meet the standard for the arbitration exception, there must be (i) an arbitration agreement, (ii) an arbitration award, and (iii) a treaty governing the award before the exception will apply.[30] If an arbitration agreement does not exist—despite the existence of an award—then the exception does not apply, and the State retains its sovereign immunity.

Less than a year ago, the Fifth Circuit Court of Appeals dismissed an enforcement petition for this very reason.[31] The facts of the case are quite like the ones here. The plaintiffs were ancestors to a Saudi ruler who leased land to Saudi Aramco—later the Saudi Arabian Oil Company—in exchange for payment. Years later, the ancestors claimed back payment for the Company's use of the land. The ancestors began an arbitration in Egypt, which was described as an "irregular" proceeding.[32] The ancestors were ultimately awarded US$18 billion.[33]

The Fifth Circuit refused to enforce the award however, finding that that an arbitration agreement did not exist. Although an arbitration clause was presented before the Court, it was from a different agreement not involving the same parties. The Court did not rely on this outside clause.[34]

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[28] Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1976).

[29] *Id.* § 1605(a)(6) ("A foreign state shall not be immune . . . in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if . . . (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.").

[30] Process and Industrial Developments Limited v. Federal Republic of Nigeria, No. 21-7003 (D.C. Cir. 2022) 10 (quoting LLC SPC Stileks v. Republic of Moldova, 985 F.3d 871, 877 (D.C. Cir. 2021)).

[31] *Al-Qarqani v. Saudi Arabian Oil Co.*, No. 21-20034 (5th Cir. 2021).

[32] *Id.* at 3.

[33] *Id.*

[34] *Id.* at 10-11.

On this same basis, Malaysia may claim immunity from enforcement under the FSIA. Malaysia has already argued before its home courts that an arbitration agreement does not exist between the parties. The High Court of Sabah agreed on that point in fact when it enjoined the heirs from pursuing arbitration.[35] The text of the 1878 Agreement between the Sultan and the British North Borneo Company says that any dispute between the parties will be "brought for consideration or judgment of Their Majesties' Consul-General in Brunei." According to the High Court, this language is not a reference to arbitration.[36]

On the other hand, the Superior Court of Justice of Madrid came to the opposite conclusion. The Superior Court found that the parties "unequivocally agreed to submit to arbitration,"[37] although that decision was later vacated by the same court.[38] Dr. Stampa reached the same conclusion, finding that the 1878 Agreement contained a valid arbitration agreement.[39] Neither decision refers to the decision from the High Court of Sabah.

If Malaysia presents this issue to a US court, the court will not be bound by the rulings of the Malaysian courts, the Spanish courts, the French courts, or the arbitration Award. The court will need to examine the arbitration agreement itself pursuant to Chapter 2 of the Federal Arbitration Act (FAA). The FAA defines an arbitration agreement as a "written provision . . . to settle by arbitration a controversy thereafter arising,"[40] which suggests that the writing must contain a reference to arbitration. The heirs will need to argue that the reference to "consideration or judgment of Their Majesties' Consul-General in Brunei" fits the definition of "arbitration agreement" under the FAA. If they are successful, then the FSIA's arbitration exception most likely applies, and Malaysia is not immune from suit.

[35] Government of Malaysia v. Nurhima Kiram Fornan & Ors, [2020] MLJU 425, ¶ 12.

[36] "There is not an iota of evidence," says the Court, "to infer that such reference *ipso facto* means a reference to that entity to act as arbitrator." *Id.* ¶ 12(1)(k).

[37] Final Award, ¶ 25.

[38] *Id.* ¶ 109.

[39] *Id.* ¶ 26; The authors have not been able to access the Preliminary Award issued by Dr. Stampa, which addresses this question.

[40] Federal Arbitration Act, 9 U.S.C. § 202 (1970) (incorporating by reference 9 U.S.C. § 2).

B. *Challenges to Enforcement under Article V of the New York Convention.*

Assuming the State is not immune, the US court will need to decide whether the Award is enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), in particular Articles V(1)(a) and V(1)(b).[41] This is a defensive argument that Malaysia will have to make in each jurisdiction in which the claimants may attempt enforcement.

1. The Arbitration Agreement is Not Valid.

According to Article V(1)(a), enforcement may be refused when the arbitration agreement is "not valid under the law to which the parties have subjected it," or, in the absence a chosen law, the law of the seat of arbitration.[42] Should Malaysia raise this defense, the analysis will once again focus on whether an arbitration agreement exists between the parties. But, unlike the FSIA analysis, the court will need to assess the validity of the arbitration agreement, not just its existence.[43]

At the outset, it is not entirely clear which law would govern this question because the 1878 Agreement is silent as to the law governing the arbitration agreement.[44] An obvious choice is Spanish law since Spain was the seat of arbitration. As explained above, however, Malaysia objected to the Spanish-based arbitration, and the Superior Court of Justice of Madrid ultimately vacated its orders advancing the arbitration.[45] The fact that the heirs chose Spain as the seat may not be enough for a US court to rely on Spanish law, as this may be considered forum shopping.

The outcome under Spanish law is also unclear. Although the decision was later vacated, the Superior Court of Madrid found that the parties "unequivocally agreed

[41] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 330 U.N.T.S. 3.

[42] *Id.* at Art. V(1)(a).

[43] *Id.* ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) … the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made[.]").

[44] Final Award, ¶ 67.

[45] *Id.* ¶ 109.

to submit to arbitration," implying that the arbitration agreement was valid.[46] The reason that decision was vacated had nothing to do with the validity of the agreement, but rather a lack of proper notice to Malaysia.[47] A US court could reasonably look to this decision as factual evidence of the agreements validity and declare the Award enforceable on that basis.

Another option is Malaysian law given that the territory in question is now part of Malaysia. In the absence of an express choice of law, US courts oftentimes choose the law of the state (or State) having the "most significant relationship to the transaction and the parties."[48] It is hard to imagine any other State having more significant a relationship to the 1878 Agreement than Malaysia. The Spanish court considered that they had jurisdiction because in 1878, when the agreement was signed, the territory was under Spanish jurisdiction.[49]

Even so, the outcome under Malaysian law is not clear either. The Malaysian High Court ruled that no valid arbitration agreement existed,[50] and a US court might look to the Malaysian decision as evidence of invalidity, same as the Spanish decision. On the other hand, a US court may also look to Malaysia's Arbitration Act, which defines "arbitration agreement" broadly and delegates questions of arbitrability to the arbitrator.[51] If the Malaysia Arbitration Act applies, then a US court may rely on the Arbitrator's ruling that the arbitration agreement is valid.

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[46] *Id.* ¶ 25; *see also* Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 182/2018, May 8, 2018 (ID CENDOJ No. 28079310012018200021) (Spain) (where the Spanish court indicated that the "parties agreed to arbitration ('the judgment') by the British Consul General in Borneo," which is not what the 1878 agreement says, and it is not a correct interpretation of the word "judgment." The word used in the treaty is "juicio" which means "judgment," but also "consider" or "adjudicate." This may not be sufficient to meet the "unequivocal" standard).

[47] Final Award, ¶ 109; *Joint Statement by the Ministry of Foreign Affairs and Attorney General's Chambers on the Decision in the Arbitration Proceedings in Paris*, MINISTRY OF FOREIGN AFFAIRS, Mar. 2, 2022, https://www.kln.gov.my/web/guest/-/joint-statement-by-the-ministry-of-foreign-affairs-and-attorney-general-s-chambers-on-the-decision-in-the-arbitration-proceedings-in-par-1.

[48] RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 188, 218 (1971).

[49] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 182/2018, May 8, 2018 (ID CENDOJ No. 28079310012018200021) (Spain), p. 3.

[50] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425, ¶ 12(1).

[51] Arbitration Act 2005 (Act 646) (Malaysia) §§ 9, 18.

A third option is US law, as the law of the enforcement forum.[52] The US has its own standard for determining the validity of arbitration agreements. To be valid, the FAA requires that the agreement make some reference to arbitration and arise out of a commercial, legal relationship between the parties.[53] It is unclear however whether the 1878 Agreement refers the parties to arbitration—as mentioned in the last section—or to some other form of dispute resolution. Dr. Stampa certainly believed the 1878 Agreement did refer the parties to arbitration.

A separate question is whether the Agreement is "commercial" in nature—a point that was raised and disputed in the arbitration. According to the heirs, the 1878 Agreement was a commercial land lease agreement between the Sultan and private individuals.[54] According to Malaysia by contrast the 1878 Agreement was a non-commercial "instrument for the permanent cession of territorial sovereignty over certain territories of North Borneo by the Sultan."[55] The Award sides with the heirs.[56]

As mentioned above, US courts will not be bound by any prior decision from the Arbitrator or the courts of Spain or Malaysia. US courts have the power at the enforcement stage to make an independent determination, a *de novo* determination, as to the validity of an arbitration agreement.[57] The heirs could argue that Malaysia waived its right to argue invalidity at the enforcement stage since it could have raised it before the Spanish courts and in the arbitration. But the courts may reject that argument given Malaysia's insistence that the 1878 Agreement lacks any reference to arbitration.

[52] At times, US courts will apply US law in the absence of some other law. *See EGI-VSR, LLC v. Coderch Mitjans*, 963 F.3d 1112 (11th Cir. 2020); *GE Energy Power Conversion France v. Outokumpu Stainless USA*, 140 U.S. 1637 (2021).

[53] Federal Arbitration Act, 9 U.S.C. § 202 (1970) (incorporating by reference 9 U.S.C. § 2).

[54] Final Award, ¶ 186.

[55] *Id.* ¶ 187.

[56] *Id.* ¶¶ 212, 222.

[57] *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3rd Cir. 2003); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293 (11th Cir. 2004); *Belize Soc'y Dev. Ltd. v. Belize*, 5 F. Supp.3d 25 (D.D.C. 2013).

2. The Standard for Evaluating Article V(1)(b) Challenges to the Recognition and Enforcement of Foreign Arbitral Awards.

In addition to the Article V(1)(a) defense, Malaysia may argue that the Award should not be recognized and is unenforceable under Article V(1)(b) of the New York Convention.[58]

Under Article V(1)(b) a party may request the domestic court to refuse recognition and deny enforcement of an award issued in a proceeding in which "*the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.*"[59] Under this Article, there are 3 different and separate causes for a court to refuse recognition and enforcement of an award. Malaysia may use any of these three causes to challenge the heir's enforcement of the Award.

The standard to determine whether the party challenging the enforceability of the award is that of the forum state and is based on that state's principles and policies.[60] In the US, the application of this article and the recognition of the forum state's due process principles was established in the *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (*RAKTA) case.[61] In this case, the Second Circuit evaluated the enforcement of an award against Parsons & Whittemore issued in an ICC arbitration. Parsons & Whittemore fully participated in the arbitration. On enforcement, Parsons & Whittemore argued inter alia that the arbitral tribunal denied it an adequate opportunity to present its case by refusing to delay the proceedings. In rejecting that challenge, the Second Circuit stated that Article V(1)(b) of the Convention "essentially sanctions the application of the forum state's standards of

[58] New York Convention, *supra* note 41, Art. V(1)(b).

[59] *Id.*

[60] A court evaluating the recognition and enforcement of foreign arbitral award, will apply its own standards of "international public order." Montserrat Manzano & Rafael F. Alves, *The Ground for the Refusal of the Recognition and Enforcement of Foreign Arbitral Awards for Breach of Due Process: Analyzing Relevant Jurisprudence in Latin America*, TRANSNAT'L NOTES (July 22, 2019) (citing Milantic Trans S.A. v. Ministerio de la Producción (Astilleros Río Santiago y otro, Arg. Corte Suprema de Justicia (March 30, 2016)).

[61] Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974); *see also* Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention—Practice in U.S. Courts*, 3 INT'L TAX & BUS. LAW. 249, 266 (1986).

due process."[62]

The Seventh Circuit reached a similar decision in *Generica Ltd. v. Pharmaceutical Basics* when evaluating a challenge to an award.[63] The arbitrator had limited Pharmaceutical Basics' ability to cross examine an expert and claimed that that curtailment violated its "fundamental" due process rights.[64] In denying the challenge to the enforceability of the award, the Seventh Circuit concluded that the arbitrator's handling of the evidentiary hearing, including the challenged cross-examination was "quite fair" and not a "fundamental procedural defect" that would violate "our due process jurisprudence."[65]

More recently in 2018, the Southern District of New York in *Jak Kamhi v. BSH Hausgeräte GmbH* reached the same conclusion adding that the inquiry was "limited to determining whether the procedure used was fundamentally unfair."[66]

Other countries have reached similar conclusions. In *Petrotesting Colombia S.A. et al. v. Ross Energy S.A.* the Colombian Supreme Court decided that "enforcing courts often decide the question of due process under their legal system's principles regarding procedure."[67] Also in *Milantic Trans S.A. v. Ministerio de la Producción (Astilleros Río Santiago y otro)*, the Argentinian Supreme Court found that "the principle of due process given effect to in Article V(1)(b) of the New York Convention was applied in Milantic by reference to 'the Argentine international public order', which the court defines as consisting of the principles and guarantees enshrined in the Argentine Constitution."[68]

Therefore, the enforcement forum may apply its own fundamental principles of due process to determine whether to grant recognition and enforcement to the award before them. Should enforcement be sought in the US–most likely New York

[62] *Parsons v. Societe*, *supra* note 62, at 975.

[63] Generica Ltd. v. Pharmaceutical Basics, 125 F.3d 1123 (7th Cir. 1997).

[64] *Id.* at 1129-30.

[65] *Id.* at 1131.

[66] BSH Hausgeräte GMBH v. Kamhi, 291 F. Supp. 3d 437, 442 (S.D.N.Y. 2018).

[67] Montserrat Manzano, *The Ground for the Refusal*, *supra* note 61, at 5, 7.

[68] *Id.* at 8.

or Washington D.C.–the Award will be subject to the fundamental principles of due process applicable in the US.

3. The Challenging Party was Not Given Proper Notice of the Appointment of the Arbitrator.

Giving proper notice of the appointment of the arbitrator seems like a simple matter. However, it may be complicated when the parties have not agreed to a method of service. In such case, as described above, the enforcement forum's rules should apply.

Under US law, the process to accomplish effective service of process or legal notice to a state is governed by the FSIA, and international treaties regulating the matter. The applicable rules require that the serving party send the service or notice directly to the Minister of Foreign Relations, or the equivalent to the Secretary of State, of the foreign sovereign. In *Republic of Sudan v. Harrison*, the US Supreme Court, through Justice Alito, held that when civil process is served on a foreign state under the FSIA, a mailing must be sent directly to the foreign minister's office in the foreign state.[69]

The US enforcing court may also look at the related decisions of foreign courts as reference. The Superior Court of Justice of Madrid previously found that the heirs failed to properly serve Malaysia with the arbitrator appointing procedures in Spain.[70] This decision was taken before the case was moved to France, and thus it is a reference to the standard of service on a sovereign from the arbitral seat.

In the Sulu case, the heirs served Malaysia with the notice of intent to arbitrate and the notice of appointment of Dr. Stampa in the corresponding proceedings at the Malay Embassy in Madrid, Spain.[71] Under the standard of *Parsons & Whittemore*, *Harrison*, and the FSIA, such is not proper service on Malaysia. In addition, the seat of the arbitration, Spain had also decided on the matter.

[69] Republic of Sudan v. Harrison, 139 U.S. 1048 (2019); Foreign Sovereign Immunities Act, 28 U. S. C. §1608(a)(3) (1976).

[70] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 594/2021, June 29, 2021 (ID CENDOJ No. 28079310012021200080) (Spain), p. 2.

[71] *Id.* at 4.

Therefore, it seems to us that Malaysia was not given proper notice of the appointment of the Arbitrator and, as a consequence, the Final Award should not be enforceable in the US.

4. The Challenging Party had Notice of the Arbitration Proceedings and could have Presented its Case.

The two remaining bases for a US court to refuse recognition and enforcement under Article V(1)(b) are likely not applicable to the heirs' case. These are that the party opposing enforcement did not receive "proper notice of the arbitration proceedings" or "was otherwise unable to present his case."[72]

(i) Malaysia had Notice of the Arbitration Proceedings.

Although Malaysia did not participate in the arbitration, as discussed above, Malaysia actively opposed the arbitration. Malaysia filed several lawsuits in Malaysia and Spain to stop the arbitration from proceeding. Malaysia obtained an anti-suit injunction in its own courts, which was not enforced by the Spanish courts. Later, it obtained from the Spanish courts the annulment of all actions taken during the arbitration proceeding.[73] This prompted the heirs to request the Arbitrator, a Spanish national, to rebuke his own courts and move the arbitration to France. The Arbitrator complied.[74] In France, Malaysia has tried to vacate the Award, a process that is currently on going. These activities would likely be sufficient to prove that Malaysia had notice or at least knowledge of the arbitration and was aware of the proceedings, even though it disagreed with them. However, that is not necessarily "proper notice."

The Convention does not define "proper notice of the arbitration proceeding;" it is a concept that, as discussed above, relies on the local laws of enforcement and the rules of procedure.[75] The heirs' case was an *ad hoc* arbitration, subject to Spanish law first, and then French law. The rules of procedure were those established by the Arbitrator, Dr. Stampa, subject only to a very general, international standards of due

[72] New York Convention, *supra* note 41, Art. V(1)(b).

[73] Nurhima Kiram Fornan, et al. v. Malaysia, A.T.S.J. M. 594/2021, June 29, 2021 (ID CENDOJ No. 28079310012021200080) (Spain), p. 4.

[74] Final Award, ¶ 66.

[75] New York Convention, *supra* note 42, Art. V(1)(b).

process.

The standard rule in arbitration, unlike that of domestic courts, is that

> an arbitral tribunal has 'no authority to enter an award based on accepting as admitted claims which have not been denied.' Instead, an arbitral tribunal is required to review the evidence presented to it, satisfy itself that the case has been proven, and provide reasons for its conclusion in the final award.[76]

Thus, in case of a failure to appear—a default—the tribunal may continue the proceedings and render an award after the party who is present, typically the claimant, has satisfied its burden of proof. That is what Dr. Stampa apparently did.

The ICSID Arbitration Rules also provide for this process in Rule 42 and establish that the tribunal, after a grace period, certain discretionary proceedings, and the request of the party who is present, should proceed with the case and render an award.[77] The AAA and ICC Rules also have default rules which allow for the continuation of proceedings, although these require that a party be duly served or summoned before the arbitrator may proceed with the case.[78]

There are very few cases in which the respondent in an arbitration has wholly failed to appear to the proceedings, especially when having knowledge of the case. This was the case in *Kaiser Bauxite v. Jamaica*, an ICSID case. ICSID decisions are informative because ICSID is the preeminent forum for resolution of investor-state disputes.[79]

In *Kaiser Bauxite v. Jamaica*, Jamaica did not appear or act in the case at all. When the tribunal started undertaking an evaluation of its own jurisdiction *sua sponte*, Jamaica sent a communication to the tribunal, explaining that Jamaica had made reservations to any ICSID tribunal's jurisdiction over "investments related to minerals

[76] *See* Dr. Wolfgang Kühn, *Defaulting Parties and Default Awards in International Arbitration*, *in Contemporary Issues in* INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014, 400-401 (Rovine, A. ed. 2015).

[77] ICSID Rules of Procedure for Arbitration Proceedings, Rule 42 (Apr. 10, 2006) [hereinafter "ICSID Arbitration Rules"]; CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 720 et seq. (2d ed. 2009).

[78] *See* AAA Rules (2013), R-31; ICC Rules of Arbitration (2021), Arts. 6(8), 26(2).

[79] The authors consider that ICSID cases are informative because the heirs' case is like an investor-state case in that the arbitration claimant is a private party and the respondent is a sovereign state.

or other natural resources."[80] After analyzing the history of Jamaica's accession to the Convention and its disclaimer of jurisdiction, the tribunal concluded that the disclaimer was not effective for this case; Jamaica had consented to arbitrate with Kaiser before the disclaimer was effective. Therefore, the tribunal had jurisdiction.[81] Later the case was discontinued under Rule 44 of the ICSID Arbitration Rules at the request of a party, presumably Kaiser, before the tribunal had issued the final award.[82]

In this case, the tribunal applied the standard suggested above and left no stone unturned before deciding to continue with the proceedings in the absence of Jamaica. In the heirs' case, Dr. Stampa seems to have performed a similar exercise.

Thus, it is unlikely that a domestic court in the jurisdiction of enforcement, for our example Washington D.C. or New York, would consider that Malaysia did not have "proper notice of the arbitration proceeding."

(ii) Malaysia could have Presented its Case.

On the other hand, Malaysia will have a very difficult time alleging that it was unable to present its case. As Malaysia willfully remained outside the proceedings, not even trying to challenge the jurisdiction of the Arbitrator, before the Arbitrator itself, it is likely that an enforcement court will reject a challenge based on this argument.

An enforcement court could likely base its decision on an estoppel argument. As explained by Timothy Nelson, "'[e]stoppel' is a term familiar to those in the common law system: it potentially operates to preclude a party from adopting inconsistent positions, particularly if the opposing party has relied upon such positions and would suffer prejudice if they were to change. Doctrinally, it is sometimes associated with the maxim *venire contra factum proprium* ("no one may set himself in contradiction to his own previous conduct") as well as the general principles of good faith and *pacta*

[80] Kaiser Bauxite Company v. Jamaica, ICSID Case No. ARB/74/3, Decision on Jurisdiction and Competence, 22 (July 6, 1975); Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, Art. 45(1), 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[81] *Bauxite*, Decision on Jurisdiction, 24.

[82] ICSID Arbitration Rules, Art. 44.

sunt servanda."[83] As described, estoppel requires that the affected party show that it relied on the prior position of the other party to its detriment.[84]

The heirs could advance the argument that enforcement is proper because Malaysia chose to not participate in the arbitration, despite having challenged the proceedings in different forums, and because of such willful inactions Malaysia cannot argue on enforcement that it did not have an opportunity to present its case. In making this argument, the heirs will have to show that they relied on Malaysia's inaction to their detriment.

Although it would be reasonable to argue that Malaysia is precluded from asserting that it did not have an opportunity to present its case, the heirs will likely not be able to show reliance or detriment; the heirs did not change their position and suffered no detriment.

The heirs continued with the arbitral proceedings despite Malaysia's failure to participate and continued to push forward despite anti-suit injunctions and orders to suspend the proceedings. This was the heirs' plan from the beginning; they wanted this arbitration to proceed uninterrupted. Thus, it does not seem like the heirs changed their position in reliance of Malaysia's inaction. In addition, the heirs suffered no detriment. In fact, Malaysia may argue that the heirs received a benefit: the Award for US$14 billion, the second largest award in recorded history.

In turn, if Malaysia argues that recognition and enforcement would be improper because it did not have an opportunity to present its case, the enforcement court may reject the argument on the basis of waiver. Malaysia waived its right to be heard.

The general, international standards of due process "requires that each party have a fair opportunity to present its case to the tribunal and to rebut its opponent's case at a meaningful time and in a meaningful manner.[85] However, such right may be waived.

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[83] Timothy G. Nelson, *Blowing Hot and Cold: State Commitments to Arbitrate Investment Disputes*, 9 WORLD ARB. & MED. REV. 181, 182 (2015).

[84] *Id.* 192-93 (citing Pan American Energy LLC & BP Argentina Exploration Co. v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (July 27, 2006).).

[85] RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (2011) § 4-13, cmt. c.

Waiver is a widely recognized principle of law in possibly all jurisdictions and legal traditions. In the US, waiver "occurs when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished."[86] The waiver may be accomplished by express actions or language, but it also may be implied from the party's course of conduct inconsistent with an intent to enforce the right.[87]

Here, by voluntarily and intentionally failing to participate in the arbitration—because it disagreed with it, or because it was challenging it in other forums—Malaysia may have unintentionally waived its right to assert in the enforcement proceedings that it did not have an opportunity to present its case. The only element of the waiver defense which is unclear under the facts is whether Malaysia's actions induced the heirs to believe that Malaysia had relinquished this due process right. It is possible for the heirs to make such argument. Malaysia's actions represented a complete abandonment of the arbitration process in which it had initially attempted to participate in. This, coupled with its multiple court challenges to the Arbitrator's appointment and his conduct of the process, may indicate to the reasonable observer a desire to give up all rights and remedies related to the process.

As a result, Malaysia will not be able to resist recognition and enforcement based on its inability to present its case. Hence, neither of these arguments seems to lead to a satisfactory result for either of the parties.

IV. CONCLUSION

The Award against Malaysia is one of the largest awards ever issued against a state, surpassed only by the Yukos Award. It arises out of a 150-year-old contract with very ambiguous terms. It was issued in the context of a highly disputed *ad hoc* arbitration, in which neither the alleged arbitration clause, nor the conduct of the proceedings was accepted by the parties or the courts of the seat, Spain. The Arbitrator took actions which may be considered unreasonable, extreme, or even defiant, such as

[86] *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 938 (9th Cir. 2017); *see also United States v. Olano*, 507 U.S. 725, 733 (1993).

[87] ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 273-74 (2004).

relocating the seat of arbitration, to ultimately issue a polarizing Award. Any enforcement effort, in any jurisdiction will likely be met with substantial resistance.

The heirs will need to overcome several obstacles if they seek to enforce their Award in the US. The fact that the 1878 Agreement does not expressly refer to arbitration may offer Malaysia a chance to assert immunity from suit under the FSIA. That same issue—the lack of any reference to arbitration—may also give Malaysia an opportunity to challenge the Award under Article V of the New York Convention for lack of arbitration agreement. Separately, Malaysia may challenge the Award for lack of proper notice—also under Article V of the New York Convention. Indeed, this challenge may prove successful given prior rulings from the Superior Court in Madrid.

Nonetheless, the heirs have a non-frivolous case that the Award should be enforced in the US. The 1878 Agreement contains some reference to dispute resolution, interpreted as a reference to arbitration by both the Arbitrator and the Superior Court of Madrid. As for notice, there is no question that Malaysia was aware of the arbitration early in the proceedings. A US court may reasonably conclude that Malaysia should have raised its challenges in the arbitration itself.

Either way, the story of this dispute highlights the importance of the New York Convention and the protections it provides to both parties. For the heirs, the Convention offers a mechanism to enforce a money judgement that may be rightfully due to them. On the other hand, it gives Malaysia a chance to challenge an arbitration that some would say went completely rogue.

Ultimately, based on the analysis above, we believe that there are sufficient arguments and procedural peculiarities in the process that a US court would be justified in denying recognition and enforcement of the Final Award.

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BOOK REVIEW
INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY (2ND ED.)
BY PETER CAMERON

Reviewed by Elizabeth J. Dye

I. INTRODUCTION

The second edition of Professor Peter D. Cameron's "International Energy Investment Law: The Pursuit of Stability" maintains the first edition's focus on the role that stability plays in international energy investment law but addresses issues in international investment law from the perspective of the states that give their consent to follow the rule of international investment law and discusses investment issues relating to non-fossil fuel sources of energy. It also gives thoughtful consideration to emerging energy sectors, including renewables, as well as non-investment laws, such as environmental laws and human rights, that are beginning to shape energy investment law landscape in new yet familiar ways. The book provides a comprehensive overview of the goals of stability in energy investment law, suggests how to implement these goals together with the challenges that may arise in the process, and poses thoughtful questions and answers to the role that stability is likely to play in the future of international investment law. The following summarizes the three main parts of the book, which are further divided into chapters (12 total), and the book also includes appendices, a select bibliography, and an index.

II. THE BOOK

A. *Part I.*

Part I examines the backdrop to the development of the extensive body of law that comprises international energy investment law and how there are "six characteristics of energy investments" that effect the law's development, including that energy investments are international, large scale, longer in duration than most, demonstrate a pervasive state presence, operate in a context of price volatility, and have a degree of complexity. Dr. Cameron adds two contextual features: the transformational potential that such investments pose in economic and social terms and the legacy of

investment history. Dr. Cameron explores how these features requires both states and investors to focus their efforts and attentions on the development and promotion of a stable legal framework for investments—and necessarily build in flexibility mechanisms to respond to volatility in the worldwide energy market to policy changes implemented by host states.

1. Chapter 1. Energy Investment Law.

Given the volume of energy investment worldwide (estimated to be $1.8 trillion annually), Professor Cameron elaborates on the aforementioned six characteristics and two contextual features of international investment. Chapter 1 also provides an overview of the aims, approach, scope, and structure of this book.

2. Chapter 2. States, Investors, and Energy Agreements.

This subpart examines the investment triangle (or "three basic elements of any investment relationship")—the relations between the host state, the investors, and the investment, as well as energy governance, which he describes as the "glue" that makes the main elements stick together. In discussing host states, he focuses on the states' multifaceted role, on the one hand as umpire or regulator, and on the other as participant and commercial partner. In discussing investors, he focuses on issues surrounding the notion of "investor" in a globalized economy, especially as it relates to different types of investors, and advances a unique typology to classify investors. With regards to the third element, the investment, he focuses on the debate among arbitral tribunals over what constitutes an "investment," and the modern-day challenge of interpreting and applying decades-old treaties in the context of now common yet increasingly complex investments in the energy sector. "Energy governance" involves energy contracts, the host state's sovereignty over energy, and investor-state arbitration, which all work together (in theory) to allow for peaceful ways of settling disputes among the parties.

This chapter concludes with an overview of the main investment agreement in six energy sub-sectors, including hydrocarbons, natural gas, electricity and renewable energy, coal and energy-related mining, unconventional energy (*i.e.*, hydrocarbons produced from shale rock or oilsands), and nuclear energy.

3. Chapter 3. Stability Based on Contract.

The focus of this chapter is the mitigation of political risk in an energy investment contract through the use of stabilization clauses, which Professor Cameron defines as a contractual assurance of negotiated terms against future legal or regulatory changes. He walks through the interplay between investment stability guaranteed in a contract and other legal instruments, including host state legislation, international treaties, and international law as the governing law of the contract. In doing so, the book examines the four principal kinds of stabilization clauses available to investors, including both the freezing kind of clause and the more flexible variety, variously called a balancing, equilibrium, or adaptation clause. This chapter also examines the issues surrounding renegotiation under balancing clauses, and the practical enforceability of stabilization clauses before international tribunals. The chapter ends by examining the legal foundations of two international pipeline projects and the ways in which they provide for long-term stabilization.

4. Chapter 4. The Classic Tests of Contract-Based Stability.

This chapter examines twelve well-known, early investment cases, including *Aramco*,[1] *Sapphire*,[2] and the *Libyan*[3] cases to highlight examples of expropriations that took place in the 1960s, 1970s, and 1980s. The author describes the arbitral awards that arose from these disputes as the "classic tests" of the validity, scope, and function of contractual stabilization in international energy arrangements. Interestingly, Professor Cameron points out that despite the awards' association with an approach to stabilize long-terms contracts, the contracts at issue in these cases failed to provide investors with the level of security they had hoped for when they negotiated their contracts.

5. Chapter 5. Stability Based on Treaty

Chapter 5 reviews the features of the investment treaty regime that are most relevant to energy investment law and its goal of providing investors with the kind of

[1] Saudi Arabia v. Arabian American Oil Company (ARAMCO), Award (Aug. 23, 1958), 27 I.L.R. 117 (1963).

[2] Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., Award (Mar. 15, 1963), 35 I.L.R. 136 (1963).

[3] Libyan Am. Oil Co. ("LIAMCO") v. Libya, Award (Apr. 12, 1977), 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB. 177 (1979).

long-term stability that is emblematic of energy investments. The author reminds us that the investment treaty system has been established incrementally by states themselves, and not private investors, and examines the history behind the explosive growth of international investments agreements, including on the one hand the need for an enforcement regime for investors to revert to when disputes between themselves and states arise, and on the other hand the perception that political risk was higher-than-average for foreign investors and the view that this perception would inhibit the flows of foreign investment into developing countries and emerging market economies.

The chapter next examines general treaty standards most relevant to the notion of stability in international investment: the Fair and Equitable Treatment (FET) standard and the related meaning of "legitimate expectations," the standard of full protection and security, and the notion of an umbrella clause. Next, Professor Cameron discusses the impact of the Energy Charter Treaty (ECT)[4] on energy investment, as well as USMCA[5] and NAFTA Chapter 11,[6] and ends with the outsized role that ICSID plays in investor state arbitrations.

B. *Part II.*

Part II examines the challenges to the stability framework in international energy investment through cases studies from (i) Latin America, (ii) East Europe/Central Asia, and (ii) Africa. Chapters 6, 7, 8, and 9 assess whether the investment treaty regime has fulfilled its promise of providing long-term stability to both investors and states. Finally, it examines critically several areas of public interest over which states have always found it important to retain regulatory oversight.

1. Chapter 6. Meeting Challenges to Investment Stability-Across the Energy Spectrum.

In this Chapter, the author argues that the inclusion of the FET standard in international investment treaties is the most important feature of energy

[4] Energy Charter Treaty, 2080 U.N.T.S. 100 (Dec. 17, 1994).

[5] United States-Mexico-Canada Trade Agreement,

[6] North American Free Trade Agreement, 32 I.L.M. 605, Ch. 11 (Jan. 1, 1994).

investments. The author notes that tensions between states and investors arose from two broad processes in what he describes as policy formation and legal implementation: (i) the response of populist governments to rising commodity prices and (ii) the effects of liberalized policies that incentivized inward investment on a large scale. The author also contrasts the different legal guarantees that arose in the context of the hydrocarbons and electricity and gas utilities sectors, and the different expectations that investors could have with respect to each sector.

This Chapter examines five principal challenges to the stability of energy investments, and the role of international investment law in responding to them. The author identifies the challenges as (i) threats presented by regulatory acts and taxation measures, (ii) expropriation, direct and indirect, (iii) defenses for state action in emergency situations—such as the well-known 'state of necessity'—(iv) the time and complexity of arbitral procedures in investment arbitration, and (v) the various measures introduced by governments in their efforts at lowering carbon intensity in their energy use.

Next, the Chapter discusses the fulsome and complex body of case law that has developed on the relationship between FET and legitimate expectations and the provision of a stable and predictable legal and business framework. The author determines that the case law reflects that FET protection is not equivalent to that of a stabilization clause, and an investor must navigate several challenges before receiving FET protection. Finally, the Chapter examines the ways in which tribunals ensure that investors accept their responsibilities to the host state and give a brief review of the debate on reforming the energy investment system itself.

2. Chapter 7. Latin America: Treaty and Contract Stability in the Face of Policy Realignment and Crisis

Chapter 7 examines how the legal protection of long-term energy investments has responded and fared to the variety of challenges in the Latin American setting, including the wide swings toward and then away from foreign investment in the energy and mining sectors. In particular, the author raises and then examines whether legal protections given to investors have worked when predecessor governments in Latin America sought to unilaterally amend existing contracts or the

legal and political environments in which those contracts are operational. For example, this chapter discusses the investment policies swings in Venezuela, Bolivia, Ecuador, and most notably Argentina in the face of State measures taken in response to its economic crisis in 2002-2003.

The author walks through the political context from which unilateral states' measures arose Venezuela, Bolivia, Ecuador, and Argentina, and then examines how Peru, Venezuela, and Colombia have taken their own approaches to contract-based stabilization through the use of Legal Stability Agreements. In Latin America, it has been applied to investments generally and not only to energy investments.

The author examines several case studies in Latin American countries, including the CMS *v. Argentina* case,[7] which arose when an investor that had purchased a minority shareholding in an Argentina company that operated a gas transportation network in northern Argentina was suddenly subject to government measures taken during the economic crisis. The tribunal found that Argentina's actions had violated standards of protection in the relevant BIT but declined to hold that Argentina had expropriated the investment at issue in the arbitration. The author notes that the outcome of this case supports a view that asserting other treaty standards are more likely to result in a favorable outcome from the investor than a claim of expropriation, and notes that *Enron v. Argentina* failed on similar grounds.[8]

3. Chapter 8. Russia, Ukraine, and Central Asia: Treaty and Contract Stability in the Post-Soviet Space

Chapter 8 examines the different strategies worked out by investors and host states Russia, Ukraine, and Central Asia to provide long-term stability for energy investments, including stabilization by contract, by treaty and domestic law. The author discusses the history of energy investment and the development of both domestic and international regimes to govern energy investment in each country and region. The author next examines what he describes as the major tests of these stability mechanisms, particularly against the background of rising commodity prices

[7] CMS Gas Trans. Co. v. Argentina, ICSID Case No. ARB/01/8.

[8] Enron Corp. v. Argentina, ICSID Case No. ARB/01/3.

in the first decade of the twenty-first century in Russia, Kazakhstan, Ukraine, and Central Asia and the Caspian Sea region. Similar to Chapter 7, this Chapter then weighs the actions of the host state against the performance of contractual obligations by the investor. Next, the author considers the (modest) role gas contracting and the sale and transit of natural gas from Russia to European consumers has played in foreign investment in this region.

The Chapter next discusses the different forms of stability introduced by the ECT. The author notes that the political aims of the ECT have largely failed due to Russia's withdrawal from the treaty in 2009 and its de facto refusal to meaningfully engage up until that point, but that nevertheless the ECT's legal framework have proven quite successful in managing foreign investment claims. The author discusses earlier awards made under the ECT, including the *Plama v. Bulgaria* award[9] in which the investor claimed that Bulgaria had interfered with the operation of an oil refinery in which Plama had purchased an equity interest. The tribunal found that Plama had acted contrary to the principle of good faith, which includes the obligation that an investor provide relevant and material information to the host state when seeking approval from an investment, and that Plama was guilty of malpresentation. The author also includes an in-depth discussion of the well-known *Yukos* cases[10] and the question of whether Russia was subject to the provisional ratification of the ECT. Finally, the author considers the substantive protections given to investors in the mining sector in this region.

4. Chapter 9. Africa: Treaty and Contract Stability

This Chapter discusses the importance of large-scale foreign investment to African governments but notes that the relative goals of governments and investors in the region have traditionally been at odds: while African governments would benefit from investment in manufacturing or infrastructure development, the investors' focus has been on exporting raw materials out of Africa, leading to a lack of

[9] Plama Consortium Ltd. v. Rep. of Bulgaria, ICSID Case No. ARB/03/24.

[10] Yukos Universal Ltd. (Isle of Man) v. Russ., UNCITRAL, PCA Case No. 2005-04/AA227; Yukos Capital Ltd. (formerly Yukos Capital SARL) v. Russ., UNCITRAL (Geneva Tribunal), PCA Case No. 2013-31.

meaningful development in host countries in Africa.

Professor Cameron discusses the evolution of energy investment in Africa, starting in the post-colonial period of the 1980s wherein several large states, including Algeria, Angola, Egypt, Equatorial Guinea, Gabon, Libya, and Nigeria that built up their export-driven energy industries on the back of substantial foreign investment from the 1980s onwards, and the second wave of energy investment that arose in the early 2000s in Ghana and Senegal, and the East, such as Mozambique, Tanzania, and Uganda. This chapter focuses on several African states within each of these two groupings (first wave group and second wave group) and will examine how legal stability for long-term, often complex energy investments has been tested, and with what results in terms of preserving (or ending) the relationship between host state and investor. In particular, the author points to the range of stabilization instruments used in Africa, from stabilization clauses in long-terms agreements, to legislative guarantees (such as Nigeria's law applicable to an LNG project) or presenting a negotiated contract to the legislature for adoption as a *lex specialis* (as has been used in Egypt for many decades). However, in his conclusion, the author poses the question of whether these varied stabilization instruments are effective, and then points to the fact that many disputes in Africa reach a settlement which benefits both host states and investors in two ways: (i) the commercial relationship continues and (ii) provides for a commercial relationship satisfying to both parties. The author leaves us with the thoughtful view that Africa is the region least prone to nationalistic ideology of any of the other regions discussed in his book, and that African states are the most effective at managing disputes with investors in a pragmatic manner.

C. *Part III.*

Part III examines two important areas relevant to the stability of investments: the prospect and practice of damage awards in the event of a breach of state assurances, and the enforcement of arbitral awards, before concluding with an overall assessment and a look ahead. The question addressed is whether the various steps taken in pursuit of stability have in fact led to an improvement in the investors' ability to

mitigate risk: for example, by smoothing out the cycles that generate investor vulnerability, while protecting state interests. If so, have they done so at the price of harming the sense of mutual benefit that states and investors need to have about the operation of the international investment regime? Have they depoliticized the legal relationship between the investor and the host state, or failed in this objective?

1. Chapter 10. The Limits to Investment Stability: Environmental and Human Rights Issues.

Chapter 10 discusses the challenges to long-term stability of investments in energy and natural resources caused by actions stemming from exercise of the host states' powers in climate change policies, environmental and social sustainability, and human rights, bolstered by the adoption of the UN Sustainable Development Goals and this Paris Agreement on Climate Change.[11]

This chapter examines the ways in which these two sets of issues, environmental and climate change, and human rights, have been accommodated within the framework of international energy investment law to deliver legal stability. The author notes that both sets of issues provided a basis for which States can raise defenses for a breach of obligations to investors with a view to limiting or precluding their liability.

For example, the author examines the inclusion of environmental provisions in BITs or international investment treaties obligating contracting parties to enforce their environmental laws, such as the US Model BIT (2021),[12] the DR-CAFTA (2004),[13] and in NAFTA (1994).[14] Specifically, the DR-CAFTA obligates its member states not to fail to effectively enforce their environmental laws 'in a manner affecting trade between the Parties'.

The author discusses the different types of claims that can be brought (both by or

[11] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[12] US Model BIT (2021), *available at* https://trade.gov.

[13] The Dominican Republic - Central America Free Trade Agreement, May 28, 2004, 43 I.L.M. 514 (2004), available athttp://www.ustr.gov/TradeAgreements/Bilateral/CAFTA/CAFTA-DRFinalTexts/SectionIndex.html.

[14] North American Free Trade Agreement, *supra* note 6.

against the state or investor) under these environmental provisions. The author notes that these provisions also attract a much wider involvement of actors than is usual in investor–state proceedings, creating a complex set of dynamics. One example examined by the author is the engagement of local communities and indigenous peoples, very evident in hydrocarbons and mining disputes in Latin America. Another example is the *Chevron and TexPet v. Ecuador* case[15] involving a dispute between two US oil companies and the State of Ecuador over the costs of cleaning up an area damaged by hydrocarbons operations, which first arose as a lawsuit against Chevron filed by several indigenous communities.

The Chapter next discusses policies that contemplate a transition away from fossil fuels and their implications not only for future investments but for existing, late-life hydrocarbons projects. The author predicts that change -of-law issues seem likely to arise in some parts of the world when hydrocarbons structures are decommissioned, as well as an increase in treaty-based disputes related to decommissioning.

The Chapter next discusses human rights and the expansion of legal interest in controls over business in the past decade, and how stabilization clauses in long-term contracts have been amended in recent years so as not to curtail a host states' ability to act in order to protect human rights. The author believes that emerging generations of BITs will impose obligations related to human rights on investors and points to earlier arbitrations involving Argentina—such as *Vivendi v. Argentina*[16] and *Urbaser v. Argentina*[17]—in which Argentina used, as a defense, its obligation to ensure that the right to water was not undermined by third parties. Though the objection in *Urbaser* was ultimately unsuccessful, the author observes that the award may be indicative of future trends, as: (1) the tribunal referred to several international declarations and resolutions to support its view that international law 'accepts

[15] Chevron Corp. & Texaco Petroleum Corp. v. Ecuador (II), PCA Case No. 2009-23.

[16] Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3.

[17] Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina, ICSID Case No. ARB/07/26.

corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce', including the commitment to comply with human rights; and (2) the tribunal explained that treaties must be interpreted according to Article 31(3)(c) of the Vienna Convention (account must be taken of 'any relevant rules of international law applicable in the relations between the parties').[18] Accordingly, the author concludes that tribunals may give effect to or take account of international standards on the protection of human rights by means of treaty interpretation.

2. Chapter 11. Damages and Enforcement of Awards.

The first part of this chapter gives a broad overview of the principles that are typically applied to the award of damages in energy investment cases and the main approaches adopted by tribunals to give a value to an energy investment. The author uses case studies to consider how these approaches have been applied in selected energy disputes. The author observes that tribunals in energy have displayed a marked tendency to rely heavily on testimony from experts in arbitral proceedings. The second part of this Chapter considers the ways in which an arbitral award in an energy investment dispute is enforced. Finally, the author examines the role of settlement agreements in energy investment arbitrations.

3. Chapter 12. States, Investors, and Energy Agreements

This Chapter returns to and builds upon the six features of energy investments and the two contextual factors influencing energy investments identified in Chapter 1, based upon the insights gained from the chapters of this book: the framework chapters (Chapters 2, 3, 4, and 5); the case studies (Chapters 7, 8, and 9); the carve-outs (Chapter 10) and the group of 'final' issues, damages, enforcement, and settlement (Chapter 11). In particular, the author explores the forms that legal stability takes in the international energy takes given the inevitability of changing circumstances over the life of long-term contracts, and how such forms of legal stability manage the relationship between the host state and the investor.

[18] Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(4), 1155 U.N.T.S. 331.

III. CONCLUSIONS

Professor Cameron provides a thorough and thoughtful overview of the different and widely varying aspects of international energy investment law. In particular, the book's careful attention to historical and current trends provides an indication of future areas for the expansion of energy investments, and predicts how investment disputes may shift correspondingly, making the book a worthwhile and enjoyable ready for any practitioner. It would also be an engaging and informative read for a law student, or anyone interested in the historical roots of energy investments generally, and the evolution of energy investment law specifically. In sum, this well-written book gives a broad but nuanced view of energy investment law.

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ETHICALLY CHALLENGED? A COMMENTARY

by Francis Ojok

I. INTRODUCTION

From January 20-21, 2022, the Institute for Transnational Arbitration in conjunction with the Institute for Energy Law of The Center for American and International Law and the International Chamber of Commerce ("ICC") hosted the 10th ITA-IEL-ICC Joint Conference on International Energy Arbitration. The conference reviewed the past year and looked to the year ahead in arbitration of international energy disputes. The event featured highly recognized international arbitration practitioners and covered a wide range of topics. The focus of this report is on a panel titled, "Ethically challenged? The increasing prevalence of challenges to arbitrators in both investor-state and contractual disputes."

This panel was moderated by Mr. William W. Russell, Counsel at Reed Smith LLP, Houston, and adjunct professor of international commercial arbitration at the University of Houston Law Center. The members of the panel were Ms. Claudia Salomon, the President of the ICC Court of Arbitration. She is the first woman to serve as President of the ICC in its almost 100 years. Mr. Gonzalo Flores, the Deputy Secretary General at the International Centre for the Settlement of Investment Disputes (ICSID). He has been with ICSID since 1998 and has participated in all the ICSID arbitration challenges except one. Mr. Doak Bishop, a partner at King & Spalding. He has served as arbitrator in over 70 arbitrations in all the major institutions both in commercial and investor-state arbitrations. Professor Loukas Mistelis, a distinguished professor of Transnational Commercial Law and Arbitration, and a Director of the Institute of Transnational Commercial Law, at Queen Mary University of London, School of Law.

The panel focused on the increasing prevalence of challenges to arbitrators in both investor-state arbitration and commercial arbitration.

II. DEFINING ARBITRATION

The moderator, Mr. Russell, commenced the discussion by defining what

arbitration is. In his view, arbitration at its core is the decision by parties to opt out of the national court system and to establish their own alternative process to resolve the dispute. He noted that the legitimacy of the process is the foundation of arbitration. A central component to maintaining arbitration's legitimacy is ensuring the impartiality and independence of the arbitrator(s).

According to him, there are two important tools to ensure impartiality and independence: (1) having informed parties, which is achievable through disclosures, and (2) having the tools to challenge arbitrators who do not meet impartiality and independence standards. Paradoxically, these same tools can also be used to undermine the process.

III. ICC'S ASSESSMENT OF AN ARBITRATOR'S DISCLOSURE OBLIGATIONS

Mr. Russell posed a question addressing the ICC's assessment of what an arbitrator needs to disclose and the consequences of their failure to do so.

Ms. Salomon noted that one of the key functions of arbitral institutions is to vet prospective arbitrators for independence and impartiality, and the ICC is no exception in this respect. Under the ICC Rules, every arbitrator must be independent and impartial of the parties involved in the arbitration.[1] Under Article 11(2) of the ICC Rules, arbitrators have a duty to disclose any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.[2] Article 14 of the ICC Rules provides that an arbitrator may be challenged for an alleged lack of impartiality or independence.[3]

To decide whether to accept the challenge, the ICC does a two-part analysis. They first look at whether the challenge is timely, *i.e.*, whether it is submitted within 30 days from the time of appointment, or from when parties making the challenge were informed of the facts and circumstances on which the challenge is based.

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[1] ICC Rules Arbitration (2021), *available at* https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

[2] *Id.* at Art. 11(2).

[3] *Id.* at Art. 14.

If the request is timely, the ICC will decide the merits of the challenge. In doing so, the ICC considers a range of factors and sources. Significant weight is accorded to decisions taken in previous cases that were based on similar facts and circumstances. It also considers international sources such as the IBA Guidelines on Conflicts of Interest.[4]

To maintain full transparency, ICC allows parties to request the reasoning for its decision on challenges. The ICC's most common grounds for challenges are: (i) relationships with other members of the tribunal or counsel; (ii) relationships with one of the parties, either directly or through the arbitrator's law firm; (iii) lack of impartiality, grounded on the argument of due process, manifest bias, improper conduct, and failure to conduct arbitral proceedings in accordance with the rules; (iv) repeat appointments of an arbitrator by the parties, counsel or law firm; and (v) non-disclosure of potential conflicts.

IV. ARBITRATOR CHALLENGES BASED ON REPEAT APPOINTMENTS

Regarding repeat appointments, there are two common scenarios that arise. First, where an arbitrator was appointed in another case involving one of the parties with overlapping issues. The ICC's position on this scenario is that multiple overlapping appointments with one or some common parties concerning the same or overlapping subject matter could potentially give rise to a reasonable doubt as to arbitrator's impartiality. The ICC's concern is information asymmetry for one of the arbitrators, *i.e.*, he or she could have access to information that is relevant to the case but not available to all parties.

The second component is repeat appointment of an arbitrator by a party involving different matters or repeat appointment of an arbitrator by counsel. Paragraph 27 of the ICC's note to parties enumerates what should be disclosed.[5] Specifically, if the arbitrator or prospective arbitrator has been appointed as an arbitrator by one of the

[4] IBA Guidelines on Conflicts of Interest in International Arbitration (Oct. 23, 2014), *available at* https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 [hereinafter "IBA Guidelines"].

[5] International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration ¶ 27 (Jan. 1, 2021).

parties (or its affiliates) or by counsel (or their law firm), such relationship must be disclosed. The ICC's note does not have a timeframe which differentiates it from the IBA Guidelines 3.1(3) and 3.3(8) on the orange list, which have a three-year window.[6]

V. CHALLENGE ON THE GROUND OF NON-DISCLOSURE

The issue here is the arbitrator's belated, partial, or even complete lack of disclosure as a ground of challenge. Is non-disclosure a separate ground? Or, is it raised to support the main ground?

Few disqualifications have resulted from failure to disclose, alone. But it is considered by the ICC as a factor in assessing whether a challenge is well founded. In exceptional circumstances, there have been instances where the ICC has accepted a challenge on nondisclosure grounds. In doing so, the ICC considered the behavior of the prospective arbitrator in not disclosing facts and circumstances.

In 2020, there were over 1500 arbitrators appointed in ICC cases. There were 92 challenges, of which only five were accepted. Statistically, that means challenges are accepted in about 4% of cases, with a success rate in about a half of a percent.

VI. ICSID ASSESSMENT OF AN ARBITRATOR'S DUTY TO DISCLOSE

According to Mr. Flores, things that are paramount to the legitimacy of the system are: (i) an arbitrator's independence and impartiality and (ii) allowing participants to have sufficient information about the arbitrators. Parties need to know who is being appointed.

Under the ICSID arbitration rules, arbitrators are obligated to disclose any circumstances that may cause their independence, impartiality, confidentiality, or availability to be questioned. The idea behind full disclosure is: (i) to prevent challenges by making sure the parties have all the information they need at the start of the arbitration proceedings, and (ii) for arbitrators to have all the information necessary to decide whether to accept an appointment in a completely transparent situation.

Recently, ICSID distributed to all its member states a package to vote on ICSID's

[6] IBA Guidelines, *supra* note 4, §§ 3.1(3), 3.3(8).

proposals to amend its rules. In recognition of the importance of arbitrator disclosures, ICSID's proposed new arbitration rules require disclosure of third-party funders, which is not included in the current rules and expand the arbitrator's obligation to disclose relationships with the parties, counsel, and members of the tribunal within a five-year period. Thus, ICSID is seeking to expand an arbitrator's disclosure obligations.

VII. CHALLENGES BASED ON REPEAT APPOINTMENTS

According to Mr. Flores, there is a rise in challenges based on repeat appointment of arbitrators. There is also an increasing number of repeated challenges of arbitrators over the course of proceedings. This is presumably due to ICSID's increased caseload and efforts to increase transparency. ICSID's position is that users should be free to take advantage of the different tools that are available to ensure the legitimacy of the proceedings. As such, the concern should not be the right of the parties to propose disqualification when it is founded. Rather, the focus should be on the procedural consequences of the motion, which can be used to tackle the possibility of frivolous challenges.

Under the ICSID arbitration rules, when parties propose to disqualify an arbitrator, the proceeding on the merits is automatically suspended.[7] This has attracted criticism from practitioners and scholars who argue that the rule entices the proposal for disqualification purposefully for a dilatory tactics, *i.e.*, to simply delay or derail the proceedings. ICSID proposed changing the current rule to suspend the merits proceeding, but most users prefer to keep the suspension rule. Parties can, however, agree not to suspend the proceedings during the disqualification process.

To tackle fear of delays resulting from challenges, ICSID has proposed a more expedited procedure for challenges. The idea is that it should be concluded within 60 days. ICSID will also remind the parties that they can derogate from the rule of suspension and proceed with the arbitration.

Another element that ICSID is incorporating in the proposed arbitration rule is a

[7] ICSID Rules of Procedure for Arbitration Proceedings, Rule 9(6) (Apr. 15, 2006) [hereinafter "ICSID Rules"].

notion that the tribunal must take into consideration the conduct of the parties when they are allocating costs. They also seek to remind tribunals of their power to issue an interim award of costs during the proceedings and before the final award. According to Mr. Flores, these procedural measures would likely minimize the negative consequences of unmeritorious challenges.

VIII. PARTIES ENGAGED IN REPEATED CHALLENGES

There are two ICSID arbitration cases involving Venezuela in which there where repeated challenges.[8]

In one of those cases, Venezuela lodged six challenges. The first challenge was after the arbitrator's firm merged with Norton Rose Fulbright LLP. The challenged arbitrator resigned from his law firm after the challenge was filed and it was rejected. The same arbitrator was later challenged for a second time along with the chairman of the tribunal for having a "general negative attitude" toward the case, allegedly relying too much on claimant's representations. That challenge was also rejected. The same arbitrator was later challenged for a third time along with the chairman for a second time. Their ground for challenge was a negative attitude because of an alleged ongoing relationship with Norton Rose Fulbright LLP. This challenge was also rejected. He was again challenged three more times over the next two years for different aspects of an alleged relationship with Norton Rose Fulbright LLP.[9]

In another case, *Fábrica de Vidrios v. Venezuela*,[10] Venezuela challenged the arbitrator, Stephen Drymer, four times. ICSID rejected all four challenges. One could certainly see those challenges as obstruction tactics, delay tactics, and abuses.

IX. CONSEQUENCES OF REPEAT CHALLENGES

There are several potential consequences of repeat challenges. These include: (i) a tribunal may award costs against the party who makes repeated challenges without justification, (ii) an injunction to stop repeat and future challenge, and (iii) adverse

[8] Liberty Seguros, Compañía de Seguros y Reaseguros v. Venezuela, ICSID Case No. ARB(AF)/20/3 (2020); Fábrica de Vidrios Los Andes, C.A. v. Venezuela, ICSID Case No. ARB/12/21, Award (Oct. 17, 2017).

[9] Liberty Seguros, ICSID Case No. ARB(AF)/20/3.

[10] Fábrica de Vidrios Los Andes, ICSID Case No. ARB/12/21.

inferences. According to Mr. Bishop, there is a fourth option, namely, changing or removing the automatic suspension rule under the ICSID Arbitration Rules.[11]

X. CHALLENGING THE ENTIRE TRIBUNAL

The panel then discussed instances of parties challenging the entire tribunal and making challenges based on the ruling or procedural issue that they do not like. According to Mr. Bishop, instances of parties challenging the entire tribunal are on the rise.

Mr. Bishop then went on to address questions such as why do parties ever challenge the entire tribunal? Are they ever effective?

According to him, the case *Chevron v. Ecuador* is instructive.[12] Ecuador challenged the entire tribunal on several grounds, one of which had to do with the merits of certain interim measures decisions. The secretary general of the PCA issued a 45-page decision rejecting all the challenges. The secretary general said the law did not allow him to pass judgment on the correctness of the tribunal decision and substitute his own views in place of theirs. Instead, the secretary general assesses whether the decisions were so unreasonable that bias is the most likely explanation for them. He rejected the challenge finding that there was no justifiable doubt of impartiality and no appearance of bias.[13]

There was also an LCIA Arbitration where a party challenged all three arbitrators for improperly delegating their decision-making authority to the tribunal secretary.[14] The challenge occurred after the chairman mistakenly sent an email to the plaintiff which was intended for the secretary to the tribunal. The email asked the secretary a question "your reaction to this latest from the claimant"? The LCIA decided that this email alone did not prove improper delegation of authority by the tribunal, and they rejected the challenge. The case went to the English commercial court. It also

[11] ICSID Rules, *supra* note 7, Rule 9(6).

[12] Chevron Corp. v. Ecuador, PCA, Award (Aug. 31, 2011).

[13] *Id.*

[14] P v. QRS & U, LCIA, Award (2015).

agreed with the LCIA's decision.[15] Conversely, in Italy a party challenged an award because a tribunal which was composed entirely of construction specialists hired a lawyer to draft the award for them. The Italian Supreme court held that the tribunal effectively delegated its decision-making authority and annulled the award.

XI. CONSEQUENCES OF RAISING TACTICAL CHALLENGES

The most obvious repercussion for such challenges is cost awards. However, tactical challenges can also result in questions or concerns about the counsel's credibility, as well as the client's. Constant challenges may also create a hostile attitude towards the case. According to Professor Mistelis, if ever one is being challenged, the arbitrator could consider resigning. However, assessing whether a particular challenge is tactical or legitimate is difficult for the tribunal to make. Finding the right balance is not always very clear.

XII. DIFFERING APPROACHES AMONG INSTITUTIONS AND NATIONAL COURTS

Faced with the issue of arbitrator's challenge, national courts and arbitral institutions operate based on their practice and on the law. In the law, there have been significant approximations, but it is rather bare. Reasonable doubt as to the impartiality and independence would justify the challenge, but it is not known beyond that, *e.g.*, whether non-disclosure should result in disqualification. That is where there is a lot of divergence.

In Professor Mistelis's observation, national courts have become much more relaxed about challenges. However, the institutions have become a bit stricter. The reason for this is that institutions need to serve the role as gatekeepers of arbitration. National courts also have that role to some extent, but they seem hesitant to remove an arbitrator. Indeed, some courts would almost never remove an arbitrator. For example, in the case of *Tecnimont v. Avax* in France, there was a different decision in the ICC and in *Cour de Cassation* as to whether to remove the arbitrators.[16]

Professor Mistelis further explained that the better-known the arbitrator is, the

[15] P v Q and others, [2017] EWHC (Comm) 194.

[16] Cour de Cassation [Cass.] [Supreme Court] Paris, 1e ch., Société Tecnimont S.p.A. v. J.&P. Avax (Case No. 11-26529), June 25, 2014; Cour d'Appel [CA] [Court of Appeals] Paris, Société J.&P. Avax v. Société Tecnimont S.p.A. (Case No. 14/14884), April 12 2016.

less likely that he or she is going to be removed. That is the point the English court of appeal made in *AT&T Corporation & Anor v Saudi Cable Company*.[17] The challenged arbitrator was the then president of the LCIA. He filed a statement to the court saying that he made a genuine mistake. The court did not uphold the challenge. If the arbitrator were lesser known, the result might have been different.

Ms. Salomon concluded the session, explaining that the reason for the diverging approaches between the arbitral institutions and national courts is due to the stage of the arbitration proceeding. Institutions assess the challenge during the arbitration. Institutions are not involved in upending the outcome of the arbitration as the national court is asked to do in the enforcement stage.

Additionally, arbitral institutions do not typically decide to accept a challenge on the ground of non-disclosure alone. Rather, it is one of many factors, which is ultimately, a requirement with "no teeth." So, how can we insist on disclosure but then there would not be any consequences for the lack of disclosure? Ms. Salomon does not believe this is satisfactory to the global business community, and ultimately, it threatens the legitimacy of arbitration. The issue must be examined more closely.

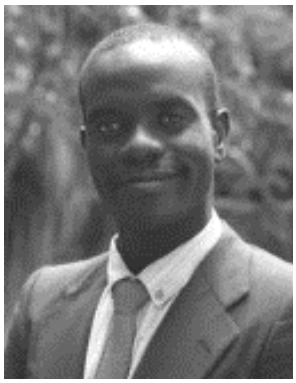
XIII. CONCLUSION

With the growth in global commerce, the use of arbitration as a neutral alternative forum for a just and fair determination of disputes is increasing. It is therefore imperative that the various users of arbitration have confidence in the system. This is achievable by arbitral institutions setting acceptable standards regarding disclosure of potential conflicts and imposing consequences for failure to meet those standards. Other stakeholders, *i.e.*, arbitrators, parties, and the tribunal support staff, must also exercise their self-policing duty to maintain transparency, by disclosing all facts that might create doubt about an arbitrator's independence and impartiality.

Depending on the facts disclosed, a challenge to one or more of the arbitrators may be appropriate. Many challenges are brought in good faith. However, some parties bring a challenge to gain a perceived tactical advantage, for example, to delay the proceedings and, potentially, to gain leniency from an arbitrator. Tactical

[17] *AT&T Corp. & Anor v Saudi Cable Co.*, [2000] EWCA (Civ) 154 (May 15, 2000).

challenges often increase costs and decrease efficiency. In turn, such challenges can decrease confidence in the system among the users. To reduce the number of tactical challenges, it is important that parties have clear guidance on when a challenge is appropriate and on the potential consequences for bringing an unmeritorious challenge.



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"BODYGUARDS" OR "POLICE," WHO CAN ESCORT US TO A MORE SUSTAINABLE FUTURE?
A DEEP DIVE INTO "ELITE EIGHT" IN 2021 INTERNATIONAL ENERGY ARBITRATION

by Lawrence (Yichu) Yuan

I. INTRODUCTION

The investor-state dispute settlement (ISDS) in Energy Charter Treaty (ECT) (investor-state arbitration in effect)[1] have been taunted as the "bodyguards for the fossil fuel industry" by some media analysts because they have been used to challenge states' climate actions, such as closing coal mines and power plants, ceasing oil and gas operations, decommissioning new fossil fuel infrastructure, and cutting subsidies.[2] The metaphorical use is telling as "bodyguards" are hired often by well-heeled private parties to protect private interests, bearing a resemblance to private secretive tribunals hired by corporations to protect corporate interests. Corresponding to "bodyguards" is the "police," which obviously cannot be hired as it is monopolized by the state for public benefits. If investor-state arbitral tribunals act like "bodyguards," courts should be the "police" correspondingly, which may sound paradoxical at first glance since ideally courts should remain independent from executive influence. But state courts, in investor-state disputes where national and geopolitical interests are often at stake, can hardly refrain from being politicized as an extension of the executive branch, one of the principal concerns that gives birth

[1] Under Article 26 of the ECT, investors have the right to bring a suit before ICSID, before an arbitral tribunal established under the UNCITRAL arbitration rules, before the Arbitration Institute of the Stockholm Chamber of Commerce, or before the courts or administrative tribunals of the respondent state. As of December 31, 2021, 145 investor-disputes reported by the Energy Charter Secretariat chose arbitration instead of state courts as ISDS. See International Energy Charter, List of Cases, https://www.energychartertreaty.org/cases/list-of-cases/.

[2] *See*, *e.g.*, *Busting myths around the Energy Charter Treaty*, CORP. EUROPE OBSERVATORY, Dec. 15, 2020, https://corporateeurope.org/en/2020/12/busting-myths-around-energy-charter-treaty; Hannah Robinson, *What we know about the EU's mysterious Energy Charter Treaty*, OPEN DEMOCRACY, Oct. 21, 2020, https://www.opendemocracy.net/en/can-europe-make-it/what-we-know-about-eus-mysterious-energy-charter-treaty/.

to investment arbitrations.[3] Therefore, metaphorizing courts as "police" is not unfounded in this context.

However, state courts are not the only police-like presence in state-related disputes. Supranational courts such as the Court of Justice of the European Union (CJEU) and the Multilateral Investment Court (MIC) in the making and intergovernmental organization like the European Commission, all of which the article would touch on, are also apt for the "police" metaphor. Correspondingly, "bodyguards"—private-driven entities favored by business community—also has a wide scope that captures ICSID arbitral tribunals, non-ICSID arbitral tribunals and even conglomerate-endowed research institute.

Drawing on the eight major cases and events ("Elite Eight") in 2021 international energy arbitration nicknamed and selected by Dr. Laurence Shore at the 10th ITA-IEL-ICC Joint Conference on International Energy Arbitration, this article examines the "Elite Eight" under the tension between and within "bodyguards" and "police" in the transition to a more sustainable future. The tension is manifested, inter alia, in:

- their power struggle for the jurisdiction of ECT disputes;
- their divergent interpretive lenses of contract terms, corporate and state conduct;
- their principals' differing visions of the energy sector's future;
- the impact they exert on achieving sustainable development.

To better present the unifying theme and better brief researchers and practitioners, each sub-section of the article leads with at-a-glance summaries of the "Elite Eight," followed by analyses of the necessary context, reasoning, policy, and impact based on the author's research alongside Dr. Shore's comments.

II. "ELITE EIGHT": "BODYGUARDS" AND "POLICE"

A. *Normal Science*

The following three "elites" are grouped under "Normal Science" by Dr. Shore because they are "exemplars of well-developed approaches in existing energy law."

[3] United Nations Conference on Trade and Development, Investor–State Disputes: Prevention and Alternatives to Arbitration, 13-14, UNCTAD/DIAE/IA/2009/11 (2010).

1. A State Aid Dispute: *Eurus Energy v. Spain*

Eurus Energy v. Spain is an ICSID arbitration brought by a Japanese company, Eurus Energy, and its fully-owned Dutch subsidiary, which owns and operates wind farms to generate electricity in Spain under the ECT[4] (the Dutch claimant withdrew from the arbitration in 2018).[5] The dispute arose from Spain's change in its state aid regime to renewable energy in accordance with EU requirements, reducing the subsidies to the Japanese claimant and even clawing back subsidies it had already received.[6] The Japanese claimant alleged that Spain violated Article 10 (fair and equitable treatment (FET)) and Article 13 (indirect expropriation) of the ECT.[7] The tribunal dismissed the expropriation claim[8] but held the retroactive claw-back of subsidies by Spain breached the FET standard.[9] The tribunal directed the parties to seek agreement on the amount of the claw-back claim.[10]

The tribunal's holding and reasoning in merits are not surprising as it "reflects well-established features of a complex energy investment arbitration, particularly concerning legislative changes to renewables' programs," as Dr. Shore pointed out.

First, the expropriation claim fell through for two reasons: (i) the Japanese claimant's purported "public law right" with unspecified duration to receive state subsidies based on administrative certificates and provisions is not a vested right recognized under the Spanish legal system but derives from administrative measures that are subject to change;[11] therefore, it is more akin to an expectation which can be frustrated, denied, but not expropriated;[12] (ii) even if it is an acquired right susceptible of expropriation, established jurisprudence suggests that expropriation requires

[4] Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/4., Decision on Jurisdiction and Liability, ¶ 3 (Mar. 17, 2021).

[5] *Id.* ¶ 3.

[6] *Id.* ¶¶ 101, 242-45.

[7] *Id.* ¶¶ 241, 276-370.

[8] *Id.* ¶ 274.

[9] *Id.* ¶ 467.

[10] *Id.* ¶ 468.

[11] *Id.* ¶¶ 259, 261, 264, 266

[12] *Id.* ¶¶ 256, 272.

"substantial deprivation of the asset in question or its value" which is unmet, because the plants here are still intact, operating under the Japanese claimant's ultimate control, although their value is impaired; and therefore, there is no conduct by Spain tantamount to expropriation.[13]

Second, on the FET Claim, the tribunal found that the Japanese claimant did not have a legitimate expectation that certain subsidies would continue to be paid for the lifetime of its plants because Spain had not made any "specific commitments" to maintain these subsidies.[14] The five-prong "Blusun test" was applied to ascertain the existence of "specific commitments" (in parenthesis are the majority's brief answers): (i) was there a specific commitment of stabilization? (no); (ii) absent a specific commitment, did the claimant entertain a legitimate expectation that subsidies would not be reduced during the lifetime of the project (no); (iii) were the subsidies lawfully granted (yes, in accordance with EU law); (iv) were the changes in legal regime "disproportionate to the legitimate aim of the legislative amendments" (no, except the claw-back of benefits already paid); and (v) did the reform have due regard to the reasonable reliance interests of recipients who had committed substantial resources on the basis of the earlier regime (yes, except the claw-back).[15] Based on the test, the tribunal found that (i) Eurus had legitimate expectations that those subsidies would be continued in "some substantial form," but not to the extent that they would remain the same for the lifetime of Eurus's investment and (ii) only the retroactive claw-back breached FET standard.[16]

In analyzing the claw-back under the fourth question of the "Blusun test," the tribunal rejected the Spanish constitutional court's formalistic interpretation of "retrospectivity" and adopted a more functional approach. Specifically, the Japanese claimant claimed its expectation that the state subsidies would sustain for the duration of the project's operational lifetime (25 years ultimately found by the

[13] *Id.* ¶¶ 256, 274.

[14] *Id.* ¶ 319.

[15] *Id.*

[16] *Id.*

tribunal) was violated because the new incentive only covered the first 20 years.[17] The reduction in future payment was based on factoring in the past subsidies made to the plants, resulting in no payments for 11 of the plants.[18] The tribunal found it to be "a weaker form of retrospectivity" as no payment would need to actually be made to Spain, but reducing future remuneration based on past gains has the effect of clawing back remuneration to which the investor had a right at the time the payment was made.[19] In reaching this conclusion, the tribunal disregarded the Spanish court's judgment and instead recalled its fellow "bodyguards' practices"—a handful of ICSID awards—and ultimately followed a substance-over-form approach adopted by the *RREEF Infrastructure Limited v. Spain* tribunal which reasoned the same.[20]

The policy consideration underpinning the deviation from Spanish court judgments seems to be not to penalize the plants producing renewable energy for their successful operation which sustained their past subsidies over those years.[21] The foothold of the non-deference to state court is ICSID's self-contained enforcement mechanism:[22] an ICSID arbitration contains (i) no arbitral seat; (2) no interim measures from the court; (3) no review of award from courts,[23] and instead the proceeding and interpretation, revision, and annulment of award must be made within the ICSID Convention framework. The very salient feature that no state "police" at seat can either stay, compel, or otherwise influence ICSID proceedings, or set aside ICSID awards, especially on the amorphous "public policy" ground allows ICSID tribunals to be the "bodyguards" of businesses in the battle against sovereign states.[24]

[17] *Id.* ¶¶ 339-40, 344.

[18] *Id.* ¶¶ 346-47.

[19] *Id.* ¶¶ 347, 354.

[20] *Eurus Energy*, ¶¶ 347, 354; RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶¶ 328-29 (Nov. 30, 2018).

[21] *Eurus Energy*, ¶ 355.

[22] URSULA KRIEBAUM, ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 343-44 (3rd ed. 2022).

[23] ICSID Convention, art. 26

[24] *Id.* at art. 54; KRIEBAUM, *supra* note 22, at 448.

Lastly, this case is a good counterexample to the one-sided media portrait of ISDS: even if the ECT and ECT tribunals are acting as "bodyguards," they are not necessarily protecting polluters in fossil fuel industry, but all corporations entitled to ECT claims, which include the ones promoting renewable energy.

2. Is "Continuous Drilling" Drilling Non-stop? *Sundown Energy v. HJSA No. 3*

In *Sundown Energy v. HJSA No. 3*, the Texas Supreme Court rendered a judgment on the contractual dispute of the interpretation of a "continuous drilling program" provision in a mineral lease between Sundown (the "Lessee") and HJSA No.3 (the "Lessor").[25] The issue was whether activities other than spudding in[26] a well are sufficient to satisfy the precondition to maintain the lease under conflicting contract terms. The Texas Supreme Court held that spudding in is not required to maintain the lease and activities other than drilling can constitute "drilling operations."

The holding that "continuous drilling" is not drilling non-stop by the Texas Supreme Court is fact-sensitive. Specifically, the lease provides that at the end of the lease's 6-year primary term the Lessee was required to reassign to the Lessor operating rights and non-producing areas unless the Lessee was engaged in a "continuous drilling program."[27]

The Lessor argued that if the Lessee failed to timely "spud in" new wells, the lease would be terminated based on the contractual provision which states, "[t]he first such continuous development well shall be spudded-in on or before the sixth anniversary of the Effective Date, with no more than 120 days to elapse between completion or abandonment of operations on one well and commencement of drilling operations on the next ensuing well."[28]

The Lessee's position was that activities other than spudding-in, such as reworking, fracturing, and other well operations, were sufficient to maintain the

[25] Sundown Energy Ltd. P'ship v. HJSA No. 3, Ltd. P'ship, 622 S.W.3d 884, 885 (Tex. 2021).

[26] "Spud in" means the first boring of the hole in the drilling of an oil well.

[27] *Id.* at 887.

[28] *Id.*

lease.[29] This is supported by a definition clause contained in the lease which defines "drilling operations" as three categories of operations that include, but are not limited to, spudding in a well. Specifically, the definition clause provides that, "*[w]henever* used in this lease the term 'drilling operations' shall mean: [1] actual operations for drilling, testing, completing and equipping a well (spud in . . .); [2] reworking operations . . . ; and [3] reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well."[30]

The trial court found for the Lessee, but a divided Court of Appeals reached the opposite conclusion and found that the lease required timely spudding in, which the Lessee had failed to do.[31] The Texas Supreme Court reviewing de novo found that the lease clearly defined that the term "drilling operations" in the continuous drilling program provision included reworking operations in addition to spudding in;[32] and therefore, activities other than spudding in a well are sufficient to maintain the lease.[33]

Other than the contract construction part being a cautionary tale for contract drafters, the Texas Supreme Court's holding and dicta in the judgment contain important policy considerations that could surface in future arbitrations if Texas law is applied. To illustrate, the Lessor argued that the mineral lease's objective is to encourage the full exploration and development of undeveloped acreage and from this utilitarian standpoint, the Lessee should have to spud in new wells to meet this policy objective.[34] In contrast, the Lessee argued the policy objective is met because fracturing and reworking are production maximizing activities as well that can be more cost-effective than drilling new wells; and therefore, maximizing production should not be equated with drilling new wells.[35] As Dr. Shore commented, "while the

[29] *Id.*

[30] *Id.* at 887-88.

[31] *Id.* at 887.

[32] *Id.* at 890.

[33] *Id.*

[34] *Id.* at 889.

[35] *Id.*

court did not choose one policy argument over the other, the per curiam opinion was clearly at pains to show that production maximizing, a central concern of Texas energy law, would be upheld either way the mineral lease is construed."

Granted, this case is not apt for the "police" and "bodyguards" metaphors because there is no state party involved in the dispute, and so the court is hardly under any executive influence to act as a "police." However, it does represent how state courts are, to the extent of its judicial discretion, willing to safeguard the business arrangements towards a more sustainable development in the fossil fuel industry: with the advent of new technology like rework and recondition and other hydrocarbon production, coupled with proper definition clauses, the end goal of "production maximizing" can be served other than drilling *per se*.

3. Resolving Billion-Dollar Dispute in One Year: *West Africa Gas v. Ghana*

West Africa Gas v. Ghana is an arbitration case of London Court of International Arbitration (LCIA) on a dispute arising out of the termination by the West Africa Gas Limited (BVI) (the "Seller") of a gas sales agreement dated in 2015 (the "Gas Sales Agreement") made between the Seller and the Republic of Ghana (the "Buyer").[36] Two principal issues before the tribunal were: (i) whether the Seller could terminate the agreement if the Seller itself was in breach of contract;[37] and (ii) whether a 18-month delay in exercising the termination right prevented the Seller from so doing when the agreement prescribed that the seller "may thereafter terminate this Agreement with immediate effect" which permits two conflicting interpretations.[38] The Seller initially sought $1 billion for recovery fees.[39] The tribunal applying Ghanaian law found for the Seller in both issues and eventually awarded Seller $69 million. (Ghanaian law is not materially different from English law).[40]

In the midst of Ghana's decade-long energy crisis, the Buyer and the Seller

[36] West Africa Gas Limited (BVI) v. The Government of the Republic of Ghana, LCIA Case No. 194422, Award, ¶ 1 (Jan. 15, 2021).

[37] *Id.* ¶ 127.

[38] *Id.* ¶¶ 143-45.

[39] *Id.* ¶ 38.

[40] *Id.* ¶¶ 163, 326.

entered into the Gas Sales Agreement for the supply of liquefied natural gas ("LNG").[41] The agreement provided for conditions precedent to the party's obligations to sell and purchase the LNG,[42] but both sides failed to fulfill all the conditions precedent.[43] For example, the Buyer failed to obtain a letter of credit[44] and the Seller did not complete the infrastructure works at Tamer.[45] The Seller eventually terminated the agreement.[46] According to the agreement, the Seller's right to terminate arose on an agreed-upon date if "any conditions" were not fulfilled on that date or a different date if the original date is waived or modified in writing (the "Seller's right to terminate").[47] Given that the Buyer failed to fulfill certain conditions on the agreed-upon date and the Buyer no longer wanted to purchase gas because the Buyer was able to receive gas at significantly lower prices from Gazprom, saving around $400 million, the Seller exercised its right to terminate.[48]

The Buyer maintained, *inter alia*, that the Buyer and Seller's conditions were "independent" of each other and had to be performed "concurrently;" alternatively, there was an order of precedence and that the letter of credit did not have to be provided before other conditions were fulfilled.[49] Therefore, Buyer argued, the Seller could not use the Buyer's failure to perform conditions as a ground for termination. Specifically, the Buyer submitted that until the Seller had satisfied all of its conditions (in particular, completed the infrastructure works), and was in a position to supply gas to the Buyer, the Buyer's payment obligations—like opening a letter of credit—did not arise.[50]

[41] *Id.* ¶ 121.
[42] *Id.* ¶ 36.
[43] *Id.* ¶ 37.
[44] *Id.* ¶ 94.
[45] *Id.* ¶ 37.
[46] *Id.* ¶ 38.
[47] *Id.* ¶¶ 132-34.
[48] *Id.* ¶¶ 101, 106.
[49] *Id.* ¶¶ 110-11.
[50] *Id.* ¶ 116.

For the first issue, the tribunal conducted a multi-layered analysis regarding contract construction to reach the conclusion that there was nothing in the Gas Sales Agreement, making the Sellers' right to terminate conditional on having itself complied with all its conditions. The principal reasons include, *inter alia*, (i) the term "any condition" without any specificity as to which condition are wide and self-explanatory;[51] (ii) the Seller's right to terminate is subject to the Seller's unilateral right to extend the agreed upon date to accommodate the Seller's delay in fulfilling conditions caused by acts of the Buyer (the "Seller's unilateral right of extension"), which is not exercised;[52] (iii) the agreed-upon date can only be changed or be postponed if the Seller exercised its unilateral right of extension or if the parties waived the date in writing, but neither happened here;[53] (iv) given the Seller's right to terminate is expressly made subject to the Seller's unilateral right of extension—which presupposes that the Seller may not comply with the conditions—the right of extension does not undermine the alternative right to terminate;[54] (v) if the Seller's right to terminate is conditional upon its fulfillment of its conditions, it would be very uncommercial to compel the Seller to perform and undertake further expenditure to complete the infrastructure works after the Buyer announced that it was not going to further perform, as it would mean an increased "recovery fee" which the Buyer would ultimately have to pay;[55] and (vi) there is nothing in the agreement which makes the Seller's right to terminate conditional on it having itself complied with all the conditions, and nor does the Buyer have an equivalent right of extension.[56]

For the second issue, the tribunal acknowledged that the words "with immediate effect" can either govern the termination date (suggesting a limited time scale of immediacy) or govern the effectiveness of the termination notice (imposing no

[51] *Id.* ¶ 134.

[52] *Id.* ¶ 135.

[53] *Id.* ¶ 137.

[54] *Id.* ¶ 138.

[55] *Id.* ¶ 104.

[56] *Id.* ¶ 140.

restrictions on the exercise period).[57] The latter interpretation was eventually adopted. The reasons include (i) the former interpretation would render "thereafter" redundant;[58] (ii) "with immediate effect" denotes a consequence of a notice, not the time within which to serve it; had the words been intended to govern the time within which to terminate, there would have been qualifying languages as present in other provisions of the agreement (*e.g.*, Article 3.1.2 uses the phrase "may forthwith terminate;" Article 23.5 which entitles the Seller "to terminate" if no acceptable replacement LC is provided "immediately," etc.);[59] (iii) to argue that the termination should have been carried out immediately is inconsistent with the Buyer's argument that the termination was premature because the Seller had not fulfilled its conditions.[60]

The tribunal then spent 147 paragraphs on an extremely detailed determination of the recovery fee totaling $69 million.[61]

The elaborate award came only around one year after the tribunal was constituted, which prompts Dr. Shore to praise that it is exactly the "rapid painstaking analysis applied to an exceedingly complex high-valued gas sales agreement with [high] level of contract construction and quantum assessment that helps sustain arbitration as the preferred method of dispute resolution in the energy sector."

But a normative inquiry into the backdrop of this well-reasoned and efficiently-rendered decision and its impact on state and sustainable development may draw a rather bleak picture: amidst Ghana's decade-long energy crisis and the halt in economic development during COVID-19, Ghana's public debt increased to 81.1 percent of GDP in 2020.[62] Ghana has lost in a number of investor-state arbitrations and is obligated to pay $12.05 million in *Balkan Energy v. Ghana* (a 2014 PCA arbitral

[57] *Id.* ¶ 147.

[58] *Id.* ¶ 150.

[59] *Id.* ¶¶ 150-51.

[60] *Id.* ¶ 153.

[61] *Id.* ¶¶ 164-310.

[62] *The World Bank in Ghana*, THE WORLD BANK, https://www.worldbank.org/en/country ghana/overview#1.

award),[63] $87.2 million in *Bankswitch v. Ghana* (a 2014 PCA arbitral award),[64] $134 million *GPGC v. Ghana* (a 2021 PCA arbitral award),[65] and now, $69 million in *West Africa Gas v. Ghana* (a 2021 LCIA arbitral award). Ghana is not alone however. From 2013 to 2019, African states have received more foreign investor claims than the previous 20 years combined.[66] Although foreign investors should not foot the bill for contract default, it begs the question: how does continuously crippling a state's liquidity by uncoordinated debt claims benefit any actor? Neither can a state ridden with immediate debt claims emerge from energy crisis and then succeed in energy transition thereafter, nor can foreign investors sustainably enforce their debt claims when the vicious circle (debt-ridden states continuously borrowing new debt and defaulting in repayments) culminates in state bankruptcy.

But are "bodyguards" really the culprits here? Absent any "police" coming to rescue, a "bodyguard" like an international arbitral tribunal can at least force African states to cough up some money and theoretically safeguard the sustainability of foreign direct investment. Arguably, it is the coordination of their principals' (foreign investors') debt claims and the construction of a regime for a special protection of sovereign states under such circumstances as Ghana is experiencing that merit our attention and efforts.

B. *Energy Arbitration and Climate Crisis*

Next are three prominent examples offering European perspectives on energy arbitration amidst the climate crisis.

1. The End of ECT Intra-EU Arbitration? *Moldova v. Komstroy*

Moldova v. Komstroy is a ruling made by the CJEU on the dispute between the Republic of Moldova and Komstroy LLC, a Ukrainian company concerning the ECT.[67]

[63] Balkan Energy v. Ghana Final Award, Permanent Court of Arbitration, Final Award, ¶ 642 (Apr. 1, 2014).

[64] Bankswitch v. Ghana, Permanent Court of Arbitration, Award Save as to Costs, ¶ 11.231 (Apr. 11, 2014).

[65] GPGC Limited v. The Government of the Republic of Ghana, Permanent Court of Arbitration, Final Award, (Jan. 26, 2021), ¶ 532.

[66] *Impacts of investment arbitration against African states*, TRANSNATIONAL INSTITUTE, Oct. 8, 2019, https://www.tni.org/en/isdsafrica.

[67] Case C-741/19, Republic of Moldova v. Komstroy LLC, 2021 E.C.J., ¶¶ 1-2.

One of the issues raised by the European Commission and several member states before the CJEU is whether intra-EU arbitration (arbitration between EU investors and EU Member States) under the ECT is compatible with EU law.[68] The ruling is the CJEU's latest position on the compatibility of intra-EU arbitration with the EU law after its *Achmea* decision in 2018 ("*Achmea*"). In *Achmea*, the CJEU held that arbitration provisions found in bilateral investment treaties (BIT) concluded between EU Member States are incompatible with EU law.[69] What's new in *Komstroy*, however, is that CJEU had to decide whether the *Achmea*'s decision in BITs would apply in the new context of the ECT, a multilateral investment treaty to which EU itself is a party. Following *Achmea*, the CJEU held that the investor-state arbitration under Article 26 of the ECT does not apply to intra-EU disputes.[70]

The CJEU's reasoning is summarized as follows.

First, recalling its reasoning in *Achmea*, the CJEU stressed the importance of the autonomy of the EU legal order, and the consistency and uniformity in the interpretation of EU law under the Treaties of the EU.[71] For instance, the preliminary ruling procedure where the EU national courts may make a preliminary reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union was designed to secure uniform interpretation of EU law, thereby serving to ensure its consistency, full effect, and autonomy.[72]

Second, the CJEU followed settled case law and found that the ECT concluded by an EU institution—the Council of the European Union in this case—is an "act of EU law" and forms part of the EU legal order.[73] It follows that an ECT arbitral tribunal is required to interpret, and even apply EU law when deciding a dispute under Article 26 of the ECT.[74]

[68] *Id.* ¶ 25.

[69] Case C-284/16, Slowakische Republik (Slovak Republic) v. Achmea BV, 2021 E.C.J.

[70] *Moldova*, ¶ 66.

[71] *Id.* ¶ 45.

[72] *Id.*

[73] *Id.* ¶ 23.

[74] *Id.* ¶ 50.

Third, CJEU maintained its position in *Achmea* and held that ECT tribunals are outside the judicial system of an EU Member state and cannot make a reference to the CJEU for a preliminary ruling.[75] Additionally, the judicial review that arises in an EU-seated investor-state arbitration is limited since the referring court can only perform a review insofar as the domestic law permits.[76] In other words, the ECT does not contain mechanisms to safeguard divergences in the interpretation of its provisions by different tribunals, which would threaten the consistency and uniformity in the interpretation of EU law.

Finally, to exempt commercial arbitration from the ruling, the CJEU attempts to distinguish investor-state arbitration from commercial arbitration. The distinction drawn by the CJEU is that commercial arbitration "originate[s] in the freely expressed wishes of the parties concerned," whereas investor-state arbitration "derives from a treaty" based on states' action to remove disputes from judicial remedies provided in national courts,[77] which by inference would limit party's autonomy to a certain extent. Unfortunately, the CJEU did not elaborate on this point.

The ruling also answered one issue referred by Paris Court of Appeal regarding the definition of "investment" and held that an acquisition of a claim arising from an electricity supply contract and without any economic contribution to the host State does not constitute an "investment" under Article 1(6) ECT.[78]

The *Komstroy*'s decision to end intra-EU ECT arbitration needs to be contextualized in EU's political environment. The first are the environmental concerns. As stated in the introduction, the ECT and ECT tribunals have been criticized for protecting the fossil fuel industry because corporations are enabled to bypass national courts and sue states for billions in secretive private tribunals for their stranded assets whereby delaying the transition to clean energy. As a response, the European Commission, along with other actors, started to reform the ECT but

[75] *Id.* ¶¶ 52-53.

[76] *Id.* ¶ 57.

[77] *Id.* ¶ 59.

[78] *Id.* ¶ 85.

very little progress has been made, especially in regard to ISDS.[79] This may give rise to the rather "result-oriented" approach taken by the CJEU, a court at the center of judicial activism debate.[80] The second political factor is the European Commission's Multilateral Investment Court project, vividly described as "A World Court For Corporations."[81] The global corporate court features an appellate body, full-time judges, transparency and intervention by interested third party.[82] This mechanism has surfaced in a number of treaties concluded by EU.[83] As Dr. Shore observed, "EU's social vision is treaty disputes belong to an investment court." By displacing EU investors holding claims against EU Member states from ECT tribunals, the judgment cleared out the legal hurdle to substitute the "police" for "bodyguards."

But whether a mere paradigm shift from arbitral tribunals to an international court can realize a uniform interpretation of the EU law that CJEU apparently desires is uncertain. Because there is inherent difficulty to construe a myriad of variations of as many as seven prototypes (the ambiguous standard of fair and equitable treatment, differentially defined rights to compensation for expropriation, umbrella clauses of different ambit, etc.) without contradicting the texts and objects and purposes of the investment treaties as required by Vienna Convention on the Law of

[79] *Energy Charter Treaty reform: Why it has failed to deliver on the EU's own objectives - Briefing*, CLIMATE ACTION NETWORK (EUROPE), Mar. 4, 2022, https://caneurope.org/ect-reform-why-it-has-failed-eus-objectives/.

[80] SUSANNE K. SCHMIDT, THE EUROPEAN COURT OF JUSTICE AND THE POLICY PROCESS: THE SHADOW OF CASE LAW, 23 (2018).

[81] *A World Court for Corporations. How the EU Plans to Entrench and Institutionalize Investor-State Dispute Settlement*, CENTER FOR INT'L ENVTL. L., Nov. 2017, *available at* https://www.ciel.org/wp-content/uploads/2017/12/AWorldCourtForCorporations.pdf.

[82] Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM/2017/0493 final, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505306108510&uri=COM:2017:493:FIN.

[83] European Commission–Canada Comprehensive Economic and Trade Agreement (final draft of Feb. 29, 2016) (CETA) art. 8.29; Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (opened for signature June 30, 2019, entered into force Aug. 1, 2020) art. 3.41; Investment Protection Agreement between the European Union and its Member States and the Republic of Singapore Investment Protection Agreement (opened for signature Oct. 15, 2018, not yet entered into force) art. 3.12.

Treaties.[84] Additionally, even if it is possible, leaving a group of judges, instead of arbitrators to figure out uniformity may not be a desideratum since "no one knows what is likely to emerge from a permanent court of State-selected judges whose very purpose is to [decide whether or not to] render monetary awards against the States that appointed them."[85] At present, it seems that courts creeping into a police-like presence in state-related dispute is a more probable outcome than the uniform interpretation somehow worked out by a group of judges, however competent they are.

While how *Komstroy* would impact political reform remains to be seen and the normative debate continues, its short-term legal fallout on ISDS is real and more complicated than one would imagine.

First, ICSID arbitral tribunals are reluctant to recognize the effects of the *Komstroy* decision: on the one hand, several ICSID tribunals have rejected Spain's attempt to invalidate multiple pre-*Komstroy* decision based on jurisdictional grounds in their reconsideration request;[86] on the other hand, the ECT tribunal in *Sevilla Beheer et al. v. Spain* dismissed Spain's intra-EU jurisdictional objection relying on *Komstroy* and continued to entertain ECT claims brought by EU investors against EU member states.[87]

Second, non-EU investors such as Eurus Energy in *Eurus Energy v. Spain* may still initiate ICSID or non-ICSID ECT arbitration against EU member states post-*Komstroy*, as they fall outside the scope of *Komstroy*. But query as to whether the tribunal in *Eurus Energy* would still maintain the same reasoning had it rendered the decision half a year later after *Komstroy* decision. Notably, the ECT tribunal in *Eurus*

[84] José E. Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV. - FOREIGN INVESTMENT L.J. 272 (2021).

[85] *Id.* at 271.

[86] Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction and Admissibility, ¶ 48 (Dec 6, 2021); Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, ¶ 117 (Feb. 1 2022); Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration, ¶ 99 (Jan. 10, 2022).

[87] Sevilla Beheer et al. v. Spain, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability, and the Principles of Quantum, ¶¶ 669-76 (Feb. 11, 2022).

Energy reasoned that (i) although Japan is a third party to the EU treaty, since the Japanese company established activities in the EU that are regulated by legal regimes (such as state aid) established by EU treaties, EU law is part of the applicable law;[88] (ii) *Achmea* did not undermine the tribunal's decision applying EU law because its jurisdiction was established by a multilateral treaty to which the EU itself is a party, as opposed to a treaty only concluded by EU member states;[89] (iii) the ECT does not contain any provision giving precedence to EU over international law, therefore the tribunal is called on to apply the normal rule of priority of international law under Article 26(6) of the ECT;[90] (iv) the autonomy of EU law does not entail that an ECT tribunal may not apply EU law and taking note of established rules of EU law does not convert ECT tribunals into unmonitored organs of the EU.[91] While the first reason is untouched by *Komstroy*, the second reason would probably be eliminated had Eurus Energy award rendered after *Komstroy*; and the third and fourth would be maintained as a take on compatibility different from CJEU.

Third, leading law firms have briefed intra-EU investors about how to maneuver around the decisions, including (i) restructuring their investment through non-EU jurisdictions (such as the UK, Switzerland, or US) or covered by extra-EU Bilateral Investment Treaties; (ii) choosing ICSID arbitration or non-EU seat for non-ICSID ECT arbitration to avoid EU jurisdiction; and (iii) identifying whether the EU Member States in which they are considering an investment has assets unprotected by immunity and located outside the EU, where enforcement of an arbitral award is less likely to be resisted on EU law grounds.[92]

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[88] *Eurus Energy*, ¶ 232.

[89] *Id.* ¶ 235.

[90] *Id.*

[91] *Id.* ¶ 236.

[92] *EU Court Undercuts Investment Protections in the Energy Charter Treaty for Intra-EU Investors*, SHEARMAN & STERLING LLP, Sept. 13, 2021, https://www.shearman.com/Perspectives/2021/09/EU-Court-Undercuts-Investment-Protections?sc_lang=de-DE; Mallory Stoyanov, *Intra-EU disputes cannot be arbitrated under the Energy Charter Treaty, says the Court of Justice of the European Union*, ALLEN & OVERY, Sept. 6, 2021, https://www.allenovery.com/en-gb/global/news-and-insights/publications/intra-eu-disputes-cannot-be-arbitrated-under-the-energy-charter-treaty-says-the-court-of-justice-of-the-european-union.

Fourth, although bypassing practices exist, EU investors may have compliance concerns post-*Komstroy* when bringing ECT claims as the Dutch claimant had in Eurus Energy post-*Achmea*. In Eurus Energy, the Dutch claimant expressed its intention not to proceed following the CJEUs *Achmea* ruling,[93] and the ECT tribunal exercised its discretion under Article 44 of the ICSID Convention to permit withdrawal in 2018.[94]

Suffice to say, the ICSID tribunals' resistance to *Komstroy* and leading law firms' client letters epitomizes the power struggle between "bodyguards" and the "police" that keeps unfolding.

2. 45% Reduction in CO2 Emissions: *Milieudefensie et al. v. Royal Dutch Shell plc.*

Milieudefensie et al. v. Royal Dutch Shell plc. was a class action brought by a group of seven Dutch NGOs and more than 17,000 individual claimants represented by climate activist lawyer Roger Cox. The complaint was filed before the Hague District Court in the Netherlands against Royal Dutch Shell ("RDS").[95] RSD is the policy-setting entity of the oil and gas conglomerate, the Shell group."[96] Claimants requested the Hague District Court to rule that (i) the annual CO2 emissions of the Shell group and RDS's failure to reduce the same constituted an unlawful act against the Claimants for which RDS was responsible; and (ii) that RDS must reduce the Shell group's CO2 emissions by 45% (net) by 2030 relative to 2019 levels.[97] The issue before

[93] *Eurus Energy*, ¶¶ 28-29, 36.

[94] *Id.* ¶ 36. Article 44 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") states, "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 44, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[95] Vereniging Milieudefensie et al. v. Royal Dutch Shell PLC, Hague District Court, Judgment, ¶¶ 2.1.-2.2. (May 26, 2021).

[96] *Id.* ¶¶ 4.3.6, 4.4.2.

[97] *Id.* ¶¶ 3.1., 4.4.39., 4.4.55., 5.3. ("45% (net)" refers to the sum of the reduction of CO2 emissions of the Shell group's entire energy portfolio, including emissions associated with the end-use of its fossil fuel products, *i.e.*, Scope 1, Scope 2, and Scope 3 emissions as classified by the World Resources Institute Greenhouse Gas Protocol.).

the Hague District Court was whether a private company violated a duty of care and human rights obligations by failing to take adequate action to curb contributions to climate change in its corporate policy. The Hague District Court found for Claimants.[98]

This case stems from the landmark *Urgenda Foundation v. the Netherlands* decision where the Dutch Supreme Court upheld Hague District Court's decision that the Dutch government must reduce its greenhouse gas emissions by at least 25% by 2020 relative to 1990 levels.[99] Building on the *Urgenda* decision, *Milieudefensie et al.* was effectively asking the Hague District Court to extend the principle from public entities to private entities.

The Hague District Court eventually held that RDS has an obligation to reduce 45% (net) CO2 emissions of the Shell group's entire energy portfolio by 2030 compared to 2019 levels.[100] The reduction obligation regarding the activities of the Shell group was held to be "an obligation of result"—obliging RDS to reduce the Shell group's own emissions by 2030,[101] whereas the obligation regarding the business relations of the Shell group, including the end-users was held as "a significant best-efforts obligation."[102]

Said obligations derive from the "unwritten standard of care" in Article 6:162 Dutch Civil Code informed by the Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"), which obliges RDS to exercise due care for Dutch residents and the inhabitants of the Wadden region when creating corporate group policy for the Shell group.[103] The Hague District Court held that the full scope of the due care is considered by taking into account all relevant facts and

[98] *Milieudefensie et al.*, ¶ 5.3.

[99] Urgenda Foundation v. the Netherlands, Supreme Court of the Netherlands, Judgment, ¶ 8.3.5 (Dec. 20, 2019).

[100] *Milieudefensie et al.*, ¶ 5.3.

[101] *Id.* ¶ 4.4.39.

[102] *Id.*

[103] *Id.* ¶¶ 4.4.1.-.3., 4.4.9.-.10.

circumstances of the case, the best available climate science, and broad international consensus on the protective effect of human rights against dangerous climate change.[104] In the present case, the court found that the Shell group's global CO2 emissions—which the court noted exceeded the CO2 emissions of many states, including the Netherlands—contributed to the "serious and irreversible consequences," including climate change-induced hot spells, floods, deterioration of air quality, increase of UV exposure, etc. for Dutch residents and the inhabitants of the Wadden region.[105] Shell's corporate strategy was held to be "intangible, undefined and non-binding plans for the long-term (2050)" and, as such, incompatible with RDS' reduction obligation.[106]

The court acknowledged that Shell cannot solve this global problem on its own; however, "this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence."[107]

RDS appealed, but the court made its decision provisionally enforceable,[108] meaning RDS will be required to meet its reduction obligations even as the case is appealed.

Although like in *Sundown Energy LP v. HJSA No. 3 Limited Partnership* there is no state party involved, the decision builds on the *Urgenda* decision which involves the Dutch state; therefore, there is still room for the "police" metaphor to come in. Moreover, the groundbreaking order of "45% reduction" as an obligation of result placed on private company corroborates the "police" role national court undertakes—an agent to deliver political commitments to sustainable development, complementing the existing Pigouvian taxes, quota trading, and other policy instruments targeted at targeting corporate actors addressing climate change. This

[104] *Id.* ¶ 4.1.3.

[105] *Id.* ¶ 4.4.6.

[106] *Id.* ¶ 4.5.2.

[107] *Id.* ¶ 4.4.49.

[108] *Id.* ¶ 4.5.7.

is evidenced in a number of "soft laws"[109] the court "hardened" in its interpretation of the "unwritten standard of care," including, inter alia, the UN Guiding Principles on Business and Human Rights (UNGP)[110] and the Paris Agreement[111] (The Paris Agreement does not include legally binding emission reduction targets for state parties and merely "welcomes" the action from private sector).[112]

The impact of the case is significant. For litigators, Dr. Shore noted that Claimants' attorney, Roger Cox, forecast "an avalanche of cases against the fossil fuel industry and related industries, like the car industry"[113] and identified banks and financial regulators as targets for having financed large CO2 emissions.[114] For adjudicators, some researchers noted that the case seems to join the global trend of judicial decisions that disregard the *fictio iuris* of the corporate veil and hold parent companies accountable for their subsidiaries' conduct impacting the environment.[115] In particular, the UK Supreme Court also found that a parent company's duty of care might arise from setting harm-inducing group-wide policy, actively ensuring follow-through of the policy by subsidiaries through training and supervision, or failing to deliver its public commitment of supervision and control of its subsidiaries.[116] It is foreseeable that the courts' interpretation may spill over to "bodyguards'" interpretation in investment treaty and commercial arbitration if the relevant state law is applied.

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[109] Soft laws are instruments agreed by actors of international law that are either non-binding political commitments or nominally binding contract but with no or weak enforcement mechanism. *See* Kal Raustiala, *Form and Substance in International Agreements*, 99(3) AM. J. INT'L L., 587 (2005).

[110] *Id.* ¶ 4.4.14.

[111] *Id.* ¶ 4.4.27.

[112] United Nations Framework Convention on Climate Change, *Decision 1/CP.21, Adoption of the Paris Agreement*, ¶¶ 117, 133, 134, UN Doc CCC/CP/2015/10/Add.1 (Jan. 29, 2016).

[113] Tom Wilson, *Lawyer who defeated Shell predicts 'avalanche' of climate cases*, FINANCIAL TIMES, Dec. 17, 2021, *available at* https://www.ft.com/content/53dbf079-9d84-4088-926d-1325d7a2d0ef.

[114] *Id.*

[115] Macchi, C, van Zeben, J, *Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al. v Royal Dutch Shell*, 30(3) REV. EUR. COMPAR. & INT'L ENV'T L., 409-15 (2021).

[116] Vedanta Resources PLC and another v. Lungowe and others [2019] UKSC 20, ¶51-53 (Apr. 10, 2019).

3. The End of Nuclear Energy in Germany: *Vattenfall AB et al. v. Germany*

Vattenfall AB et al. v. Germany is an ICSID arbitration commenced by Vattenfall AB and its German subsidiaries against the German government under the ECT in 2012.[117] Vattenfall AB is a Swedish state-owned power energy company that holds shares in three nuclear power plants located in Germany.[118] Vattenfall AB et al. claimed EUR 4.7 billion due to the shutdown and phase-out of nuclear power plants by the 13th Amendment to the Atomic Energy Act in Germany, which entered into force in 2011 in the wake of the Fukushima nuclear disaster in Japan.[119] On March 5, 2021, it was announced that the German government agreed to settle the legal dispute for EUR 2.4 billion.[120] Subsequently, the ICSID proceedings were suspended on March 11, 2021 and the tribunal issued a discontinuance order on November 9, 2021.[121]

The settlement was in part driven by a parallel litigation in Germany. Apart from the ICSID arbitration, Vattenfall AB also mounted a constitutional challenge in the German Federal Constitutional Court. In 2016, the court held that the nuclear phase-out was legal, but the operators were entitled to adequate compensation for approved electricity volumes that could no longer be produced by the phased-out nuclear power plants as well as for stranded investments.[122] This was confirmed in its second ruling in 2020.[123]

The background of the phase-out of nuclear power plants was due to the Fukushima nuclear disaster in 2011. Dr. Shore highlighted that, "the German government subsequently closed eight nuclear reactors and announced that all the

[117] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Orders of the Tribunal Taking Note of the Discontinuance of the Proceeding (Nov. 9, 2021).

[118] *Id.* ¶ 6.

[119] *Id.* ¶ 5; Gernot Heller & Lefteris Karagiannopoulos, *Germany says Vattenfall has no grounds to seek arbitration over nuclear phase-out*, REUTERS, May 8, 2018, *available at* https://www.reuters.com/article/uk-vattenfall-nuclear-case/germany-says-vattenfall-has-no-grounds-to-seek-arbitration-over-nuclear-phase-out-idUKKBN1I91L3?edition-redirect=uk.

[120] *Press Release*: *Understanding to terminate disputes on German nuclear phase out*, Vattenfall, Mar. 5, 2021, *available at* https://group.vattenfall.com/press-and-media/pressreleases/2021/understanding-to-terminate-disputes-on-german-nuclear-phase-out.

[121] *See generally Vattenfall*, *supra* note 117.

[122] 1 BvR 2821/11, Judgment of the First Senate, German Federal Constitutional Court (Dec. 6, 2016).

[123] 1 BvR 1550/19, Order of the First Senate, German Federal Constitutional Court (Sept. 29, 2020).

nation's nuclear plants would close by 2022, earlier than had been planned but arguably consistent with the previous government schedule. UK, Poland, France, Finland, are generally amenable to considering building new reactors, but the German public has for decades been opposed." The decision reflects Germans' social vision: a de-nuclearized energy sector.

Germany's vision is on the opposite end of Sweden's. Nuclear generation represented around 30% of Sweden's electricity production in 2020. It also clashes with the International Energy Agency (IEA)'s recommendations that governments should ensure the operation of existing nuclear power plants as long as they are safe, support new nuclear construction and encourage new nuclear technologies to be developed to achieve CO2 emissions reductions in line with the Paris Agreement.[124] IEA also forecasts that stopping nuclear energy globally could result in billions of tons of additional carbon emissions.[125]

Although *Vattenfall AB* utilized both "bodyguards" and the "police" to protect its efforts to shape a fossil-free future, including its billion-dollar investment in nuclear facility,[126] neither stopped Germany from de-nuclearizing its energy sector but both strive to guarantee compensation for the corporate sacrifice for German's social vision. The consensus between "bodyguards" and the "police" echoes the counter to the pejorative narrative of "ISDS as bodyguards for fossil fuel industry" in *Eurus Energy*: companies in the non-fossil fuel and non-renewable sector[127] may warrant the necessary protection from "bodyguards" for their stranded investments as nuclear energy, a sustainable power source, faces an uncertain future in different states during the clean energy transition.

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[124] *Nuclear Power in a Clean Energy System*, INT'L ENERGY AGENCY, May 2019, *available at* https://www.iea.org/reports/nuclear-power-in-a-clean-energy-system.

[125] *Id.*

[126] *Sustainable production: Development of fossil-free solutions is happening*, VATTENFALL, https://group.vattenfall.com/what-we-do/roadmap-to-fossil-freedom/sustainable-production.

[127] At present, nuclear energy's renewability is questionable because of the finitude of uranium deposit and the harmful nuclear waste generated from nuclear power reactors. *See* Nicole Jawerth, *What is the Clean Energy Transition and How Does Nuclear Power Fit In?*, INT'L ATOM. ENERGY AGENCY, https://www.iaea.org/bulletin/what-is-the-clean-energy-transition-and-how-does-nuclear-power-fit-in.

C. *Emerging US and European Initiatives*

The last two "Elites" are two initiatives emerging in the US and Europe.

1. US Initiative: The Hamm Institute for American Energy

On December 15, 2021, the Harold Hamm Foundation and Continental Resources announced a combined $50 million gift creating the Hamm Institute for American Energy at Oklahoma State University, for the purpose of educating energy leaders and bringing researchers scientists, academics, and advocates for innovation in clean and reliable energy to Oklahoma State.[128] The institute plans to host symposia, authors, speakers, energy summits, and global energy leadership conversations.[129] Harold Hamm, Chairman of Continental Resources, is world-famous for his tremendous business success in horizontal drilling, hydraulic fracturing, and extracting shale oil and gas resources.[130]

Dr. Shore noted that Mr. Hamm refers to it as a focus on energy research, "free of emotions," by which he means that natural gas, for example, should not be tarred by the climate crisis and climate activists.

The Hamm Institute for American Energy is obviously a "bodyguard" hired by fossil fuel industry, but it aims at forming a "more sustainable modern world of energy" as Mr. Hamm put it.[131] In any case, it seems that what the Hamm Institute represented is a more pragmatic pathway towards sustainable development: since fossil fuels cannot be eliminated in the short-term, let's make it better.

2. European Initiative: EU Taxonomy Guidance on Certain Gas and Nuclear Activities

On January 1, 2022, two weeks after the Hamm Institute for American Energy was

[128] *Historic donation establishes Hamm Institute for American Energy at Oklahoma State University*, Oklahoma State University News & Media, Dec. 15, 2021, https://news.okstate.edu/articles/communications/2021/historic_donation_establishes_hamm_institute_for_american_energy_at_oklahoma_state_university.html.

[129] *Id.*

[130] Harold Hamm, *Fracking Pioneer, Faces a Career Reckoning*, THE WALL STREET JOURNAL, May 21, 2020, *available at* https://www.wsj.com/articles/harold-hamm-fracking-pioneer-faces-a-career-reckoning-coronavirus-shutdown-11590074165.

[131] Hamm Institute for American Energy at Oklahoma State University, Dec. 15, 2021, https://www.youtube.com/watch?v=T7crWnptpys.

founded, the European Commission began consultations with EU member states on a draft text of a Taxonomy Complementary Delegated Act covering certain gas and nuclear activities that might be undertaken on the path to achieving climate neutrality by 2050.[132] The Delegated Act is part of the EU Taxonomy which is a classification system of economic activities that aims to create a common language for investments with a substantial positive environmental impact and introduce disclosure obligations on companies and financial market participants.[133]

Acknowledging that some parts of Europe are still heavily based on high carbon-emitting coal, and the existing energy mix in Europe varies from one state to another, the Commission stated on New Year's Eve that:

> there is a role for natural gas and nuclear as a means to facilitate the transition towards a predominantly renewable-based future. Within the Taxonomy framework, this would mean classifying these energy sources under clear and tight conditions (for example, gas must come from renewable sources or have low emissions by 2035), in particular as they contribute to the transition to climate neutrality.

The New York Times reported on this new consultation with the headline "Europe Plans to Say Nuclear Power and Natural Gas are Green Investments."[134] Dr. Shore commented that the headline perhaps is slightly premature. This is because any final plan on what constitutes a sustainable investment can be blocked by "reverse reinforced qualified majority" (at least 20 Member States representing at least 65% of the EU population), and the European Parliament by a majority.[135] "But that's unlikely after the consultation," Dr. Shore predicted, "because of the reality of the energy mix in Europe."

Although the European Commission's pragmatic approach resembles the one

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[132] EU Taxonomy: Commission begins expert consultations on Complementary Delegated Act covering certain nuclear and gas activities (Jan. 1, 2022, (IP/22/2)), *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2.

[133] EC Factsheet: How Does the EU Taxonomy Fit Within the Sustainable Finance Framework?, https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/sustainable-finance-taxonomy-factsheet_en.pdf.

[134] *Europe Plans to Say Nuclear Power and Natural Gas Are Green Investments*, THE NEW YORK TIMES, Jan. 2, 2022, *available at* https://www.nytimes.com/2022/01/02/business/europe-green-investments-nuclear-natural-gas.html.

[135] *See* EU Taxonomy, *supra* note 132.

taken by the Hamm Institute, "that short-term convergence, on natural gas" as Dr. Shore noted, does not indicate that the "long-term goals of the two initiatives" are the same. After all, EU is making a temporary compromise to its pro-renewables social vision, whereas the US "bodyguard" seated in the resource-rich Oklahoma State is hired by a profit-driven company for a win-win in both fossil fuel research and business.

III. CONCLUSION

To recapitulate briefly, the tension between and within "bodyguards" and "police" are four-layered. First, the jurisdictional tension intensified after *Achmea*, as evidenced in the CJEU's hardline stance on intra-EU ECT arbitration in *Komstroy* ("police") *vis-à-vis* ICSID's self-contained feature allow for ECT arbitration cases such as Eurus Energy ("bodyguard") to continue. Second, the tension in the outcome of the merits persists as courts and tribunals take divergent interpretative lenses to examine contract terms, corporate and states' action: a functional approach in *Eurus Energy* ("bodyguard"), a formalistic approach in *West Africa Gas* ("bodyguard"), an activist approach in *Komstroy* ("police") and *Milieudefensie et al.* ("police"). Third, the tension also lies in the multiplicity of their principals' visions of the energy sector's future: a production-maximization and fossil-fuels–based pragmatic vision in the US represented by *Sundown Energy* ("police") and the Hamm Institute ("bodyguard") in contrast to a pro-renewables vision in Europe represented by *Milieudefensie et al.* ("police") and the European Initiative ("police"), with a de-nuclearized spin offered by Germany in *Vattenfall AB et al.* ("bodyguard" and "police"). Lastly, the impact they exert on states and energy sector's future are wide-ranging: opening the floodgate on lawsuits against fossil-fuel-related industry by *Milieudefensie et al.* ("police"), safeguarding non-fossil fuels in *Vattenfall AB et al.* ("bodyguard" and "police") and *Eurus Energy* ("bodyguard") and protecting fossil fuels in *West Africa Gas* ("bodyguard").

Upon closer scrutiny via the eight influential cases and events presented at the ITA year-in-review, the characterization of private-driven entities as "bodyguards for the fossil fuel industry" as if they are "shameful enterprise that only protects the

property of wealthy oligarchs—'the one percent'"[136] are far from accurate.

Correspondingly, painting state-driven forces as "police safeguarding the non-fossil fuels" are equally misleading. In addition to the discrepancy between what their principals have envisioned for the future, the agents' own power struggles and divergent legal approaches also add more complexity to whose interests they are shielding and the energy future they are shaping. Joining the forces of "police" and "bodyguards" and incremental self-correcting reforms within the existing dispute resolution framework promise a more pragmatist pathway to a more sustainable future than movements to demonize and phase out the "bodyguards."

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[136] ALVAREZ, *supra* note 84, at 253 (describing the views of hardline critics of international investment agreements).

THE SALEM TRIALS REDUX?
PERU & ARBITRATOR'S MISCONDUCT: A COMMENTARY ON THE FERNANDO CANTUARIAS CASE

by Paula Juliana Tellez

I. INTRODUCTION

In December 2020, The Institute for Transnational Arbitration (ITA) and The Latin American Association of Arbitration (ALARB), with support from the Brazilian Arbitration Committee (CBAr) and the International Chamber of Commerce (ICC), held a virtual conference on arbitrators' immunity, conflicts in relation to the immunity and criminal liability, and the new challenges on the role and duties of arbitrators, particularly in Latin America.[1] One panel was held specifically on the "Fernando Cantuarias Salaverry's Paradigmatic Case." The panel, in which Alfredo Bullard (Bullard Falla Ezcurra +, Lima) and Mario Reggiardo (Payet, Rey, Cauvi, Pérez Abogados, Lima) were interviewed by Estefania Ponce (Posse Herrera, Bogotá), presented the main facts and details of the case and the criminal accusations from 2019. The panel also addressed the case in the context of the Odebrecht corruption scandal in the region and provided their opinions on the effects of this case and the lessons learned, both in Peru and in Latin America.

In this article we will start by recalling the specifics of Peru's arbitration law and the Odebrecht scandal in Latin America as a general background to better revisit Bullard's and Reggiardo's unique insights on the Cantuarias case, which will allow us to analyze the consequences and effects that this scandal has had on Peruvian arbitration since 2019.

II. THE SPECIFICS OF ARBITRATION IN PERU

Peru has historically implemented and promoted arbitration, and it is quite safe to say it is a pro-arbitration jurisdiction: Arbitration is expressly recognized in Article 139 of the Peruvian 1993 Constitution, and the current arbitration act in force, which

[1] *ITA-ALARB Americas Workshop*, THE CTR. FOR AM. AND INT'L L., https://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2020/ita-alarb-conference.html.

regulates both domestic and international arbitrations, the *Decreto Legislativo No. 1071*, is based on the UNCITRAL Model Law. Peru is a member state of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1965 Convention on the Settlement of Investment Disputes (ICSID), and the Lima Chamber of Commerce is a main Latin-American arbitration institution.

One particularity of the jurisdiction, that is relevant to the Cantuarias case, is the fact that Article 45 of the public procurement Law No. 20225 of 2014,[2] provides that arbitration is mandatory to resolve disputes arising out of any public procurement contract, and it stipulates special regulations for this type of arbitration. The law also gives the parties the autonomy to choose between *ad hoc* and institutional arbitration. The fact that arbitration is mandatory for the State under such contracts, has been related to the advancement of arbitration in Peru, and the growth of international investment to the country.[3] However, as Bullard and Reggiardo explained in the conference, the fact that the parties have to go to arbitration instead of the national courts, and that they are allowed to choose between *ad hoc* and institutional arbitration, caused misunderstandings among the public, the media, and criminal judges, who started to see arbitration as a corrupt method to resolve disputes, meant to escape and hide from justice.[4]

III. THE BROADER CONTEXT: THE ODEBRECHT CORRUPTION SCANDAL AND OPERATION "LAVA JATO"

As explained by Bullard and Reggiardo, "Lava Jato" or "Car Wash"[5] was an operation launched by Brazilian law enforcement in 2014,[6] related to corruption and

[2] L. 20225/2014, July 11, 2014, NORMAS LEGALES (Colom.), https://portal.osce.gob.pe/osce/sites/default/files/Documentos/legislacion/ley/Ley%2030225%20Ley%20de%20contrataciones-julio2014.pdf.

[3] *Peru's Oil & Gas Investment Guide 2017/2018*, EY, 2017, https://www.investinperu.pe/RepositorioAPS/0/0/JER/GUIA_INVERSION/Guia_oil_gas_2017_2018.pdf.

[4] Alonso Bedoya, *Lessons from Perú's Legacy in Public Procurement: A Successful Approach to Follow and Mistakes to Avoid*, KLUWER ARB. BLOG, Dec. 14, 2018, http://arbitrationblog.kluwerarbitration.com/2018/12/14/lessons-perus-legacy/.

[5] Fergus Shiel & Sasha Chavkin, *Bribery Division: What is Odebrecht? Who is Involved?*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, June 25, 2019, https://www.icij.org/investigations/bribery-division/bribery-division-what-is-odebrecht-who-is-involved/.

[6] *Lava Jato Case*, MINISTÉRIO PÚBLICO FEDERAL, http://www.mpf.mp.br/grandes-casos/lava-jato/entenda-o-caso/entenda-o-caso.

money laundering. This operation originated on the illegal procuring of infrastructure contracts by Odebrecht,[7] a Brazilian infrastructure company, with the Brazilian national oil company Petrobras (and other companies), as well as the procurement for other main infrastructure initiatives in Brazil such as a nuclear plant. This led to the unveiling of a major corruption scandal involving 12[8] different Latin American countries, with requests for cooperation from the Brazilian authorities to over 58 countries around the world, in order to gather evidence and apprehend those involved.[9]

From 2005 to 2014[10] Odebrecht, under the direction of CEO Marcelo Odebrecht (sentenced to 19 years in prison for the scandal),[11] paid at least US$700M in bribes to high government officials and political parties, in order to obtain and maintain infrastructure contracts in the region (such as highways in Colombia and Peru, or the Caracas metro in Venezuela), through a complex financial scheme and an official bribery department within the company.[12] The investigations related to this corruption scandal are still ongoing in most countries and several government officials across the continent have been charged with crimes.

IV. THE SPECIFICS OF PERU'S ODEBRECHT SCANDAL AND FERNANDO CANTUARIAS' CASE

A. *General Context of Peru's Odebrecht Scandal*

In Peru, Odebrecht[13] administered 24 major construction contracts over a period

[7] Odebrecht is a Brazilian construction company operating since the 1940s, that continues to exist and operate under the name Novonor. *Nossa história*, NOVONOR, https://novonor.com/pt/a-novonor/nossa-historia.

[8] The scandal reached several Latin American countries where investigations continue to this day. Javier Lafuente, *Los tentáculos de la compañía Odebrecht en América Latina*, EL PAÍS, July 30, 2015, https://elpais.com/internacional/2015/07/28/actualidad/1438104065_276346.html.

[9] *Lava Jato Case*, *supra* note **Error! Bookmark not defined.**.

[10] Bedoya, *supra* note **Error! Bookmark not defined.**.

[11] *Marcelo Odebrecht pasará el resto de su condena de 10 años en una mansión*, RPP NOTICIAS, Dec. 19. 2017, https://rpp.pe/mundo/latinoamerica/marcelo-odebrecht-pasara-el-resto-de-su-condena-de-10-anos-en-una-mansion-noticia-1094855.

[12] The company created an entire division—the Division of Structured Operations—primarily dedicated to making corrupt payments. Shiel & Chavkin, *supra* note **Error! Bookmark not defined.**.

[13] *Los contratos de Odebrecht en Perú*, IDL—REPORTEROS, March 21, 2016, https://www.idl-reporteros.pe/los-contratos-de-odebrecht-en-peru/.

of 15 years and made over US$10,000,000. According to Marcelo Odebrecht's confession, over US$29,000,000 was paid in bribes to high-ranking government officials (three former presidents of Peru and two former Lima mayors have been involved in the investigations, among many other politicians).

But the Peruvian case has an additional component, which is that bribes were also given to arbitrators, in commercial institutional and *ad hoc* arbitration cases, of Odebrecht against the Peruvian State. Between 2003 and 2016, Odebrecht initiated 41 arbitrations and was awarded over US$254,000,000 in 34 of the awards.[14]

Arbitrator Jorge Horacio Cánepa Torre,[15] appointed by Odebrecht in 17 arbitrations and a member of the tribunal in 19 of the cases, admitted to receiving bribes in exchange for obtaining a unanimous decision in favor of Odebrecht and against the Peruvian State. The bribes were paid to Cánepa through offshore companies and accounts in Andorra, and it was his duty to send the payments to the other arbitrators and state officials involved in the arbitration bribes.[16] Due to the confession in Cánepa's case, all of the arbitrators that participated in arbitrations against the Peruvian State involving Odebrecht or its subsidiary companies or consortiums, are being investigated by the Peruvian government, whether evidence of bribery has been found or not.[17] In total, 19 arbitrators were apprehended and sent to provisional detention before they were charged with a crime.[18] As Bullard and Reggiardo pointed out, and as analyzed further below, this decision appeared to be uninformed and meant for the media in order to ease the public amid the corruption scandal.

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[14] *Arbitrajes a la Odebrecht*, IDL–REPORTEROS, Sept. 29, 2016, https://www.idl-reporteros.pe/arbitrajes-a-la-odebrecht-lavajato/.

[15] Carlos Ríos Pizarro, *Mixing Righteous and Sinners: Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators*, KLUWER ARB. BLOG, Dec. 10, 2019, http://arbitrationblog.kluwerarbitration.com/2019/12/10/mixing-righteous-and-sinners-summary-of-the-odebrecht-corruption-scandal-and-the-peruvian-jailed-arbitrators/.

[16] *Los sobornos de Odebrecht en Perú, al descubierto*, IDL–REPORTEROS, Sept. 30, 2017, https://www.idl-reporteros.pe/los-sobornos-de-odebrecht-en-peru-al-descubierto/.

[17] *Caso Laudos arbitrales a favor de la empresa Odebrecht*, MINISTERIO PÚBLICO–FISCALÍA DE LA NACIÓN, https://www.fiscalia.gob.pe/equipo_especial/caso_laudiosarbitrales_odebrecht/.

[18] *Id.*

B. *Fernando Cantuarias' Case*

As Cánepa's confession and the evidence collected from Andorra proved, it is true that corruption has tainted some arbitrators and arbitration proceedings involving Odebrecht in Peru. However, unlike Horacio Cánepa's case, Fernando Cantuarias has not been charged with any crimes and there is no evidence that the award rendered by the Cantuarias tribunal was a product of bribes.

A brief overview of the main facts of the case is instructive here. Cantuarias is under a preliminary investigation (even in 2022 he has not yet been charged) and was detained in a prison from November 4, 2019 to November 29, 2019[19] for the crimes of bribery and criminal conspiracy, for allegedly having received a disguised bribe from Odebrecht through artificially increased arbitrator fees. These crimes have not yet been proved.

The detention and investigation against Cantuarias arose from an *ad hoc* arbitration initiated by IIRSA Norte S.A., a company owned by Odebrecht, against the Peruvian Ministry of Transport and Communications, concerning additional costs in a highway construction project in the Peruvian Amazon. Cantuarias was a co arbitrator alongside President Franz Kundmüller Caminiti and Horacio Cánepa. The award was rendered in favor of Odebrecht on August 21, 2013. The tribunal ordered a payment of US$23,000,000 out of over US$26,000,000 claimed.[20]

As Bullard and Reggiardo pointed out, both during the conference but also in news articles[21] and in an amicus curiae brief that several members of the Peruvian arbitral community sent to the Peruvian courts, the reasoning from the prosecution and the court to detain and investigate Cantuarias has several failures.

First, the prosecution considered that the fees received by Cantuarias for the *ad*

[19] *Fernando Canturias es liberado tras revocatoria de prisión preventive*, LA REPÚBLICA, Nov. 29, 2019, https:// larepublica.pe/politica/2019/11/29/odebrecht-arbitrajes-abogado-fernando-canturias-salaverry-es-liberado-tras-revocatoria-de-prision-preventiva-mtc-poder-judicial-ministerio-publico/.

[20] Concesionaria Iirsa Norte S.A. v. Miniterio de Transportes y Comunicaciones, LCC Case No. 3094, Award (Aug. 23, 2013).

[21] Alfredo Bullard, *Resumen: Caso Fernando Cantuarias Salaverry*, VALOR.PE, Nov. 8, 2019, https://valor.pe/resumen-caso-fernando-cantuarias-salaverry/.

hoc arbitration were abnormally high, which would necessarily mean that the fees were inflated to include a bribe from Odebrecht, a so called "indirect bribe." Second, the prosecution considered the fact that the tribunal and the parties met before the hearings to discuss procedural aspects of the arbitration, such as the appointment of the President of the Tribunal, and that the arbitrators called each other over their mobile phones, was indicative of a criminal conspiracy.

However, for the first argument, the prosecution made several mistakes in its reasoning and calculation: the prosecution used the 2019 Lima Chamber of Commerce institutional fees to calculate the allegedly correct fees. However, the award was rendered in an *ad hoc* arbitration (so the arbitrators had no obligation to refer to the LCC fees), and the proceedings were conducted during 2012 and 2013, not 2019, when values for the LCC fees were very different and significantly lower. Also, the prosecution ignored the 18% VAT, which is a considerable difference. Last, the prosecution did not calculate the fees based on the amount of the claims, but on the amount awarded, which is lower than the claims, and did not consider the complexity of the case (which was bifurcated, had a partial award rendered, and the request and response were modified).

As a result, the real difference between what the fees would have been in an institutional arbitration before the LCC and the actual *ad hoc* arbitration, is not US$30,000 per arbitrator, as presented by the prosecution to the court, but around US$10,000, which as any arbitration practitioner knows, is not an exorbitant amount. Actually, as both panelists pointed out, it is easy to verify that an ICC or an ICSID arbitration would have probably meant even higher fees and that what the arbitrators received in this case is not out of the ordinary.

On the second fact, any arbitration practitioner knows that case management conferences are not only usual but also necessary steps in the proceedings, particularly in *ad hoc* arbitrations where the parties and the tribunal must set out the rules for the proceedings, and that these meetings have nothing to do with criminal conspiracy.

It becomes clear that the prosecution and the judge that ordered the detention of

Cantuarias, had very little knowledge of how arbitration proceedings operate and how and why fees are set by the arbitrators, which led them to confuse perfectly normal and legal practices for crimes.

Due to this confusion, the judge of the case agreed to detain Cantuarias and 18 other arbitrators. For over 20 days, Cantuarias was held in a high security prison, even though he has not been charged with a crime to this day. The measure had to be reversed by the judge, who has denied further requests by the prosecution, due to a possible violation of fundamental rights. In Peru the detention as an interim measure must comply with specific criteria, such as absolute necessity and proportionality of the measure to the crime perpetrated. Since there is not enough evidence to convince the judge that Cantuarias is guilty, he has no previous convictions, and there is no danger of Cantuarias escaping,[22] there is no reason for Cantuarias to be detained as a criminal. Even if the investigation is still ongoing, no evidence has arisen to lead to any doubt as to whether Cantuarias complied with his duties as an arbitrator or to suspect that the fees he received were other than the correct amount considering the duties performed and the dispute solved.

V. EFFECTS OF THE CANTUARIAS CASE ON THE PERUVIAN ARBITRATION ENVIRONMENT

A. *Arbitration Community*

A positive effect can be drawn from the Cantuarias case: the arbitration community, both in Peru[23] and internationally, came together in unprecedented acts of unity in support of Cantuarias. Not only did several members of the Peruvian arbitral community sign the *amicus curiae* explained by Reggiardo in the conference,[24] but there were also several communications sent to the Peruvian

[22] *'Caso Arbitrajes': PJ rechazó pedido de la fiscalía para dictar prisión preventiva a ocho abogados*, GESTIÓN, Aug. 27, 2021, https://gestion.pe/peru/politica/caso-arbitrajes-odebrecht-poder-judicial-declaro-infundado-pedido-de-la-fiscalia-para-dictar-prision-preventiva-a-8-abogados-nndc-noticia/?ref=gesr.

[23] *Perú-Odebrecht: Surgen Voces en Defensa de Algunos Árbitros ante Orden de Prisión Preventiva*, CIAR GLOBAL, Nov. 5, 2019, https://ciarglobal.com/peru-odebrecht-surgen-voces-en-defensa-de-algunos-arbitros-ante-orden-de-prision-preventiva/.

[24] *Piden la Libertad de Fernando Cantuarias, uno de los Árbitros en Prisión por Caso Odebrecht en Perú*, CIAR GLOBAL, Nov. 11, 2019, https://ciarglobal.com/piden-la-libertad-de-fernando-cantuarias-uno-de-los-arbitros-en-prision-por-caso-odebrecht-en-peru/.

authorities by lawyers and institutions across the globe,[25] such as the International Bar Association (IBA) and the Club Español del Arbitraje (CEA),[26] and even the ICC,[27] pleading for Cantuarias' safety and integrity and defending arbitration as a legal, effective, and positive dispute resolution mechanism. These lawyers and institutions further explained that the Peruvian authorities misunderstood this case due to a lack of knowledge of the principles and common practices of arbitration.[28]

B. *General Public*

Sadly, as pointed out by Reggiardo in the conference, the main adverse effect of the case was that the general Peruvian public and mainstream media do not understand the technicalities of the arbitral proceedings. Therefore, they see arbitration as a corrupt mechanism to escape national justice, and arbitrators who participated in any arbitration related to any Brazilian companies, as corrupt. This view is difficult to justify even though it is true that some arbitrations were tainted by corruption, as Cánepa himself confessed and other evidence has shown. Due to the general lack of knowledge about arbitration among the public, this brings a very negative outlook on arbitration.

C. *Consequences on Arbitration Regulation and Institutional Tools*

The most direct legal consequence of the corruption scandal on Peruvian arbitration is that the government, in a speedy action to appease the public,[29] issued an emergency decree, the Decreto de Urgencia N° 020-2020 in January 2020 that

[25] *Impactos del Arbitraje en 2019: Las Cosas Buenas del Proceso Contra Árbitros en Perú*, CIAR GLOBAL, Jan. 13, 2020, https://ciarglobal.com/impactos-del-arbitraje-en-2019-las-cosas-buenas-del-proceso-contra-arbitros-en-peru/.

[26] *Cantuarias suma más Apoyos: La IBA, El CEA y Catherine Rogers Condenan el Trato Recibido por el Árbitro Peruano*, CIAR GLOBAL, Nov. 15, 2019, https://ciarglobal.com/cantuarias-suma-mas-apoyos-la-iba-el-cea-y-catherine-rogers-condenan-el-trato-recibido-por-el-arbitro-peruano/.

[27] *Ante Proceso contra Árbitros en Perú, Alexis Mourre y Carlos Matheus Alegan Desconocimiento del Arbitraje*, CIAR GLOBAL, Nov. 8, 2019, https://ciarglobal.com/ante-proceso-contra-arbitros-en-peru-alexis-mourre-y-carlos-matheus-alegan-desconocimiento-del-arbitraje/.

[28] *Instituto Peruano de Arbitraje y Cámara de Comercio de Lima Denuncian Situación de Árbitros en Caso Lava Jato*, CIAR GLOBAL, Nov. 15, 2019, https://ciarglobal.com/instituto-peruano-de-arbitraje-y-camara-de-comercio-de-lima-denuncian-situacion-de-arbitros-en-caso-lava-jato/.

[29] Rafael T. Boza, *Protectionist Amendments to Peru's Arbitration Law Disguised as Transparency*, KLUWER ARB. BLOG, May, 4, 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/04/protectionist-amendments-to-perus-arbitration-law-disguised-as-transparency/.

modifies several provisions of the Peruvian Arbitration Act. The aim of the decree is to ensure that the Peruvian State will not be harmed in the arbitrations it becomes part of. The decree states that its purpose is to modify the arbitration act in relation to the arbitrations in which the Peruvian State is a party to prevent the further spread of malpractice that may cause harm to the Peruvian State.[30] This is controversial because the law is not supposed to favor either of the parties. Instead, it is supposed to ensure and maintain fairness and due process.[31]

Consistent with the aim mentioned above, the decree introduced a series of limitations to the Peruvian arbitration act. These limitations include a restriction on *ad hoc* arbitration to claims less than US$13,000, a broadened criteria as to when an arbitrator might lack impartiality or independence, and the establishment of a registry of arbitrators before the justice ministry.

It is relevant to note that, as stated above, arbitrations arising from contracts in which the Peruvian State is a party are not only mandatory but also regulated by the Public Procurement Law No. 20225 of 2014. As such, if the State really needed to make substantial changes to the law in order to protect itself, it could have done so in the Public Procurement Law, since those are the special provisions that are still mandatory in State-contractor disputes. As it is, there are doubts as to whether the new changes to the arbitration act will influence the arbitrations of the Peruvian State with international contractors and, therefore, besides being a measure that might seem like an improvement for the media and the public, who do not understand arbitration, it does not seem to be an effective measure to protect the interests of the State.

Another effect of the Cantuarias case on Peruvian arbitration is the development of a "faro de transparencia" or "beacon of transparency" tool by the Lima Chamber of

[30] The original text is as follows "Que, resulta urgente y necesaria la modificación del marco normativo vigente, en los procesos arbitrales en los que interviene como parte el Estado peruano, a fin de fortalecer la institución del arbitraje y evitar la proliferación de casos en los que las malas prácticas resten eficacia al arbitraje y causen graves perjuicios al Estado peruano." L. 20/2020, Jan. 24, 2020, NORMAS LEGALES (Colom.), https://www.gacetajuridica.com.pe/boletin-nvnet/ar-web/DECRETO%20DE%20URGENCIA%20 N%20020-2020.pdf.

[31] *Comentarios y Críticas al DU 20/2020 que Modifica la Ley de Arbitraje*, CIAR GLOBAL, Dec. 23, 2020, https://ciarglobal.com/comentarios-y-criticas-al-du-20-2020-que-modifica-la-ley-de-arbitraje/.

Commerce.[32] Contrary to the speedy urgency decree, the beacon of transparency seems to be a helpful online platform, that gives access to a vast amount of information on arbitrations administered by the LCC since 2012. The public can freely access a list of registered arbitrators and some of the statistics regarding their performance as arbitrators (number of tribunals they have been a part of, current tribunals, challenges, an estimated time of award rendering, and all of the case files of the arbitrations administered by the LCC), the tribunals that are constituted, any sanctions by the LCC on arbitrators, a list of annulled awards, awards where the Peruvian State is a party and abstracts of commercial arbitration awards.

It seems to be a useful tool for parties wishing to appoint an arbitrator and for the public to have control over the tribunals in State-related arbitrations by making easily recognizable situations as Horacio Canepa's repeated appointment by Odebrecht that, in itself is not an illegal practice, but can be useful to determine the impartiality and independence of an arbitrator.[33]

VI. LESSONS LEARNED

At the end of the conference, Bullard and Reggiardo gave their opinions on the current state of arbitration in Peru and the consequences and the lessons that can be learned from the Cantuarias case. Reggiardo pointed out that, regarding the current state of arbitration in Peru, Peruvian public entities feel very powerful in their current arbitration proceedings, especially in domestic arbitrations. The counsel for the private contractors generally has to accept continuous and excessive requirements of the public entities, such as introducing evidence after the set timeframe or requesting a postponement of a hearing on the same day, in order to avoid risk of a further set aside of the award.

As a lesson learned, Reggiardo considers that the case put in the spotlight the fact that local criminal prosecutors have no knowledge of arbitration and were more interested in a giving a show for the media due to the corruption scandal. The task

[32] *Faro De Transparencia*, CENTRO DE ARBITRAJE, https://www.arbitrajeccl.com.pe/farodetransparencia.

[33] José Carlos Reyes, *CADE 2019: "Buscamos evitar que empresas como Odebrecht tengan árbitros caseritos", promete la CCL*, GESTIÓN, Nov. 29, 2019, https://gestion.pe/peru/cade-2019-buscamos-evitar-que-empresas-como-odebrech-tengan-arbitros-caseritos-promete-la-ccl-noticia/.

for the arbitration community in Peru is, therefore, to educate people on how arbitration works in order to avoid bad publicity.

Bullard agreed that he personally learned much about criminal justice in Peru, but also realized how arbitration can be badly misunderstood and realized that arbitrators and lawyers now have the task of educating judges and prosecutors about arbitration. Arbitrators and lawyers must also have a better understanding of criminal law and how criminal courts work in order to avoid the superficial approach the Peruvian prosecution had on arbitration. He concluded by warning that case occurred in Peru, but that it could happen in any country in Latin America if we do not properly educate those outside the arbitration community on arbitration.

I would also add to Bullard's and Reggiardo's insights that the Peruvian experience exposed, that speedy legislative changes may not be good for the jurisdiction and that changes must come from a deep understanding of arbitration and how it works. The LCC displayed this understanding with the *Faro de Transparencia*, that addresses the concern for transparency from within the arbitration community.

VII. CONCLUSIONS

Just as Bullard concluded in the conference, it would not be surprising that the consequences of the Cantuarias case will be seen across Latin America, especially in the countries that have also been hit by the Odebrecht corruption scandal. It is not only up to the Peruvian arbitration community to better educate the public and media on what arbitration is and how it works. It is also for the rest of the Latin American arbitration community to ensure that each country has a fair understanding of arbitration, its advantages, and its proceedings. This is especially true in jurisdictions such as Colombia, which is in the process of adopting a new law that modifies its arbitration act.[34] Similar to Peru, Colombia's proposed amendment has mandated arbitration for public infrastructure contracts[35] and has adopted the UNCITRAL

[34] A draft version of this new law is available at https://img.lalr.co/cms/2021/07/22171156/Proyecto-de-Ley-Arbitraje_julio-2021.pdf.

[35] The Law 1682 of 2013, modified by Law 1742 of 2014, have special provisions on mandatory dispute adjudication boards and arbitration in infrastructure projects. L. 1682/2013, Nov. 22, 2013, DIARO OFICIAL (Colom.), https://www.ani.gov.co/sites/default/files/ley_1682_de_2011.pdf; L. 1742/2014, Dec. 26, 2014, DIARO OFICIAL (Colom.), https://www.ani.gov.co/sites/default/files/ley_1742.pdf.

Model Law in order to attract international investment, increase competitivity in the region, and relieve pressure on the courts. It is important to educate the public about arbitration, so it views arbitration as a way of improving justice rather than avoiding it.[36]

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[36] As stated in the explanatory memorandum of the Colombian arbitration act available at http://leyes.senado.gov.co/proyectos/images/documentos/Textos%20Radicados/Ponencias/2011/gaceta_542.pdf.

REFLECTIONS FROM THE "PRESERVING PERSPECTIVE PROJECT" INTERVIEW WITH THE HON. GABRIELLE KIRK MCDONALD

by Jessica Sblendorio

I. INTRODUCTION

In March 2021, the ITA's Academic Council organized an interview with Judge Gabrielle Kirk McDonald as part of the Preserving Perspectives Project, an oral history speaker series to detail the modern evolution of international arbitration through established arbitrators and jurists. The interview was conducted by Professor Victoria Shannon Sahani of Arizona State University Sandra Day O'Connor College who also serves as the Vice-Chair of the Academic Council of the Institute for Transnational Arbitration. Judge McDonald characterized herself first as "a civil rights lawyer that became an international judge." She began her judicial career in 1979 with the US District Court for the Southern District of Texas. Throughout her career, Judge McDonald has overcome cultural and racial barriers and successfully left her mark on two international tribunals, serving as judge and arbitrator respectively for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and later the Iran-United States Claims Tribunal (IUSCT). What is evident from the reflections of Judge McDonald on her career and experience is that even in impossible or difficult circumstances, it is possible to build a better and more inclusionary future for lawyers in international law.

II. EARLY BEGINNINGS AS A CIVIL RIGHTS LAWYER AND FEDERAL JUDGE

Professor Sahani first began the discussion by asking what inspired Judge McDonald to become a lawyer and what her experience was at Howard University in the early 1960s during the civil rights movement. Judge McDonald described her experience at Howard University as "transformative" and "liberating" as she was often the only African American student in her classes in other schools. Following her time at Howard University, Judge McDonald joined the NAACP Legal Defense Fund in 1966 where she learned to apply the law and was at the forefront of arguing important cases focused on civil rights and discrimination. With a strong track record of

success for her clients, Judge McDonald was nominated by President Carter to serve on the US District Court for the Southern District of Texas, becoming the first African-American female nominated to the federal bench in Texas and only the third African-American woman to be nominated as a judge in the US.

During her tenure, Judge McDonald heard a number of high-profile cases and reflected on one particular case that involved a dispute between Vietnamese fishermen and members of the Ku Klux Klan (KKK).[1] During this case, Lewis Beam, the Grand Dragon of the Texas Chapter of the KKK, called upon Judge McDonald to recuse herself and testified that Judge McDonald was prejudiced against the KKK because of her past experience representing African-Americans and stated that all African-Americans are prejudiced against the KKK. Judge McDonald ultimately denied the motion and affirmatively stated in response to the motion that it was clearly based on race and noted that she would be fair.[2] The impact of this particular case was significant and ultimately resulted in the closure of the paramilitary camp of the KKK because the existence of such an organization as a private militia was prohibited by state statute.

What is particularly noteworthy about Judge McDonald's recollection of this case is that it was imperative to ensure that a fair trial was given despite the accusations that Judge McDonald was biased against the KKK as the defendants. Despite the challenging circumstances and racial undertones that were at the forefront of this case, Judge McDonald did not shy away from her duty to provide justice and fairness in what were tenuous circumstances and with prejudicial litigants appearing before her. As noted by Professor Sahani, Judge McDonald's ability to dispense judgement under difficult circumstances was clearly a "testament to integrity" and her "high caliber as a jurist."

[1] Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982).

[2] Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 1017, 1021 (S.D. Tex. 1981) ("A litigant in a federal court is not entitled to a judge of his choice, he is only entitled to a fair and impartial judge. This defendant as well as all defendants who appear before this Court is entitled to nothing more and will get nothing less.").

III. BUILDING THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND EXPERIENCE AT THE IRAN-US CLAIMS TRIBUNAL

Shortly after leaving the bench, Judge McDonald was tapped in 1993 to be one of 11 judges from different legal systems and traditions on a brand-new international tribunal—the ICTY—in which the group was given the rare task of designing and implementing a procedural and evidentiary system for a new international tribunal. Judge McDonald remarked on her experience of identifying the space for the court and the drafting process for the rules and evidentiary procedures, including the compromises that had to be made to formulate the rules for the ICTY. Moreover, after being elected president of the ICTY in 1997, Judge McDonald was instrumental in expanding the infrastructure of the court. She recognized that the number of individuals held in detention and a single courtroom were insufficient to accommodate for the ICTY's growing day-to-day activities. As part of this initiative, Judge McDonald successfully approached the UN Security Council and was able to secure additional funding for the hiring of three more judges and the ability to add additional trial chambers.

Following her departure from the ICTY, Judge McDonald was nominated to serve as one of three American arbitrators on the IUSCT in 2001. In recalling her experience at the IUSCT, Judge McDonald discussed the cultural barriers and gender bias that she faced as both a woman and African-American arbitrator on the court, including the fact that her Iranian counterparts would not shake her hand and how she was referred to as the "lady judge" in some of the hearings. One particular instance that Judge McDonald recalled as being an issue was working with a colleague who had never worked with an African-American woman before and disrespected her in such an egregious manner that the tribunal had to become involved. This particular individual took the position that he was not responsible nor involved and Judge McDonald recalled the "sense of privilege that he adhered to his denial." Furthermore, Judge McDonald stated that prior to her departure from the IUSCT a third-country arbitrator congratulated her on her "high morality" and gifted her a book with an inscription noting her intelligence and morality—she noted that this was a way of saying that what had happened was not right and it did sadden her that those

other countries saw the same gender and racial bias she saw.

In both of her roles as judge and arbitrator on two different international tribunals, Judge McDonald had to navigate cultural, gender and racial barriers and bias from among colleagues and those from other legal systems and countries, as well as work on building new international institutions and relationships. Although the legal marketplace, at least in the US, has become more diverse over time, there is still a strong inequality based on gender and racial bias within the industry. Judge McDonald's experiences, particularly as being the first woman and African-American in all of her prominent roles as an international jurist, demonstrate the types of obstacles that arise for those that face not only biases in the legal marketplace but across different legal cultures and traditions. Such instances of bias and prejudice in the legal industry can overshadow the important work that institutions or individuals do and detract from the clear intellect and legal prowess of those individuals, like Judge McDonald. However, Judge McDonald also details the importance of being vocal and addressing such issues head-on and to persevere in challenging circumstances and gives examples of how individuals can chip away at those barriers through her experiences.

IV. THE CREATION OF BLACKS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (BASIL) AND DIVERSITY AND INCLUSION IN THE INTERNATIONAL ARBITRATION COMMUNITY

After a long and distinguished career, Judge McDonald was nominated to serve as the first African-American honorary president of the American Society of International Law (ASIL) in 2014. In this role, Judge McDonald was instrumental in advocating for increasing the number of black lawyers in the field of international law and ultimately helped form the Blacks of the American Society of International Law ("BASIL"). The purpose of BASIL was not only intended to increase the number and influence of blacks in ASIL as an organization but also in the field of international law generally in the US. Although Judge McDonald's experience in arbitration was limited to the IUSCT, she stated that her experience showed how change could occur once the leadership (in this instance ASIL) decided to focus on increasing the number of black Americans in international law. With respect to BASIL, the focus was to encourage law students and young professionals to explore careers in international

law, a field that has historically been Caucasian. BASIL did the same for international arbitration through engagement with Young ICCA.

In her remarks, Judge McDonald stated that more efforts were needed in the international arbitration community in order to increase diversity and cited an important statistic from 2020 that drove home this point—of the 3,430 international arbitration practitioners at the top 500 US law firms, only 57 were African-American. Even within the last ten years, the number of organizations and individuals addressing diversity and inclusion in the international arbitration space has changed dramatically. Organizations, such as Racial Equality for Arbitration Lawyers ("REAL") and the Equal Representation in Arbitration ("ERA") Pledge have gained traction and put diversity and inclusion at the forefront in the international arbitration community. In order to effect change, it is important that the next generation of lawyers learn from the past and continue to push through gender and racial barriers to make the field of international law and arbitration more diverse and inclusionary. As made clear from the statistics cited by Judge McDonald, such change takes time but the efforts being made in the space must continue.

Moreover, in addition to the advocacy and creation of groups promoting more diversity and inclusion within the industry, it is important that such efforts are incorporated into the process of arbitrator selection—both during the party-appointment process and at the stage of choosing a chair among the party-appointed arbitrators. An example of committing the decision-makers for arbitrator selection to considering diversity and inclusion is the ERA Pledge, which has amassed 4,929 signatories since 2015 and has been signed by arbitrators, States, arbitral institutions, individuals, and firms. Such ongoing efforts and advocacy for diversity and inclusion are critical in presenting an image of diversity in the international arbitration community and also to attract the next generation of talented practitioners to the field of international law and arbitration.

V. CONCLUSION

What is evident from Judge McDonald's long and distinguished career as an international jurist is that her perseverance in the face of adversity and ability to

break down cultural barriers contributed to her success and lasting impact as a jurist. Professor Sahani captured this sentiment best by stating that Judge McDonald "changed hearts and minds of people who had never worked with a black woman before" and could grow to appreciate her intellect and counsel. The experiences of Judge McDonald make evident that strong advocates are needed to set examples for more diversity and inclusion in international law and arbitration, which includes the creation of strong communities like BASIL, REAL and the ERA Pledge to push forward the agenda to address such barriers head-on with the next generations of leaders.

It is never easy being the first or breaking down barriers, but the remarks by Madeline Albright, cited by Professor Sahani to describe Judge McDonald at an ABA Central and Eastern European Law Initiative dinner in 1999, provide a clear message to drive forward change and continue addressing barriers within the field of international law and arbitration:

> Her example reminds us that we can understand that there will be limits on what we can accomplish without ourselves limiting unduly what we attempt and that in doing so that we may achieve more than was ever believed possible. We may seek justice; we may serve the cause of peace and we may do our part in creating a future that is better than the past.

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"DA MIHI FACTUM, DABO TIBI IUS" FACT FINDING AND IURA NOVIT CURIA IN ARBITRATION: HOW FAR DO ARBITRATORS' POWERS REACH?

by Viktor Előd Cserép

I. INTRODUCTION

On September 28, 2021, Young ITA's inaugural conference, in its new region, Central and Eastern Europe ("CEE"), and the first #YoungITATalks event organized and moderated by me as Young ITA Central and Eastern Europe Chair, took place under the title "*Da mihi factum, dabo tibi ius*—Fact Finding and *Iura Novit Curia* in Arbitration: How Far Do Arbitrators' Powers Reach?" in the Aula Magna of Eötvös Loránd University's Faculty of Law in Budapest, Hungary.

As a prelude to the conference, I provided an overview of the activities and objectives of ITA and Young ITA, covering the perspectives for the new region, followed by the introduction of the topics, the concept of the event, and the speakers.

The overarching theme around which the debates revolved concerned arbitrators' powers, in particular the question of how far arbitrators' powers reach when establishing the facts of the case and when developing the legal reasons for the award. The topics I selected are relevant both from an international perspective and locally: they not only touch upon universal questions closely connected to the guiding—and often competing—principles of arbitration, but they are also of specific relevance in CEE jurisdictions, especially in view of recent developments in arbitral rule-drafting. The speakers—counsel, arbitrators, and academics active in the region and beyond—were invited to argue in two rounds of one-on-one, Oxford-style debates (comprised of presentations by each speaker as well as rebuttals and sur-rebuttals) in favor of broad versus limited powers of arbitrators to establish the facts of the case and to find and apply the relevant law. (Disclaimer: accordingly, the speakers' arguments presented during the debate and also summarized below do not necessarily correspond to their personal views on the topics.) Before and after each round, the audience members were also requested to vote for one or the other proposition.

II. THE FIRST DEBATE: "DA MIHI FACTUM—GIVE ME THE FACTS (OR NOT)!"—HOW FAR DO ARBITRATORS' FACT-FINDING AND EVIDENCE-TAKING POWERS REACH?

The first proposition was that arbitrators should have broad powers to establish facts and take evidence, even on their own accord. Language to this effect has been included in several institutional sets of rules. For example, pursuant to Article 25 of the ICC Rules 2021 entitled "Establishing the Facts of the Case," the arbitral tribunal shall "establish the facts of the case by all appropriate means"[1] may, after consulting the parties, "appoint one or more experts, define their terms of reference and receive their reports"[2] and "[a]t any time during the proceedings, . . . summon any party to provide additional evidence."[3] Another example of an express provision on broad fact-finding powers is Article 29 of the VIAC Rules 2021, which bears the same title and provides that "[i]f the arbitral tribunal considers it necessary, it may on its initiative collect evidence, question parties or witnesses, request the parties to submit evidence, and call experts."[4]

The Prague Rules,[5] often mentioned as an alternative to the IBA Rules on the Taking of Evidence in International Arbitration, were also drafted by lawyers from mainly civil law countries. In this spirit,[6] the Prague Rules provide "a framework and/or guidance for arbitral tribunals and parties on how to increase the efficiency of arbitration by encouraging a more active role for arbitral tribunals in managing proceedings."[7] Accordingly, Article 3 of the Prague Rules provides that "[t]he arbitral tribunal is entitled and encouraged to take a proactive role in establishing the facts

[1] ICC Arbitration Rules (2021), art. 25(1).

[2] *Id.* at art. 25(3).

[3] *Id.* at art. 25(4).

[4] VIAC Arbitration Rules (2021), art. 29(1).

[5] Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018).

[6] As stated in the Note from the Working Group at the beginning of the Prague Rules, the drafters considered that "[o]ne of the ways to increase the efficiency of arbitral proceedings is to encourage tribunals to take a more active role in managing the proceedings (as is traditionally done in many civil law countries)" and that the Prague Rules were intended to be used in cases where "the nature of the dispute or its amount justifies a more streamlined procedure actively driven by the tribunal." *Id.* at 2.

[7] *Id.* at 3.

of the case which it considers relevant for the resolution of the dispute."[8]

Of particular relevance, in view of the venue of the conference, are the respective provisions in Article 40 of the 2018 edition of the Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry ("HCCI Arbitration Rules" or "Budapest Arbitration Rules").[9]

The competing proposition—the gist of which comes down to party autonomy, the ultimate cornerstone of arbitration, which is essentially a private system of dispute resolution where the parties are supposed to be calling the shots to a great extent—was that arbitrators should "work with what they get," *i.e.*, that they are limited to the facts and evidence submitted by the parties and cannot go beyond. In line with this approach, whenever the parties do not adduce enough evidence, the tribunal can—and should—decide questions of fact by relying on the burden of proof and by drawing adverse inferences. Thereby not only the expeditiousness of the proceedings can be secured, but also the burden of proof—and any consequence of not discharging it—indeed, stays on the party to which the law allocates it.

A. *Sua Sponte, Broad Fact-Finding and Evidence-Taking Powers for Arbitrators!*

The position in favor of broad, *sua sponte* fact-finding and evidence-taking powers of arbitrators was advocated by Professor Dr. István Varga (Eötvös Loránd University and PROVARIS Varga and Partners, Budapest), who relied on two main arguments: (i) the parties' expectation of the effective establishment of the objective facts of the case and (ii) the heightened judicial responsibility of arbitrators in arbitration compared to litigation before courts.

With respect to establishing the facts of the case, Professor Varga pointed out that there is tension between the different approaches of traditional procedural systems. As he noted, on the one hand, common law tends to favor and promote the establishment of objectively true facts, which is reinforced by the introduction of

[8] "This, however, shall not release the parties from their burden of proof." Article 3(1) Prague Rules. The measures that the tribunal may "in particular" take, after having heard the parties, are listed in a non-exhaustive manner in paragraph (2). These include requesting the parties to submit relevant documentary evidence and make fact witnesses available for oral testimony, the appointment of one or more experts (also legal experts), or site inspections.

[9] Amended as of September 1, 2019.

procedural disclosure obligations (non-compliance with which is effectively sanctioned) and the pre-trial discovery of facts. By contrast, continental legal tradition is rather characterized by the trial-phase establishment of facts and a tendency to turn to the substantive rules on the burden of proof in case facts are not established with sufficient certainty.

The heightened judicial responsibility of arbitrators follows from the fact that whereas litigation is a multi-tier dispute resolution mechanism (where cases may not end in the first instance, with the second instance court then typically remanding the case back to the court of the first instance with the instruction to take evidence), in arbitration there is, by default, only one instance.

On these premises, Professor Varga argued that in international arbitration the ideal approach is to entrust arbitrators with broad fact-finding and evidence-taking powers; a "relativised inquisitorial principle" compensates for the lack of appeals and also bridges cross-cultural differences in terms of the taking of evidence. This ultimately serves the integrity of arbitration in general, which is the most reliable substitute for civil litigation before state courts.

In Professor Varga's view, the aforesaid arguments cannot be rebutted by time and cost considerations. Professor Varga noted that the arbitrators' powers to take evidence sua sponte was codified in Article 40 of the new Budapest Rules[10] for these reasons and to allow the institution to compete with institutions that had taken a similar path. Accordingly, the newly introduced provisions expressly foresee that "[i]n order to investigate the circumstances relevant for the decision on the dispute the arbitral tribunal may also order the taking of evidence even failing a motion from the parties to do so"[11] and that "[t]he arbitral tribunal is not bound by the parties' motions for the taking of evidence."[12] Professor Varga added that parties are, of

[10] Drafted by Professor Varga.

[11] Budapest Arbitration Rules, art. 40(1).

[12] *Id.* at art. 40(2). The non-exhaustive list of measures includes document production orders, the taking of witness testimony, the inspection of an object or place and the appointment of experts (see paragraphs (3) and (6)).

course, free to derogate from said rule.[13]

Professor Varga finally noted that the approach one chooses as an arbitrator ultimately comes down to whether one wants to close the case or just the docket. In this context, he suggested that the right approach should be the resolution of the dispute.

B. *Work With What You Got—Arbitrators are Limited to the Facts the Parties Submit!*

The contrary proposition—the limitation to the facts and evidence submitted by the parties—was presented by Dr. Miklós Boronkay (Szecskay, Budapest), who structured his presentation into three parts. First, he characterized how state courts deal with the issue, where the general rule is that courts are not allowed to take evidence *ex officio*. The law recognizes litigant parties' capacity to decide whether they bring a lawsuit, what materials they provide and what motions they make. It would be too paternalistic an approach for the judge to help them out if they do not want to make a motion.

Against this background, Dr. Boronkay turned to the question of whether arbitration is indeed so special that a different approach is warranted. He argued that the lack of appeal in arbitration does not suffice to justify giving extra powers to arbitrators. Namely, an appeal essentially means an additional forum reviewing the case to see whether the first instance made a mistake. In arbitration, the lack of appeal is the result of a trade-off because there are other means to ensure that mistakes are not being made that are not available in litigation, notably the possibility of choosing the arbitral institution and the arbitrators. Setting aside proceedings can still be initiated in case of the most serious mistakes. Arbitrators can reach the same quality of decisions as second instance judges, even absent an appeal mechanism and even without extra powers to take evidence *ex officio*.

Second, Dr. Boronkay highlighted three potential "downsides" of *ex officio* evidence-taking: (i) thereby arbitrators help the party who has the burden of proof,

[13] Paragraphs (4) and (5) of Article 40 of the Budapest Rules even expressly note that the details of the taking of witness testimony and expert evidence shall be established during the case management conference and in the procedural order recording the outcome thereof.

which involves the risk of unequal treatment; (ii) it increases the costs and the timeframe of the arbitration, and (iii) it is impossible to know where the arbitrators should stop (e.g., asking for a full copy of a document submitted in a redacted form, asking for a document that has not been submitted at all, etc.), with the ensuing uncertainty opening up arbitrators to criticism.

Dr. Boronkay concluded by suggesting that any *ex officio* evidence-taking powers of arbitrators must be subject to the parties' agreement–like decision-making *ex aequo et bono*–with the default rule being that arbitrators are limited to what the parties submit.

C. *Takeaways and Analysis*

Before the debate, only one person in the audience was in favor of broad powers, and the rest of the participants were in favor of the limited approach. After the debate, five participants voted in favor of *sua sponte* evidence-taking by the arbitrators.

As also confirmed by the ensuing discussion, the right approach will have to be chosen on a case-by-case basis given a myriad of factors:[14] It will necessarily depend on the result of a balancing exercise between competing policy considerations and expectations (well-foundedness and efficiency, arbitrator proactivity and party autonomy), intertwined with issues of impartiality, the approach(es) of the relevant legal tradition(s) and their possible interplay. It will also naturally depend on the powers and tools arbitrators have pursuant to the applicable arbitration law, arbitration rules, any additional sets of rules, and soft law instruments (such as the Prague Rules) as well as the circumstances of the concrete case, in view of which additional procedural rules may also be adopted, ideally through agreement of the parties reached at the beginning of the proceedings, typically during the case management conference, also in line with the ILA Recommendations on Inherent and

[14] JEFFREY MAURICE WAINCYMER, *Part II: The Process of an Arbitration, Chapter 10: Approaches to Evidence and Fact Finding*, *in* PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 743, 743–745 (Kluwer Law International 2012).

Implied Powers of International Arbitral Tribunals.[15] Importantly, the provisions quoted at the outset provide arbitrators with the power to take evidence *sua sponte*, which they nonetheless do not necessarily have to use.[16]

III. THE SECOND DEBATE: "DABO TIBI IUS–I WILL GIVE YOU THE LAW (OR CAN I)?"– HOW FAR DO ARBITRATORS' POWERS TO FIND AND APPLY THE CORRECT LAW REACH?

The second debate concerned arbitrators' powers to develop the legal reasoning for the award. Motivations for a "spill-over" may be diverse. Maybe the arbitrators wish to make a perfect, complete award. Perhaps neither side addresses a certain legal issue, or only succinctly, and the arbitrators–even inadvertently–pick up on that and elaborate it further. The question to be answered by the speakers essentially was whether arbitrators can "take the parties' legal arguments to the next level."

A. *Iura Novit Arbiter: Arbitrators Can–and Must(!)–Develop the Legal Reasoning (Themselves)!*

The "broad powers" or "*iura novit arbiter*" approach, *i.e.*, the proposition that arbitrators can–in fact must(!)–develop the legal reasoning of the award (further) themselves, was presented by Dr. Veronika Korom (Queritius and ESSEC Business School, Paris).

Dr. Korom began with the latin dictum in the very title of the conference, according to which a litigant has nothing to do but to show what the alleged fact is, and the judge must decide on the law. She then noted that the application of *iura novit curia*, *i.e.*, the *ex officio* finding of the correct law and the correct application of it by the judge, is of particular importance as *iura novit arbiter* in international arbitration, where a multitude of national laws have to be applied by arbitral tribunals. (The latest ICC statistics showed that the newly registered 946 cases were subject to 127 different national laws).

Dr. Korom's overarching proposition was that the arbitral tribunal must ensure that the award is legally correct, valid, and enforceable and that in order to do so, the

[15] Annex to Resolution NO. 4/2006 International Commercial Arbitration, available at https://www.ila-hq.org/images/ILA/docs/No.4_Resolution_2016_InternationalCommercialArbitration.pdf.

[16] *See*, *e.g.*, Phillipp Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, 28 ARB. INT'L, 173 (2012).

tribunal cannot limit itself to the legal arguments submitted by the parties but must ascertain and apply the law on its own motion.

She supported this argument with 11 points: (i) arbitrators are ultimately judges and are entrusted with the task of rendering justice. Once appointed by the parties, the arbitrator assumes the judge's robe and derives the authority to do so from national law. Justice can only be rendered if the law is correctly applied. So that this will be possible, judges and arbitrators cannot be limited by the legal arguments put to them by the parties. (ii) In line with the justice-rendering duty of arbitrators, a number of arbitration laws and arbitration rules explicitly recognize the arbitral tribunal's power to implement and assess the right law.[17] (iii) National legislation typically provides for arbitrators' duty to base the award on law,[18] and (iv) the same principle, from which it follows that the arbitral tribunal can and must independently ascertain and apply the relevant law, is also reflected in a number of arbitration rules.[19] (v) Arbitration laws and rules also place tools and case management powers at the disposal of arbitrators, enabling them to independently ascertain and apply the applicable law and thereby arrive at a valid and just decision (*e.g.*, the appointment of experts, the introduction of legal arguments with an invitation to the parties to comment, etc.).

(vi) A defaulting party cannot sabotage an arbitration by not participating in it. The tribunal can still rely on legal arguments favoring the non-participating party, which amounts to the indirect recognition of arbitrators' powers to rely on law irrespective of the parties' arguments.

(vii) Arbitral tribunals have the duty—indirectly also enshrined in Article 34 of the Model Law—to render an award that will withstand challenge. In this context, arbitrators' duty to apply the law *ex officio* cannot be restricted to arbitrability and

[17] *See*, *e.g.*, English Arbitration Act, sec. 34(1) and (2)(g); LCIA Arbitration Rules (2022), art. 22.1(iii) and 22.3; Rules of the Court of Arbitration at the Polish Chamber of Commerce ("PCC Arbitration Rules"), art. 6(1).

[18] *See*, *e.g.*, UNCITRAL Model Law, art. 28; Hungarian Arbitration Act, art. 41; French CCP, art. 1478; Swiss Private International Law Act, art. 187; English Arbitration Act, sec. 46.

[19] *See*, *e.g.*, LCIA Arbitration Rules (2022), art 22.1(iii) and 22.3; ICC Arbitration Rules (2021), art. 21; PCC Arbitration Rules, art. 6(1); Budapest Arbitration Rules, art. 32.

public policy rules. (viii) In international practice, challenges against awards on the grounds that the tribunal relied on a legal argument not invoked by the parties have largely been unsuccessful in the most important seats (including Switzerland, Belgium, Sweden, England, and Hong Kong). (ix) Similarly, the arbitral tribunal's duty to independently apply the law can also be derived from its duty to render an enforceable award in view of Article V of the New York Convention.

(x) In arbitration, parties can appoint arbitrators, whereby one of the most important considerations is the arbitrators' knowledge and expertise. The advantage secured by the arbitrators' knowledge and expertise in a given legal system would be lost absent *iura novit arbiter*. (xi) Dr. Korom's final point was that arbitrators must be allowed to apply and must apply the law *ex officio* so that arbitration will maintain its outstanding reputation as a mechanism for the settlement of cross-border disputes, especially in view of the fact that an award that is not fully correct or even incorrect at law cannot be corrected on the merits and could thus leave a bad "aftertaste" pushing parties to State courts the next time they have a dispute.

B. *Not So Fast—Arbitrators Cannot Go Beyond the Legal Arguments and Provisions Submitted by the Parties!.*

The competing position, *i.e.*, that arbitrators are limited to what the parties submit in terms of legal provisions and legal arguments, was elaborated by Dr. Viktor György Radics (DLA Piper, Budapest).

Dr. Radics structured his presentation around five main points. ***First***, he pointed out that litigation and arbitration are of a basically different nature. State courts are manifestations of the sovereign, and, by definition, sovereign power is not limited to party submissions. The holder of sovereign powers must know the correct law, apply it correctly and render the correct decision. In litigation, especially in smaller cases, not knowing the law is an effective burden to the access to justice. In arbitration, however, this is not an issue. Arbitration is a voluntary opt-out of the system of sovereign courts, with the parties' most important related expectations being that they will be treated equally, that the arbitrators will not abuse their powers, and that the decision is not in breach of the public policy of the State. In this regard, he pointed out that, from the perspective of enforcement and setting aside, the award

does not have to be correct, it just cannot be against public policy.

Second, as to the idea of a correct decision, the main argument in favor of *iura novit arbiter*, Dr. Radics argued that it is not a mandatory obligation for arbitrators to apply the law correctly regardless of the parties' submissions. Even under the rules in which *iura novit arbiter* is mentioned, it is construed as an option (an "additional power" in the LCIA Rules and an opportunity under the PCC Rules as well), *iura novit arbiter* is therefore a discretionary power in the hands of arbitral tribunals.

Third, Dr. Radics then used the discretionary nature of *iura novit arbiter* as the main argument against it: the discretionary exercise of *iura novit arbiter* can lead to impartiality. At the same time, the requirement of equal treatment is codified in practically all arbitration laws. As an example, he noted that in a case where only contractual damages claims were put forward—and the respondent defended itself only against contractual damages for years—the arbitral tribunal would treat said respondent unfairly and unequally by awarding non-contractual damages to the claimant. ***Fourth***, Dr. Radics then noted that where awards are set aside in a similar context, it is typically because the arbitral tribunal did not give the parties the opportunity to comment on decisive legal grounds. He noted that this is a serious issue especially in view of the fact that arbitration is supposed to be a dispute resolution service for the parties.

Fifth, finally, Dr. Radics emphasized that all parties who conclude an arbitration agreement and initiate an arbitration are fully aware that they have to submit—and substantiate—their claim and that they will receive an award on the basis of their own arguments. The arbitrators' task is to decide over the parties' dispute, without having the power to discretionally turn cases from one side to the other. Even the parties winning only because of the exercise of *iura novit curia/arbiter* by the forum may feel offended if the forum comes up with legal arguments they have not managed to think of in years.

C. *Takeaways and Analysis*

Both before and after the debates, about half of the audience (of between 30 and 40 people) voted in favor of *iura novit arbiter*, whereas seven participants were in

favor of the limited approach and a part of the audience was undecided. In contrast to fact-finding, significantly more people were in favor of arbitrators' powers to develop the legal reasoning of the award themselves.

In view of the improvised polls, *iura novit arbiter* seems to be more generally accepted than the ex officio investigation and establishment of facts, which is in line with the titular dictum "*da mihi factum*, *dabo tibi ius*", *i.e.*, "give me the facts and I will give you the law," even though provisions entrusting arbitrators with the power of ascertaining the law *sua sponte* are scarce.[20] Possibly, the autonomous development of the legal reasoning by the arbitrators is considered a lesser intervention into party autonomy than proactive fact-finding. Despite such scarcity, it has been argued that *iura novit arbiter* can be useful in preventing judicial errors that might be the result of the requirement of strict adherence to the parties'–maybe erroneous or incomplete–legal arguments.[21] As in the case of fact-finding, competing expectations can be juxtaposed in the context of finding and correctly applying the law as well: here the expectation of an award that rests on correct and complete legal foundations competes with the parties' right to be heard on the arbitral tribunal's legal evaluation.[22] Of course, the right balance will, once again, have to be found in view of the circumstances of the concrete case.[23]

IV. CONCLUSION AND PERSPECTIVES

As pointed out in the foregoing, both topics–autonomous fact-finding and the application of the law by the arbitral tribunal–involve both practical issues and conflicting policy considerations and expectations handled differently in different

[20] Exceptions are Section 34(2)(g) of the English Arbitration Act, sec. 34(2)(g) and LCIA Rules (2022), arts. 22.1(iii) and 22.3. *See* MOHAMED S. ABDEL WAHAB, *Ascertaining the Content of the Applicable Law in International Arbitration: Converging Civil and Common Law Approaches*, *in* ARBITRATION: THE INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT 412, 414 & 421 (Michael O'Reilly, ed. 2017).

[21] *See*, *e.g. id.* at 420–22.

[22] Andrea Meier & Yolanda Mcgough, *Do Lawyers Always Have to Have the Last Word? Iura Novit Curia and the Right to Be Heard in International Arbitration: An Analysis in View of Recent Swiss Case Law*, 32 ASA BULL. 490, 491 (2014).

[23] *See* ILA Recommendations on Inherent and Implied Powers of International Arbitral Tribunals in Annex to Resolution NO. 4/2006 International Commercial Arbitration, *available at* https://www.ila-hq.org/images/ILA/docs/No.4_Resolution_2016_InternationalCommercialArbitration.pdf.

legal traditions. Without attempting to define a common denominator here, let alone a universal answer, it is suggested that the right approach is to be found by the arbitrators proceeding in the concrete case in view of all relevant considerations and the actual circumstances. As it was also confirmed in the ensuing moderated discussion initiated with a question in this regard, case management techniques can play a very important role and often already "do the trick": whenever parties do not raise a certain issue (in sufficient detail)—be it one of fact or law—for example, putting questions to the parties, the identification of points that the arbitral tribunal is interested in (maybe through the circulation of a list of issues to be addressed in a particular phase of the arbitration) and/or the formulation of "invitations" to the parties to "consider" going into more details with respect to a particular point may already yield the necessary input from the parties, or, even if not, it still provides parties with the opportunity to do so, reducing the probability of the exposure of the arbitral award to challenge due to an overreach in any direction.

The conference in Budapest, Young ITA's very first event in its new region Central and Eastern Europe, proved that the official extension of ITA's activities over the CEE region is most welcome. The active participation—also in the quite lengthy ensuing discussion—and positive responses afterward have shown that ITA's activities and exchanges within and beyond the local and regional arbitration communities through similar arbitration events are "of absolute importance" in the development of the arbitration scene, which is looking forward to "many more great events with Young ITA CEE" in a rapidly growing region.

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